URVIBEN CHIRAGHBAI SHETH

v.

VIJAYBHAI SHAMBHUBHAI JORANPUTRA & ORS.

(Civil Appeal No. 3618 of 2011)

APRIL 26, 2011

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

Motor Vehicles Act, 1988 – s. 166 – Compensation – Claim for enhancement – First respondent lost control of the car while driving and dashed the same against a milestone, resulting in serious injuries to occupants of the car – Appellant, aged 30 years and earning around Rs. 1500/- pm suffered disability and rendered bedridden as a result of the accident – Claim petition by appellant seeking Rs. 15 lakhs as compensation – Tribunal computed compensation as Rs. 6,07,000/- with interest at the rate of 9%, with the consent of the parties – Appeal filed by appellant claiming enhancement for compensation – Affidavit filed by advocate who appeared before the Tribunal contending that no such settlement was ever entered into by the consent of parties – Dismissal of the appeal by the High Court discarding the affidavit – On appeal held: High Court took a narrow view of the entire controversy – Tribunal held the amount granted by it is just proper and reasonable and also held that the same is based on the consent of the parties – High Court being the last court of fact and law did not examine whether the Tribunal's finding that the compensation granted is proper, just and reasonable in the facts of the case – Tribunal could not accept the representation lowering down the claim on the mere oral statement of counsel – It should have insisted on production of some material for the same – Also, no leave was obtained by the parties from the Tribunal to enter the said settlement – In the absence thereof, the High Court erred in discarding the affidavit filed by the advocate only on the ground that this

was filed belatedly before the High Court and is an afterthought – Stand taken in the affidavit of the advocate appears probable since there is nothing on record to show that the appellant ever filed any petition or affidavit for settlement before the MACT – Principle of sanctity of recitals in Court proceedings is available to a Court of Record and cannot be stretched to the proceedings of a Tribunal – High Court in the process erred by equating the record of proceedings in a Tribunal with proceedings in a court of record – However, on basis of the materials on record, the matter should not be remanded back, since the accident took place in 1990 and the appellant has suffered 100% medical disability which is permanent in nature with no sign of recovery – She has two children and her husband expired prior to the incident – Compensation should be assessed so that the interest accruing therefrom would be sufficient for the maintenance of the family of the victim and the concept of compensation is wider than mere damages – Thus, compensation of Rs.15 lacs with interest at the rate of 8% on the enhanced compensation from the date of filing the claim petition before MACT till date of realization.

Compensation – Assesment of – Held: Compensation should be assessed so that the interest accruing therefrom would be sufficient for the maintenance of the family of the victim – Concept of compensation is wider than mere damages.

The first respondent, while driving the car owned by the second respondent, lost control of the car and dashed the car with full force against a milestone, resulting in serious injuries to the occupants, appellant and others. The appellant suffered disability and was rendered bedridden. She filed a claim petition before the Tribunal, claiming rupees fifteen lakhs as compensation. At the time of the accident the appellant was 30 years old

and she claimed that she was earning Rs.1,500/- to Rs.1,600/- per month. The first respondent-driver, the second respondent-owner of the car and third respondent-insurance company with which the car was insured, were held jointly and severally liable to pay compensation to the appellant. The Tribunal awarded compensation of Rs.6,07,000/- with interest at the rate of 9%. While computing the compensation, the MACT held that the compensation had been computed with the consent of the parties. The appellant filed an appeal before the High Court for enhancement of compensation and the same was dismissed. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 As regards the submission that there was no consent before MACT and the same was wrongly recorded by the Tribunal, no application appears to have been made before the Tribunal to rectify the error, if there was one. Instead, the parties filed an appeal before the High Court being aggrieved by the compensation awarded by the Tribunal. In the impugned judgment, the High Court took a narrow view of the entire controversy. In its rather cryptic judgment, the High Court refused to take into consideration the affidavit filed by the advocate who appeared for the appellant before the MACT. The said affidavit is on record. A perusal of the said affidavit which was filed before the High Court shows that the advocate who appeared on behalf of the appellant before the MACT averred that the Tribunal recorded that both the parties agreed qua the amount that was to be paid to the claimant. Neither any pursis in writing was passed to the Tribunal to such effect nor while arguing any such consent was given. The said fact appears to have been recorded erroneously. The High Court ignored the said stand taken before it on the ground that such an affidavit

being placed before the High Court was an afterthought and no ground had been taken in the memorandum of appeal to that effect. [Paras 9, 10 and 11] [905-G-H; 906-A-D]

1.2 From a perusal of the judgment of the Tribunal, it does not appear that it was based solely on the consent of the parties. MACT curiously held that in the facts of the case, the amount granted by it is just proper and reasonable and also held that the same is based on the consent of the parties. The High Court, as the last court of fact and law should have examined whether the Tribunal's finding that the compensation granted is proper, just and reasonable in the facts of the case. The High Court admittedly failed to do so. [Paras 14, 16] [906-G-H; 907-B-C]

1.3 While acting as a Claims Tribunal, its proceedings are summary in nature but in exercising its summary jurisdiction the Tribunal must follow principles of justice, equity and good conscience and must be aware that its summary enquiry is in connection with a legislation which is meant for social welfare. Therefore, when a representation is made before the Tribunal that a claim of Rs.15 lacs by way of consent is reduced to Rs.6 lacs and odd, the Tribunal must insist on production of some material either, an affidavit of the claimant or the statement of the claimant before the MACT in support of such lowering down of claim. The MACT cannot accept the said representation on the mere oral statement of counsel since such settlement is purely a question of fact. No leave was obtained from the Tribunal to enter into a compromise between the parties in respect of the settlement. In the absence of all these materials, when an affidavit was filed by the advocate who appeared before the Tribunal, contending that no such settlement was ever entered into by the consent of parties, the High

Court fell into an error by discarding the same only on the ground that this was filed belatedly before the High Court and is an afterthought. It may be true that in the grounds of appeal before the High Court, this should have been mentioned, but on a mere defect of pleading of the parties, justice cannot be denied if in the facts of the case, the stand taken on the affidavit of the advocate appears probable. The stand taken in the affidavit of the advocate appears probable specially when there is nothing on record to show that the appellant ever filed any petition or affidavit for settlement or compromise before the MACT. [Paras 17, 18, 19 and 20] [907-D-H; 908-A-C]

Daman Singh and Ors. etc. v. State of Punjab and Ors. **AIR 1985 SC 973 – distinguished.**

1.4 The High Court relied on the principle of sanctity of a record entered by a Court and held that what is recited in the Court record is sacrosanct. The High Court, in the process, fell into an error by equating the record of proceedings in a Tribunal with proceedings in a court of record. Under the hierarchy of Courts, a High Court (under Article 215) and the Supreme Court (under Article 129) are recognized as Courts of Record. A Motor Accidents Claims Tribunal constituted under the Motor Vehicles Act, 1988 is a Civil Court of limited jurisdiction, and is certainly not a Court of Record. The infallibility of its formal record is one of the earliest marks of a Court of Record, but it has developed other characteristics too. Therefore, the principle of sanctity of recitals in Court proceedings is available to a Court of Record. This principle cannot be stretched to the proceedings of a tribunal. The High Court failed to appreciate this. [Paras 23 and 26] [908-G-H; 909-A, D]

State of Maharashtra v. Ramdas Srinivas Nayak and Anr. **AIR 1982 SC 1249 – referred to.**

Reg v. Aaron Mellor **(1858) 7 Cox's Criminal Law Cases 454 – referred to.**

A History of English Law by W.S. Holdsworth, **Vol 5, p. 158 – referred to.**

1.5 Having regard to the materials on record, the matter should not be remanded, keeping in mind the period which has elapsed in between since the accident took place in 1990, and the fact that the appellant had been bedridden since then. [Para 27] [909-E]

1.6 Admitted evidence about the appellant's medical disabilities is that she has 100% disability which is permanent in nature with no sign of recovery. The appellant's case that she was running a beauty parlour prior to the accident could not be proved, specially her income from the said parlour was not proved. The existence of the beauty parlour is however, not in dispute. Assuming the appellant is not running the parlour, the fact remains that she has two children and her husband died prior to the incident. Therefore, the dependence of the children and the running of the family is to be shouldered by her even though she is infirm and bedridden. She also needs someone to help her in her daily life. She has to have recurring medical expenses. Just because she is a homemaker is no reason why the courts should be miserly in fixing compensation for her. [Paras 28, 29, 30 and 31] [909-F-H; 910-A-C]

Arun Kumar Agrarwal and Anr. v. National Insurance Co. Ltd. and Ors. **2010 (9) SCC 218 – referred to.**

1.7 Compensation may be so assessed that the interest accruing therefrom would be sufficient for the maintenance of the family of the victim and the concept of compensation is wider than mere damages. Thus, the compensation of Rs.15 lacs (Rupees Fifteen Lacs) with

interest at the rate of 8% on the enhanced compensation from the date of filing the claim petition before MACT till date of realization is granted. [Paras 32 and 33] [910-D-E]

Case Law Reference:

AIR 1985 SC 973	**Referred to**	**Para 12**
AIR 1982 SC 1249	**Referred to**	**Para 25**
2010 (9) SCC 218	**Referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3618 of 2011.

From the Judgment & Order dated 06.07.2005 of the High Court of Gujarat at Ahmedabad in First Appeal No. 4994 of 2001.

Bharat Rao for the Appellant.

Manjeet Chawla, P.K. Seth, Vijay Verma for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Delay condoned.

2. Leave granted.

3. On 18.5.1990, the appellant and others were going in a Fiat car (No. GGG 792), owned by the second respondent, from Surat to Ubhrat. The said car was driven by the first respondent, who lost control of the car and dashed the car with full force against a milestone, after which the car turned turtle thrice. As a result, the occupants of the car sustained serious injuries.

4. The appellant filed a claim petition before the Motor Accident Claims Tribunal (MACT) claiming compensation of

Rs.15,00,000/-. At the time of the accident, she was aged 30 years and she claimed to be earning Rs.1,500/- to Rs.1,600/- per month from running a business in the name of Contessa Beauty Parlour at Ahmedabad.

5. Before the MACT it was established that the first respondent was absolutely liable for the accident in view of his careless, rash and negligent driving. Thus, the first respondent (driver), second respondent (owner of the car) and the third respondent (insurance company with which the car was insured) were held jointly and severally liable to pay compensation to the appellant. In the accident, the spinal cord of the appellant was damaged, as a result of which she was unable to walk and was bedridden. In computing the compensation payable to the appellant, the MACT, by order dated 23.3.2001, reached a finding that the compensation had been computed with the consent of the parties.

6. MACT awarded Rs.50,000/- towards pain and suffering, Rs.3,50,000/- towards treatment charges, Rs.10,000/- towards attendant charges and Rs.5,000/- towards nutritious food. The appellant had contended that she was running a beauty parlour, but no reliable evidence was produced to substantiate the same. Thus, appellant being a housewife, monthly income was assessed at Rs.1000/- and applying a multiplier of 16, the future loss of income was assessed at Rs.1,92,000/- (Rs.1000 X 12 X 16). Thus, the appellant was held entitled to total compensation of Rs.6,07,000/- with interest at the rate of 9%.

7. Aggrieved by the compensation awarded by the MACT, the appellant appealed to the High Court for enhancement of compensation. The High Court, vide order dated 6.7.2005, dismissed the appeal on the following ground:

> "Through these appeals judgment of the MACT Valsad at Navsari dated 23.3.2001 is assailed on the ground that proper compensation has not been awarded, therefore, it be enhanced. However, after hearing the counsel for both

the sides, it is found that the compensation has been settled as per the consent of the counsel for the parties. This fact is recorded in para 10 of the award. That being so, interference is not called for. Shri Parikh, learned counsel for the appellants want to place on record affidavit of Shri K.Z. Rifai, Advocate dated August 5, 2002 to point out that neither any pursis in writing was passed to the Claims Tribunal nor while arguing, such consent was given, fact appears to have been recorded erroneously. Placement of affidavit at this stage is after thought, therefore, declined. In such case no such agreement was there with regard to the amount of compensation as mentioned in the judgment, averment to that effect ought to have found place in the memorandum of appeal dated 20th June, 2001. Judgment record is conclusive. Neither lawyer nor litigant can claim to contradict it, except before the judge himself but nowhere else. Court is bound to accept the statement of the judge recorded in the judgment as what transpired in the court and cannot allow statement of the Judge to be contradicted by statement by affidavit and other evidence (See: *Daman Singh and others etc. v. State of Punjab and others* (AIR 1985 SC 973). Accordingly, claim for enhancement cannot be considered in light of the agreement by counsel for parties before the Claims Tribunal."

8. This appeal is directed against the aforesaid judgment of the High Court.

9. The appellant contends that there was no consent before the MACT, and the same was wrongly recorded by the Tribunal. However, we notice that no application appears to have been made before the Tribunal to rectify the error, if there was one. Instead, the parties filed an appeal before the High Court being aggrieved by the compensation awarded by the Tribunal.

10. This court finds that in the impugned judgment, the High

Court has taken a rather narrow view of the entire controversy. In its rather cryptic judgment, the High Court refused to take into consideration the affidavit filed by Sri K.Z. Rifai, the learned advocate who appeared for the appellant before the MACT. The said affidavit is on record. A perusal of the said affidavit which was filed before the High Court shows that the advocate who appeared on behalf of the appellant before the MACT averred:

> "2)……The learned Tribunal in paragraph 10 of the judgment has recorded that both the parties agree qua the amount that was to be paid to the claimant. I say that neither any pursis in writing was passed to the Tribunal to such effect nor while arguing was any such consent given. The said fact appears to have been recorded erroneously."

11. The High Court ignored the said stand taken before it on the ground that such an affidavit being placed before the High Court was an afterthought and no ground had been taken in the memorandum of appeal dated 21.6.2001 to that effect.

12. The other ground which weighed with the High Court is that statement recorded in the judgment of the Court cannot be contradicted by any affidavit or any other evidence and in coming to said conclusion the High Court relied on the judgment of this Court in *Daman Singh and others etc. v. State of Punjab and others,* reported in AIR 1985 SC 973.

13. This Court fails to appreciate the aforesaid stand of the High Court for various reasons which are discussed hereunder.

14. From a perusal of the judgment of the Tribunal, it does not appear that it was based solely on the consent of the parties. Apart from consent, if any, of the parties, the MACT also held that the amount of compensation awarded by it "appears to be proper, just and reasonable taking into consideration the aforesaid evidence."

15. In fact, the exact finding of the MACT is set out below:

"……With consent of both the parties, it has been decided to make payment of the under mentioned amount which appears to be proper, just and reasonable taking into consideration the aforesaid evidence."

16. Therefore, it appears to be a mixed bag. MACT curiously held that in the facts of the case, the amount granted by it is just proper and reasonable and also held that the same is based on the consent of the parties. The High Court, as the last court of fact and law should have examined whether the Tribunal's finding that the compensation granted is proper, just and reasonable in the facts of the case. The High Court has admittedly failed to do so.

17. Coming to the question of so-called consent of the parties, the approach of the High Court also cannot be appreciated. It is true that while acting as a Claims Tribunal, its proceedings are summary in nature but in exercising its summary jurisdiction the Tribunal must follow principles of justice, equity and good conscience and must be aware that its summary enquiry is in connection with a legislation which is meant for social welfare. Therefore, when a representation is made before the Tribunal that a claim of Rs.15 lacs by way of consent is reduced to Rs.6 lacs and odd, the Tribunal must insist on production of some material either, an affidavit of the claimant or the statement of the claimant before the MACT in support of such lowering down of claim. The MACT cannot accept the said representation on the mere oral statement of counsel since such settlement is purely a question of fact. In fact no leave was obtained from the Tribunal to enter into a compromise between the parties in respect of the settlement.

18. In the absence of all these materials, when an affidavit was filed by the learned advocate who appeared before the Tribunal, contending that no such settlement was ever entered into by the consent of parties, the High Court fell into an error

by discarding the same only on the ground that this was filed belatedly before the High Court and is an afterthought.

19. It may be true that in the grounds of appeal before the High Court, this should have been mentioned, but on a mere defect of pleading of the parties, justice cannot be denied if in the facts of the case, the stand taken on the affidavit of the advocate appears probable.

20. To our mind, the stand taken in the affidavit of the advocate referred to above appears probable specially when there is nothing on record to show that the appellant ever filed any petition or affidavit for settlement or compromise before the MACT.

21. The reliance placed by the High Court on the judgment of this court in the case of *Daman Singh* (supra) is rather misconceived. In the said case, what this court held was when several points were raised in a writ petition before the High Court, and argument is confined to some grounds or points, as other grounds are considered by the counsel unworthy of canvassing, thereafter the counsel cannot make a grievance that other grounds were not considered by the court (see para 13).

22. The situation in this case is not similar to the one pointed out in *Daman Singh* (supra).

23. Here the High Court relied on the principle of sanctity of a record entered by a Court and held that what is recited in the Court record is sacrosanct. The High Court, in the process, fell into an error by equating the record of proceedings in a Tribunal with proceedings in a court of record. Under our hierarchy of Courts, a High Court (under Article 215) and the Supreme Court (under Article 129) are recognized as Courts of Record. A Motor Accidents Claims Tribunal constituted under the Motor Vehicles Act, 1988 is a Civil Court of limited jurisdiction, and is certainly not a Court of Record. The

infallibility of its formal record is one of the earliest marks of a Court of Record, but it has developed other characteristics too (See A History of English Law by W.S. Holdsworth, Vol 5, p. 158).

24. In *Reg v. Aaron Mellor,* reported in (1858) 7 Cox's Criminal Law Cases 454, it was held "We must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity."

25. This has been followed by this Court in *State of Maharashtra v. Ramdas Srinivas Nayak & Anr.,* reported in AIR 1982 SC 1249.

26. Therefore, the principle of sanctity of recitals in Court proceedings is available to a Court of Record. This principle cannot be stretched to the proceedings of a tribunal. Unfortunately the High Court failed to appreciate this.

27. Now the question which arises is whether the matter should be remanded by this Court? Having regard to the materials on record, this Court is of the opinion that the matter should not be remanded, keeping in mind the period which has elapsed in between since the accident took place in 1990, and the fact that the appellant had been bedridden since then.

28. Admitted evidence about her medical disabilities is that she has 100% disability which is permanent in nature with no sign of recovery.

29. It is of course true that the appellant's case that she was running a beauty parlour prior to the accident could not be proved, specially her income from the said parlour has not been proved. The existence of the beauty parlour is however not in dispute.

30. Assuming the appellant is not running the parlour, the

fact remains that she has two children and her husband died prior to the incident. Therefore, the dependence of the children and the running of the family is to be shouldered by her even though she is infirm and bedridden. She also needs someone to help her in her daily life. She has to have recurring medical expenses.

31. Just because she is a homemaker is no reason why the courts should be miserly in fixing compensation for her. A Bench of this Court in *Arun Kumar Agrarwal & Anr. v. National Insurance Co. Ltd. & Ors.,* reported in 2010 (9) SCC 218, had occasion to consider this question and held that the work of homemakers and housewives should be properly assessed and in making assessment of compensation payable to them, they should not suffer from a gender bias.

32. It is an accepted principle that compensation may be so assessed that the interest accruing therefrom will be sufficient for the maintenance of the family of the victim and the concept of compensation is wider than mere damages.

33. Considering all this, we grant compensation of Rs.15 lacs (Rupees Fifteen Lacs) with interest at the rate of 8% on the enhanced compensation from the date of filing the claim petition before MACT till date of realization.

34. Compensation on the aforesaid basis must be paid to the concerned MACT by the respondents within six weeks by a demand draft. Thereupon the MACT shall forthwith deposit the same in the bank account of the appellant.

35. The appeal is thus allowed.

36. No order as to costs.

N.J. Appeal allowed.

CONSUMER ONLINE FOUNDATION
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 3611 of 2011 etc.)

APRIL 26, 2011

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

AIRPORTS AUTHORITY OF INDIA ACT, 1994:

s.22A read with ss. 12(3)(aa) and 12A – Levy of development fees at airports – Letters dated 9.2.2009 and 27.2.2009 sent by Government of India approving levy of development fees by Delhi International Airport (P) Ltd. (DIAL) and Mumbai International Airport (P) Ltd. (MIAL) from embarking domestic and international passengers – HELD: Since the lessee of an airport cannot be assigned the statutory function of the Airports Authority to establish airports or assist in establishing private airports in lieu of the existing airports at which the development fees is being collected, the lessee cannot under sub-s. (4) of s. 12A have the power of the Airports Authority to levy and collect development fees u/s. 22A of the 1994 Act – Thus, levy and collection of development fees by DAIL and MIAL as fixed by Central Government in the letters dated 9.2.2009 and 27.2.2009 is ultra virus the 1994 Act and, as such, the said two letters are not save d by s.6 of the General Clauses Act, 1897 – Interpretation of Statutes – General Clauses Act, 1897 – s.6.

s.22-A (as amended by 2003 Act) – Levy of development fee – Nature of – HELD: Levy of development fee is not charges or any other consideration for services for the facilities provided by the Airports Authority – The levy u/s 22-A though described as fee is really in the nature of cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of s.22-A – Article 265

of the Constitution of India is, therefore, attracted which provides that no tax can be levied or collected except by the authority of law – Section 22-A before its amendment by the Amendment Act, 2008 stipulated that the development fees were to be levied on and collected from the embarking passengers "at the rate as may be prescribed" – Therefore, until the rate of development fees was prescribed by the rules, levy and collection thereof was without the authority of law – Constitution of India, 1950 – Article 265.

s.22A (as amended by Amendment Act, 2008) and s.13(1) of Airports Economic Regulatory Authority Act, 2008 – Levy and collection of development fee to be determined by Regulatory Authority – HELD: After the amendment of s. 22A with effect from 01.01.2009, the rate of development fees to be levied and collected at the major airports such as Delhi and Mumbai is to be determined by the Regulatory Authority under clause (b) of sub-s. (1) of s. 13 of the 2008 Act and not by the Central Government – The Regulatory Authority has already issued a public notice dated 23.04.2010 permitting DIAL to continue to levy the development fees from embarking domestic and international passengers with effect from 01.03.2009 on an ad hoc basis pending final determination u/s. 13 of the 2008 Act – But no such public notice has been issued by the Regulatory Authority pertaining to levy and collection of development fees by MIAL – Therefore, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order u/s 22A of the 1994 Act as amended by the Amendment Act, 2008 – Airports Economic Regulatory Authority Act, 2008 – s.13(1).

s.22A – Levy and collection of development fee at airports – Appropriation of – It is directed that DIAL and MIAL will account to the Airports Authority the development fee

collected pursuant to the letters dated 9.2.2009 and 27.2.2009 –Central Government and the Airports Authority will ensure that the amount so collected has been utilized for the purposes mentioned in clause (a) of s.22A – It is further directed that any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority u/s 22A of the 1994 Act as amended by the Amendment Act, 2008 shall be credited to the Airports Authority and will be utilized for the purposes mentioned in clauses (a), (b) or (c) of s. 22A in the manner to be prescribed by the rules which may be made as early as possible.

Ministry of Civil Aviation, Government of India, sent a letter dated 9.2.2009, to the Delhi International Airport (Pvt.) Limited (DIAL), the lessee of the Indira Gandhi International Airport, New Delhi conveying the approval of the Central Government u/s. 22A of the Airports Authority of India Act, 1994 for levy of development fees by DIAL at the Delhi Airport at the Rate of Rs. 200/- per embarking domestic passenger and Rs. 1300/- per embarking International passenger purely on ad-hoc basis, for a period of 36 months from 1.3.2009. A similar letter dated 27.2.2009 was sent to the Mumbai International Airport (Pvt.) Limited (MIAL) conveying the approval of the Central Government for levy of development fees by MIAL at the Mumbai Airport at the rate of Rs. 100/- per embarking domestic passenger and Rs. 600/- per embarking international passenger purely on ad-hoc basis for a period of 48 months w.e.f. 1.4.2009. Writ petitions challenging the levy of development fees at the two Airports were dismissed by the High court. The instant appeals were filed challenging the judgment of the High Court.

Allowing the appeals, the Court

HELD: 1.1 The conclusion of the High Court that the lessee of the airport has the power of the Airports Authority u/s. 22A of the Airports Authority of India Act, 1994 to levy and collect development fees from the embarking passengers by virtue of sub-s. (4) of s. 12A of the Act is contrary to the legislative intent of the Amendment Act of 2003. A perusal of s. 22A of the 1994 Act inserted by the Amendment Act of 2003, indicates that the purposes for which the development fees are to be levied and collected from the embarking passengers at an airport are: (a) funding or financing the costs of up-gradation, expansion or development of the airports at which the fees is collected, or (b) establishment or development of a new airport in lieu of the airport referred to in clause (a), or (c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities. Though Airports Authority can utilize the fees levied by it, for all or any of these purposes mentioned in clauses (a), (b) and (c) of s. 22A, what can be assigned by the Airports Authority to a lessee under a lease entered into u/s. 12A of the 1994 Act is the power to levy fees for the purposes mentioned in clause (a) of s. 22 A of the 1994 Act. [Para 11] [946-C-H; 947-A-B]

1.2 The functions of the Airports Authority under clause (aa) of sub-s. (3) of s. 12 also inserted by the Amendment Act of 2003 to establish airports, or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purposes, cannot be assigned to the lessee u/s. 12A of the 1994 Act. The Amendment Act of 2003 which also inserted s. 12A,

therefore, provides in sub-s. (1) of s. 12A that the Airports Authority can make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out "some" of its functions u/s. 12 as the Airports Authority may, in the public interest or in the interest of better management of airports, deem fit. Obviously, "a lease of premises of an airport" as contemplated in sub-s. (1) of s.12A cannot include establishing an airport or assisting in establishment of private airports as contemplated in clause (aa) of sub-s. (3) of s.12 of the Act. [Para 12] [947-C-E]

1.3 To enable the Airports Authority to perform its statutory function of establishing a new airport or to assist in the establishment of private airports, the legislature has thought it fit to empower the Airports Authority to levy and collect development fees as will be clear from clauses (b) and (c) of s. 22A of the 1994 Act. Such development fees levied and collected u/s. 22A can also be utilized for funding or financing the costs of up-gradation, expansion and development of an existing airport at which the fees is collected as provided in clause (a) of s. 22A of the Act and in case the lease of the premises of an existing airport (including buildings and structures thereon and appertaining thereto) has been made to a lessee u/s. 12A of the Act, the Airports Authority may meet the costs of up-gradation, expansion and development of such leased out airport to a lessee, but this can be done only if the rules provide for such payment to the lessee of an airport because s. 22A says that the development fees are to be regulated and utilized in the manner prescribed by the Rules. [Para 13] [947-F-H; 948-A-B]

1.4 Since the lessee of an airport cannot be assigned the statutory function of the Airports Authority to establish airports or assist in establishing private airports in lieu

of the existing airports at which the development fees is being collected, the lessee cannot under sub-s. (4) of s. 12A have the power of the Airports Authority to levy and collect development fees u/s. 22A of the 1994 Act. [Para 13] [948-B-C]

2.1 The High Court was not correct in coming to the conclusion that the development fees to be levied and collected u/s. 22A of the 1994 Act is in the nature of tariff or charges collected by the Airports Authority for the facilities provided to the passengers and the airlines. It will be clear from a bare reading of ss. 22 and 22A that there is a distinction between the charges, fees and rent collected u/s. 22 and the development fees levied and collected u/s. 22A of the 1994 Act. The charges, fees and rent collected by the Airports Authority u/s. 22 are for the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport. Therefore, when the Airports Authority makes a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions u/s. 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority u/s. 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. [Para 14] [948-H; 949-A-D]

2.2 The legal basis of such charges, fees or rent enumerated in s. 22 of the 1994 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport. But there can be no such contractual relationship between the passengers embarking at an airport and the Airports Authority with

regard to the up-gradation, expansion or development of the airport which is to be funded or financed by development fees as provided in clause (a) of s. 22A. Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of s. 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to be based on a statutory provision and for this reason s. 22A has been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in clauses (a), (b) and (c) of s. 22A of the Act. [Para 14] [949-D-H; 950-A-B]

2.3 The object of Parliament in inserting s. 22A in the 1994 Act by the Amendment Act of 2003 is to authorize by law the levy and collection of development fees from every embarking passenger de hors the facilities that the embarking passengers get at the existing airports. The nature of the levy u/s. 22A is not charges or any other consideration for services for the facilities provided by the Airports Authority. The levy u/s. 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of s. 22A. [Para 14] [950-B-D]

Vijayalashmi Rice Mills & Ors. v. Commercial Tax Officers, Palakot & Ors. **2006 (4) Suppl. SCR 279 = (2006) 6 SCC 763 – relied on.**

The Trustees of the Port of Madras v. M/s Aminchand Pyarelal & Ors. **1976 (1) SCR 721 = (1976) 3 SCC 167 – held inapplicable.**

2.4 Once it is held that the development fees levied u/s. 22A is really a cess or a tax for a special purpose, Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law gets attracted. It is a settled principle of statutory interpretation that any compulsory exaction of money by the Government such as a tax or a cess has to be strictly in accordance with law and for these reasons a taxing statute has to be strictly construed. [Para 15] [950-F-G]

3.1 Looking strictly at the plain language of s. 22A of 1994 Act before its amendment by the Amendment Act, 2008, the development fees were to be levied on and collected from the embarking passengers "at the rate as may be prescribed". Since the rules have not prescribed the rate at which the development fees could be levied and collected from the embarking passengers, levy and collection of development fees from the embarking passengers was without the authority of law. [Para 15] [951-B-C]

Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla & Ors. **1992 (3) SCR 328 = (1992) 3 SCC 285;** *Mohammad Hussain Gulam Mohammad & Anr. v. The State of Bombay & Anr.* **1962 (2) SCR 659; and** *Dhrangadhra Chemical Works Ltd. v. State of Gujarat & Ors.* **(1973) 2 SCC 345 – relied on**

Principles of Staturory Interpretation **(12th Edn. P.813) by G.P. Singh – referred to.**

3.2 The rate at which the tax is to be levied is an essential component of a taxing provision and no tax can be levied until the rate is fixed in accordance with the

taxing provision. Therefore, until the rate of development fees was prescribed by the Rules, as provided in s. 22A of the 1994 Act, development fees could not be levied on the embarking passengers at the two major airports. [Para 15] [951-H; 951-A-B]

3.3 The High Court was not correct in holding that the exercise of the power to levy and collect development fees u/s. 22A was not dependent on the existence of the rules and, therefore, this power could be exercised even if the rules have not been framed prescribing the rate of development fees u/s. 22A of the 1994 Act. From the language of s. 22A, there is no room whatsoever for the Airports Authority to levy and collect any development fees except at the rate prescribed by the Rules. Therefore, the power u/s. 22A of the 1994 Act to levy development fees could not be exercised without the rules prescribing the rate at which development fees was to be levied. [Para 16-18] [952-C; 953-D-H; 954-A]

U.P. State Electricity Board, Lucknow v. City Board, Mussorie & Ors **1985 (2) SCR 815 = (1985) 2 SCC 16; and** *Mysore Road Transport Corporation v. Gopinath Gundachar Char* **1968 SCR 767 = AIR 1968 SC 464;** *Sudhir Chandra Nawn v. Wealth-Tax Officer, Calcutta & Ors.***1969 (1) SCR 108;** *T. Cajee v. U. Jormanik Siem & Anr.* **1961 SCR 750 = AIR 1961 SC 276;** *The Madras and Southern Maharatta Railway Company Limited v. The Municipal Council Bezwada* **(1941) 2 MLJ 189;** *Jantia Hill Truck Owners Association, etc. v. Shailang Area Coal Dealer and Truck Owner Association & Ors.* **2009 (10) SCR 536 = (2009) 8 SCC 492;** *Meghalaya State Electricity Board & Anr. v. Jagadindra Arjun* **2001 (1) Suppl. SCR 233 (2001) 6 SCC 446 - held inapplicable.**

Madras and Southern Maharatta Ry. Co. vs. Bezwada Municipality **AIR 1944 Penal Code, 71 – referred to.**

3.4 Therefore, the rate of development fees could not

be determined by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 communicated to DIAL and MIAL respectively. Under s. 22A of the 1994 Act, the Central Government has only the power to grant its previous approval to the levy and collection of the development fees but has no power to fix the rate at which the development fees is to be levied and collected from the embarking passengers. Therefore, the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 is ultra vires the 1994 Act and the two letters being ultra vires the 1994 Act are not saved by s. 6 of the General Clauses Act, 1897. [Para 19] [954-B-D]

4.1 After the amendment of s. 22A by the Amendment Act, 2008 with effect from 01.01.2009, the rate of development fees to be levied and collected at the major airports such as Delhi and Mumbai is to be determined by the Regulatory Authority under clause (b) of sub-s. (1) of s. 13 of the Airports Economic Regulatory Authority Act, 2008 and not by the Central Government. The Regulatory Authority constituted under the 2008 Act has already issued a public notice dated 23.04.2010 permitting DIAL to continue to levy the development fees at the rate of Rs.200/- per embarking domestic passenger and at the rate of Rs.1,300/- per embarking international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination u/s. 13 of the 2008 Act. This public notice dated 23.04.2010 has been issued by the Regulatory Authority under the 2008 Act long after the impugned decision of the High Court upholding the levy and it has not been challenged by the appellants. Therefore, the question of examining the validity of the said public notice dated 23.04.2010 issued by the Regulatory Authority pertaining to levy and collection of development fees by DIAL does not arise. But no such

public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Therefore, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order u/s. 22A of the 1994 Act as amended by the Amendment Act, 2008. [Para 20] [954-E-H; 955-A-B]

5.1. In the facts of the case, the development fees have been collected by DIAL and MIAL on the basis of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers at Delhi and Mumbai and these embarking passengers, from whom the development fees have been collected, cannot now be identified nor can they be traced for making the refund to them. Further there is significantly no prayer for refund in any of the three writ petitions. However, it is necessary to ensure that the development fees levied and collected are utilized only for the specific purposes mentioned in s. 22A of the 1994 Act. Interests of justice would be met if DIAL and MIAL are directed to account to the Airports Authority the development fees so far levied and collected by them and utilized for the purposes mentioned in clause (a) of s. 22A of the 1994 Act. [Para 22] [955-G-H; 956-A-B]

M/s Orissa Cement Ltd. Vs. State of Orissa **AIR 1991 SC 1676 - relied on.**

5.2 (i) It is, therefore held that development fees could not be levied and collected by the lessees of the two major airports, namely, DIAL and MIAL, on the authority of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers under the provisions of s. 22A of the 1994 Act.

(ii) It is declared that with effect from 01.01.2009, no

development fee could be levied or collected from the embarking passengers at major airports u/s. 22A of the 1994 Act, unless the Airports Economic Regulatory Authority determines the rates of such development fee.

(iii) It is directed that MIAL will not levy and collect any development fee at the major airport at Mumbai until an appropriate order is passed by the Airports Economic Regulatory Authority u/s. 22A of the 1994 Act as amended by the Amendment Act, 2008.

(iv) It is directed that DIAL and MIAL will account to the Airports Authority the development fees collected pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the Airports Authority will ensure that the development fees levied and collected by DIAL and MIAL have been utilized for the purposes mentioned in clause (a) of s. 22A of the 1994 Act.

(v) It is further directed that any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority u/s. 22A of the 1994 Act as amended by the Amendment Act, 2008 shall be credited to the Airports Authority and will be utilized for the purposes mentioned in clauses (a), (b) or (c) of s. 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible. [Para 23] [956-C-H; 957-A-D]

Orissa State (Prevention & Control of Pollution) Board v. Orient Paperdd Mills & Anr. **(2003) 10 SCC 421,** *Kerala State Electricity Board v. M/s S.N. Govinda Prabhu & Bros. & Ors.* **(1986) 4 SCC 198,** *Surinder Singh v. Central Government & Ors.* **1986 (3) SCR 946 = 1986 (1986) 4 SCC 667;** *Jayantilal Amrathlal v. Union of India* **[(1972) 4 SCC 174;** *S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India & Anr.* **1991 (2)**

Suppl. SCR 305 = (2006) 2 SCC 740; *Mumbai Agricultural Produce Market Committee & Anr. v. Hindustan Lever Limited & Ors.* **2008 (4) SCR 471; (2008) 5 SCC 575;** *Union of India v. S. Narayana Iyer* **(1970) 1 MLJ 19; and** *Union of India & Ors. v. Motion Picture Association & Ors.* **(1999) 6 SCC 150;** *Commissioner of Income Tax, Udaipur, Rajasthan v. Mcdowell and Company Ltd.* **2009 (8) SCR 983 = (2009)10 SCC 755;** *State of West Bengal v. Kesoram Industries Ltd. & Ors.* **(2004) 10 SCC 201; and** *Bangalore Water Supply & Sewerage Board v. A. Rajappa & Ors.* **1979 (3) SCR 545 = (1978) 2 SCC 213 – cited.**

Case Law Reference:

1985 (2) SCR 815	**held inapplicable**	**para 5**
1968 SCR 767	**held inapplicable**	**para 5**
1969 (1) SCR 108	**held inapplicable**	**para 5**
(2003) 10 SCC 421	**cited**	**para 7**
(1986) 4 SCC 198	**cited**	**para 7**
1986 (3) SCR 946	**cited**	**para 7**
(1972) 4 SCC 174	**cited**	**para 7**
1991 (2) Suppl. SCR 305	**cited**	**para 7**
1976 (1) SCR 721	**held inapplicable**	**para 8**
1961 SCR 750	**held inapplicable**	**para 8**
2008 (4) SCR 471	**cited**	**para 8**
(1970) 1 MLJ 19	**cited**	**para 8**
(1999) 6 SCC 150	**cited**	**para 8**
(1941) 2 MLJ 189	**held inapplicable**	**para 8**
2009 (10) SCR 536	**held inapplicable**	**para 8**

2001 (1) Suppl. SCR 233	**held inapplicable**	**para 8**
2006 (4) Suppl. SCR 279	**relied on**	**para 8**
2009 (8) SCR 983	**cited**	**para 8**
(2004) 10 SCC 201	**cited**	**para 8**
1979 (3) SCR 545	**cited**	**para 8**
1962 (2) SCR 659	**relied on**	**para 8**
(1973) 2 SCC 345	**relied on**	**para 8**
AIR 1991 SC 1676	**relied on**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3611 of 2011 etc.

From the Judgment & Order dated 26.08.2009 of the High Court of Delhi at New Delhi in Writ Petition (D) No. 9316 of 2009.

WITH

C.A. Nos. 3612, 3613 & 3614 of 2011.

F.S. Nariman, Arunabh Chodhury, Anurag Sharma, Prashant Kumar, Raktim Gogoi, Anupam Lal Das (for AP & J Chambers), Meenakshi Arora, Joseph Pookkatt, Sanjib Sen (for AP & J Chambers), Sumita Hazarika, Partha Sil for the Appellant.

Indira Jaisingh, ASG, Dr. A.M. Singvi, Harish N. Salve, Milanka Chaudhary, Sarojanand Jha, Abhishek Sharma, Rook Ray, Dharmendra Kumar Sinha, Prateek Jain, Balaji Subramanian, Sushma Suri, Atul Nanda, Rameeza Hakeem (for Law Associates & Co.), Amar Dave, Ashish Jha, Farid Karachiwala, Meenakshi Chatterjee (for "Coac", Harish Beeran, R.S. Jena for the Respodents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Application for permission to file SLP in SLP [C] No.11799/2011 [CC No.1066/2010] is allowed and delay condoned.

2. Leave granted.

3. These are appeals against the judgment and order dated 26.08.2009 of the Division Bench of the Delhi High Court in public interest litigations upholding the validity of levy of development fees on the embarking passengers by the lessees of the Airports Authority of India at the Indira Gandhi International Airport, New Delhi and the Chhatrapati Shivaji International Airport, Mumbai.

Relevant Facts:

4. The Airports Authority of India Act, 1994 (for short 'the 1994 Act') came into force on 01.04.1995 and under Section 3 of the 1994 Act, the Central Government constituted the Airports Authority of India (for short 'the Airports Authority'). Section 12 of the 1994 Act enumerates the various functions of the Airports Authority. By the Airports Authority of India (Amendment) Act, 2003 (for short 'the Amendment Act of 2003'), Sections 12A and 22A were inserted in the 1994 Act with effect from 01.07.2004. The newly inserted Section 12A provides that the Airports Authority may make a lease of the premises of an airport to carry out some of its functions under Section 12 as the Airports Authority may deem fit. The newly inserted Section 22A of the 1994 Act provides that with the approval of the Central Government, the Airports Authority may levy on, and collect from, the embarking passengers at an airport, the development fees at the rate as may be prescribed. On 04.04.2006, the Airports Authority leased out the Indira Gandhi International Airport, New Delhi (for short 'the Delhi Airport') to the Delhi International Airport Private Limited (for short 'DIAL') and also leased out the Chhatrapati Shivaji International Airport, Mumbai (for short 'the Mumbai Airport') to Mumbai International Airport Private Limited (for short 'MIAL').

Section 22A of the 1994 Act was amended by the Airports Economic Regulatory Authority of India Act, 2008 (for short 'the 2008 Act') and the amended Section 22A provided for determination of the rate of development fees for the major airports under clause (b) of sub-section (1) of Section 13 of the 2008 Act by the Airports Economic Regulatory Authority (for short 'the Regulatory Authority'). The amended Section 22A was to take effect on and from the date of the establishment of the Regulatory Authority. The Government of India, Ministry of Civil Aviation, sent a letter dated 09.02.2009 to DIAL conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of development fees by DIAL at the Delhi Airport at the rate of Rs.200/- per departing domestic passenger and at the rate of Rs.1300/- per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 36 months with effect from 01.03.2009. Similarly, the Government of India, Ministry of Civil Aviation, sent another letter dated 27.02.2009 to MIAL conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of development fees by MIAL at the Mumbai Airport at the rate of Rs.100/- per departing domestic passenger and at the rate of Rs.600/- per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 48 months with effect from 01.04.2009. The levy of development fees by DIAL as the lessee of the Delhi Airport was challenged in Writ Petition No. 8918/2009 by Resources of Aviation Redressal Association. The levy of development fees by DIAL and MIAL as lessees of the Delhi and Mumbai Airports were challenged in Writ Petition No. 9316 of 2009 and Writ Petition No. 9307 of 2009 by Consumer Online Foundation. The Writ petitioners contended inter alia that such levy of development fees under Section 22A of the 1994 Act can only be made by the Airports Authority and not by the lessee and that until the rate of such levy is either prescribed by the Rules made under the 1994 Act or determined by the Regulatory Authority under the 2008 Act as provided in Section 22A of the Act before and after its

amendment by the 2008 Act, the levy and collection of development fees are ultra vires the 1994 Act. The Division Bench of the High Court, after hearing, held that there was no illegality attached to the imposition of development fees by the two lessees with the prior approval of the Central Government and dismissed the writ petitions by the impugned judgment and order.

Conclusions of the High Court:

5. In the impugned judgment and order, the High Court held that under sub-section (1) of Section 12A of the 1994 Act, the Airports Authority is empowered to lease an airport for the performance of its functions under Section 12 and such a lease is a statutory lease which enables the lessee to perform the functions of the Airports Authority enumerated in Section 12. The High Court further held that sub-section (4) of Section 12A provides that the lessee who has been assigned some functions of the Airports Authority under sub-section (1) shall have "all" the powers of the Airports Authority necessary for the performance of such functions in terms of the lease and use of the word "all" indicates that the lessee would have each and every power of the Airports Authority for the purpose of discharging such functions including the power under Section 22A to levy and collect development fees from the embarking passengers. The High Court took the view that development fee though described as fee in Section 22A is more akin to a charge or tariff for the facilities provided by the Airports Authority to the airlines and passengers. The High Court came to the conclusion that the exercise of the power to levy and collect development fees under Section 22A was not dependent on the existence of the rules and, therefore, this power can be exercised even if the rules have not framed prescribing the rate of development fees under Section 22A (before its amendment by the 2008 Act). In coming to this conclusion, the High Court relied on the decisions of this Court in *U.P. State Electricity Board, Lucknow v. City Board,*

Mussorie & Ors. [(1985) 2 SCC 16], *Mysore Road Transport Corporation v. Gopinath Gundachar Char* [AIR 1968 SC 464] and *Sudhir Chandra Nawn v. Wealth- Tax Officer, Calcutta & Ors.* [1969 (1) SCR 108].

Contentions on behalf of the appellants:

6. Mr. Fali S. Nariman, learned senior counsel, leading the arguments on behalf of the appellants, made these submissions:

(i) The conclusion of the High Court that the power under Section 22A to levy and collect the development fees from the embarking passengers can be exercised without the rules is erroneous because the language of Section 22A of the 1994 Act prior to its amendment by the 2008 Act makes it clear that development fees could be levied and collected from the embarking passengers at the airport "at the rate as may be prescribed" and the fees so collected are to be credited to the Airports Authority and are to be regulated and utilized "in the prescribed manner". Unless, therefore, the statutory rules are made prescribing the rate at which such fees are to be collected and prescribing the regulation and manner of the utilization of development fees, the power under Section 22A cannot be exercised. After the amendment by the 2008 Act, Section 22A(ii) provides that the development fee to be levied on and collected from the embarking passengers at major airports, such as the Delhi Airport and the Mumbai Airport, would be at the rate as may be determined under Clause (b) of sub-section (1) of Section 13 of the 2008 Act. The Regulatory Authority has been established by notification dated 12.05.2009 and unless the rate of development fees is determined by the Regulatory Authority under Clause (b) of sub-section (1) of Section 13 of the 2008 Act, the same cannot be levied and collected from the embarking passengers at the two major airports. The determination of the rate of development fees to be levied at the two major airports under Clause (b) of sub-section (1) of Section 13 of the 2008 Act by the Regulatory Authority of India

is still pending and the impugned levy of development fees by DIAL and MIAL are, therefore, ultra vires.

(ii) The purposes for which the development fees are to be levied and collected are indicated in clauses (a), (b) and (c) of Section 22A of the 1994 Act and these are:

(a) funding or financing the costs of upgradation, expansion or development of the airports at which the fees is collected, or

(b) establishment or development of a new airport in lieu of the existing airport, or

(c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the existing airport or advancement of loans to such companies or other persons engaged in such activities.

Under the 1994 Act, it is only the Airports Authority which can carry out these three purposes and not the lessee of the Airports Authority under Section 12A of the 1994 Act and, therefore, the lessee can have no power to levy and collect the development fees from the embarking passengers. He argued that the conclusion of the High Court in the impugned judgment and order, that under sub-section (4) of Section 12A of the 1994 Act, the lessee having been assigned some of the functions of the Airports Authority has all the powers of the Airports Authority necessary for the performance of such functions in terms of the lease including the power to levy development fees under Section 22A of the 1994 Act, is therefore not correct. He referred to the various provisions of the Operation, Management and Development Agreement (for short 'OMDA') and the State Support Agreement executed between the Airports Authority and DIAL/MIAL to show that the power to levy

development fees from the embarking passengers have in fact not been assigned by the Airports Authority to DIAL/MIAL.

Reply on behalf of the Union of India:

7. Mr. Gopal Subramanium, learned Solicitor General appearing for the Union of India, made these submissions:

(i) Section 12A of the 1994 Act begins with a non-obstante clause and it empowers the Airports Authority to lease the premises of an airport to a third party to carry out some of its functions under Section 12 of the 1994 Act and in exercise of this power the Airports Authority and the DIAL and the Airports Authority and MIAL have entered into agreements in respect of the leases and the Airports Authority has delegated some of its functions to DIAL and MIAL in respect of the Delhi Airport and Mumbai Airport respectively. A reading of the lease agreements (OMDA) would show that the functions of operation, maintenance, development, design, construction, up-gradation, modernization, finance and management of the airports are to be carried out by the two lessees. If DIAL and MIAL have to carry out these functions under the lease agreement to develop, finance, design, construct, modernize, operate, maintain, use and regulate the use of the airports by the third party, they must have power to determine, demand, collect and retain appropriate charges from the users of the airports.

(ii) Section 22A of the 1994 Act permits the Airports Authority after previous approval of the Central Government to levy on and collect from embarking passengers at an airport development fees. Accordingly, after the lease of the two airports by the Airports Authority to DIAL and MIAL, the Central Government has conveyed its approval in the two letters dated 09.02.2009 and 27.02.2009 to DIAL and MIAL for levy of development fees by DIAL and MIAL respectively from the two airports. Such approval conveyed by the Central Government is entirely in accordance with Section 12A of the 1994 Act. In

view of sub-section (4) of Section 12A of the 1994 Act providing that a lessee who has been assigned any of the functions of the Airports Authority would have all the powers of the Airports Authority necessary for the performance of such function in terms of the lease, the power of the Airports Authority to levy the development fees has also been rightly assigned to DIAL and MIAL. A reading of the two approval letters would show that various conditions and safeguards have been incorporated in the approval letters to protect the interest of the public and to provide rigorous checks with regard to the manner in which DIAL and MIAL can deal with the fees collected by them and it will be clear from the approval letters that the fees can be utilized only for the purpose mentioned in Section 22A of the 1994 Act.

(iii) The purposes mentioned in clauses (b) and (c), namely, "development of a new airport" and "a private airport" respectively relate to the very airport in respect of which the lease is executed and fees are collected, as it would be clear from the expression "in lieu of the airport referred to in clause (a)". It is significant that Section 12A and Section 22A of the 1994 Act were both introduced by the same Amendment Act of 2003.

(iv) Though Section 22A of the 1994 Act, before its amendment by the 2008 Act provided that for levy of development fees "at the rate as may be prescribed" and for regulation and utilization of the development fees "in the prescribed manner", the absence of the rules prescribing the rate of development fees or the manner of regulation and utilization of development fees will not render Section 22A ineffective. The legal proposition that absence of rules and regulations cannot negate the power conferred on an authority by the legislature is settled by decisions of this Court in *Orissa State (Prevention & Control of Pollution) Board v. Orient Paperdd Mills & Anr.* [(2003) 10 SCC 421], *U.P. State Electricity Board, Lucknow v. City Board, Mussorie & Ors.*

(supra), *Kerala State Electricity Board v. M/s S.N. Govinda Prabhu & Bros. & Ors.* [(1986) 4 SCC 198], *Surinder Singh v. Central Government & Ors.* [(1986) 4 SCC 667] and *Mysore Road Transport Corporation v. Gopinath Gundachar Char* (supra).

(v) The arguments advanced by Mr. Nariman on behalf of the appellant regarding the amendment of Section 22A of the 1994 Act by the 2008 Act were not raised before the High Court and the foundation for such a plea has also not been laid in the special leave petition. In any case the approval granted by the Central Government to DIAL and MIAL to levy the development fees for a period of three years would not be rendered automatically inoperative on the enactment of the 2008 Act amending Section 22A of the 1994 Act and therefore DIAL and MIAL continue to have the right to collect the development fees by virtue of the approvals granted by the Central Government which are saved by Section 6 (c) of the General Clauses Act, 1897 despite the amendment of Section 22A by the 2008 Act. The decisions of this Court in *Jayantilal Amrathlal v. Union of India* [(1972) 4 SCC 174], *S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India & Anr.* [(2006) 2 SCC 740] and *M/s. Gurcharan Singh Baldev Singh v. Yashwant Singh & Ors.* [(1992) 1 SCC 428] support this contention.

(vi) Section 2 (n) of the 2008 Act defines "service provider" as any person who provides aeronautical services "and is eligible to levy and charge user development fees from the embarking passengers at any airport and includes the authority which manages the airport". This provision expressly indicates that under the 2008 Act also the entity managing the airport is eligible to levy and collect the development fees. The 1994 Act and the 2008 Act provide a statutory framework for the modernization and improvement of the aviation infrastructure of the country and should be interpreted in a harmonious manner so that they complement each other rather than conflict with each other. The Regulatory Authority constituted under the

2008 Act has already issued a public notice dated 23.04.2010 which would show that it has permitted DIAL to continue to levy the development fees at the rate of Rs.200/- per departing domestic passenger and at the rate of Rs.1,300/- per departing international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination. The Court should not therefore interfere with the levy and collection of the development fees by DIAL and MIAL at this stage.

Reply on behalf of MIAL and DIAL:

8. Mr. Harish N. Salve, learned senior counsel, and Dr. Abhishek Singhvi, learned senior counsel, appeared for MIAL and DIAL and made these submissions:

(i) The challenge of the appellant to the levy and collection of airport development fees by the lessees of the two airports is based on a misconception that development fees is in the nature of a tax and can be levied strictly in accordance with Section 22A of the 1994 Act, only by the Airports Authority and not by the lessee. Development fees is not really a tax but charges levied and collected by the lessee for development of facilities for the use of the airport. The lessees, which are non-government companies, have established the utility in a public-private partnership, and do not require a statutory authorization or permission to recover such charges by way of development fee, from the passengers using the airport and the lessees do not require the support of the statutory provision of Section 22A for levy and collection of development fees. Section 11 of the 1994 Act mandates that the Airports Authority would discharge its functions on business principles and Section 12 of the 1994 Act enumerates the functions of the Airports Authority and as the Airports Authority in the discharge of its functions provides different facilities, it is entitled to collect charges for such facilities as per contractual arrangements with those who use the facilities. These charges are really in the nature of consideration from persons using the facilities provided by the Airports Authority. The nature of these charges for the facilities

provided by an authority has been clarified by this Court in The Trustees of the Port of Madras v. M/s Aminchand Pyarelal & Ors. [(1976) 3 SCC 167], Mumbai Agricultural Produce Market Committee & Anr. v. Hindustan Lever Limited & Ors. [(2008) 5 SCC 575], Union of India v. S. Narayana Iyer [(1970) 1 MLJ 19] and Union of India & Ors. v. Motion Picture Association & Ors. [(1999) 6 SCC 150]. As the facilities are in the nature of monopolies, the statute imposes regulations for the charges to prevent an abuse of monopolistic position and Sections 22 and 22A of the 1994 Act reflect such statutory curtailments of the rights of the owners of the facilities to recover sums from airlines and passengers. Hence, the right to recover charges is not based on Sections 22 and 22A but flows from the ownership of the facilities. What is determined, therefore, is the charges that would be contractually recovered from the users of the facilities as was held in M/s Aminchand Pyarelal & Ors. (supra).

(ii) Section 22 of the 1994 Act identified the heads on which charges could be recovered. Section 22A, therefore, merely adds three more heads for which funds could be raised and this is akin to adding components of a tariff. Section 22A does not change the quality and character of the recovery of charges by the owners of the facilities from the users thereof. Section 22A does not also change the nature and character of what is recovered by an airport operator from its customers. The High Court was, therefore, right in coming to the conclusion in the impugned judgment that development fees under Section 22A of the 1994 Act was in the nature of a tariff.

(iii) Section 12A of the 1994 Act (a) recognizes statutorily the power of the Airports Authority to make a lease of the premises of an airport for the purpose of carrying out some of its functions under Section 12 and (b) transfers as it were to the lessee all the powers of the Authority. As will be clear from sub-section (4) of Section 12A of the Act, the lessee who has been assigned some functions of the Airports Authority under Section 12 of the 1994 Act has the power of the Airports

Authority "necessary for the performance of such functions". The power to recover charges for the facilities at the airport in respect of which a lease is made, whether they be the charges under Section 22 or the charges under Section 22A are necessary for discharging of the functions of maintaining and upgrading the airports. Since sub-section (4) of Section 12A itself states that the lessee shall have "all" the powers of the Airports Authority, there is no warrant to take the view that the lessee shall not have the power of the Airports Authority under Section 22A to levy and collect development fees.

(iv) The functions which have been entrusted to the two lessees, DIAL and MIAL, include the up-gradation and modernization of the airport including construction of new terminals and this will be clear from clause 2.1 titled "Grant of Function" and clause 8.3 titled "Master plan" of the OMDA. The relevant provisions of the State Support Agreement between the Airports Authority and the two lessees and in particular clauses 3.1 and 3.1A also deal with the recovery of such charges in the performance of the functions. It is for the discharge of these functions that development fees is levied and collected and the power to collect development fee has been passed on to the lessee under sub-section (4) of Section 12A of the 1994 Act.

(v) Rules prescribing the rate of development fees and regulation and the manner in which the development fees will be utilized as provided in Section 22A of the 1994 Act cannot curtail the power to levy and collect development fees under Section 22A of the 1994 Act. This proposition is settled by the decisions of this Court in Orissa State (Prevention & Control of Pollution) Board v. Orient Paperdd Mills & Anr. (supra), T. Cajee v. U. Jormanik Siem & Anr. (AIR 1961 SC 276), The Madras and Southern Maharatta Railway Company Limited v. The Municipal Council Bezwada [(1941) 2 MLJ 189] as approved by the Privy Council in its decision reported in AIR 1944 PC 71, Jantia Hill Truck Owners Association, etc. v.

Shailang Area Coal Dealer and Truck Owner Association & Ors. [(2009) 8 SCC 492], Surinder Singh v. Central Government & Ors. (supra), Meghalaya State Electricity Board & Anr. v. Jagadindra Arjun [(2001) 6 SCC 446] and U.P. State Electricity Board, Lucknow v. City Board, Mussorie & Ors. (supra). Since the power to collect the development fee is already available to the Airports Authority or its lessees as part of its power to collect charges for the facilities, absence of a rule does not negate the power. The rule under Section 22A was to be made not for purposes of conferring the power but to regulate the rate of development fees and manner of utilization of development fee as a check on such power.

(vi) After the 2008 Act and after the notification dated 31.08.2009 bringing the provisions of 2008 Act in Chapters III and VI into force w.e.f. 01.09.2009, the Regulatory Authority has jurisdiction under Section 13(1)(b) of the 2008 Act to determine the amount of development fees in respect of major airports, such as, Delhi and Mumbai Airports. The Regulatory Authority has already commenced its functions and has undertaken the process of final determination of development fee. Till the Regulatory Authority modifies the levy of development fees, the two lessees are entitled to collect development fees as per the two letters dated 09.02.2009 and 27.02.2009 of the Central Government conveying the approval to the lessees of the two airports. The contention of the appellant that the development fees cannot be recovered till such time as the Regulatory Authority determines the rate of development fees is misconceived. The contention of the appellant that the development fees can be utilized only for the purposes mentioned in Section 22A of the 1994 Act is also misconceived. The approval letters of the Central Government show that the development fees can be utilized for the development of Aeronautical Assets which are Transfer Assets in terms of OMDA; and under the OMDA, these Transfer Assets shall revert to the Airports Authority on the expiry or early termination of OMDA. On a perusal of the three clauses

enumerated in Section 22A of the 1994 Act, it is clear that depending on the functions assigned to the lessee, the corresponding powers to collect development fees for discharging the function also is passed on to the lessee under sub-section (4) of Section 12A of the 1994 Act. In other words, there is a clear nexus established between the function so assigned and the power to collect the development fees.

Rejoinder on behalf of the appellants:

9. In rejoinder, Mr. Nariman made these submissions:

(i) Under Clause 13(i) of OMDA the lessee has undertaken to arrange for financing and/or meeting of all financial requirements through suitable debt and equity the contribution in order to comply with its obligation including development of the airport pursuant to the Master Plan and the Major Development Plans. Hence, there was no question of levy of development fees by the lessee for the purposes of development of the airport which has been leased out to the lessee. The airports belong to the Central Government and the Airports Authority has leased out the airport premises to the lessee to manage the airport. Section 38 of the 1994 Act empowers the Central Government to temporarily divest the Airports Authority of the management of the airport and Section 39 of the 1994 Act empowers the Central Government to supersede the Airports Authority. The lessee, therefore, is not the owner of the airport and is consequently not empowered to charge development fess for the development of the airport. Only a limited right has been conferred on the private lessee under Section 12A of the 1994 Act to undertake some of the functions of the Airports Authority enumerated in Clause 2.1.1 of the OMDA read with Schedule 5 and Schedule 6 which enumerate the aeronautical services and non-aeronautical services respectively.

(ii) The levy under Section 22A of the 1994 Act is for the specific purposes mentioned in Clauses (a), (b) or (c) thereof

and though termed as fees, it is really in the nature of a cess and therefore there need not be any direct co-relation between the levy of fees and the services rendered as has been held by the High Court in the impugned judgment. In *Vijayalashmi Rice Mills & Ors. v. Commercial Tax Officers, Palakot & Ors.* [(2006) 6 SCC 763], this Court has also held that ordinarily a cess means a tax which raises revenue which is applied to a specific purpose. This Court has held in Commissioner of Income Tax, Udaipur, Rajasthan v. Mcdowell and Company Ltd. [(2009)10 SCC 755] that the power to levy tax, duty, cess or fee can be exercised only under law authorizing the levy. Thus, cess is ultimately a compulsory exaction of money and must satisfy the test of Article 265 of the Constitution which declares that no tax shall be levied or collected without authority of law. This Court has also held in *Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla & Ors.* [(1992) 3 SCC 285] that the power of imposition of tax and/or fee must be very specific and there is no scope of implied authority for imposition of such tax or fee. This position of law has been reiterated by this Court in *State of West Bengal v. Kesoram Industries Ltd. & Ors.* [(2004) 10 SCC 201]. Section 22A of the 1994 Act was, therefore, enacted by the Amendment Act of 2003 to specifically empower the Development Authority to impose levy and collect development fees which is to be used for the specific purposes indicated in clauses (a), (b) and (c) of Section 22A of the 1994 Act and this power cannot be usurped by the lessee of the airport by treating it as charges for facilities.

(iii) The judgments relied on by the respondents in support of their contention that non-framing of rules do not negate the power to levy development fees under Section 22A of the 1994 Act have been rendered by this Court in the context of enactments which are not pari materia with Section 22A of the 1994 Act. In *Bangalore Water Supply & Sewerage Board v. A. Rajappa & Ors.* [(1978) 2 SCC 213], this Court has cautioned that the same words may mean one thing in one

context and another in different context. This position of law has also been stated in Justice G.P. Singh's Treatise on Interpretation of Statutes, 12th Edition 2010 at pages 298-299. Hence, the judgments cited on behalf of the respondents are of no aid to interpret Section 22A of the 1994 Act which clearly provides that the development fees can be levied and collected at the rate prescribed by the rules and are to be regulated and utilized in the manner prescribed by the rules. In *Mohammad Hussain Gulam Mohammad & Anr. v. The State of Bombay & Anr.* [1962 (2) SCR 659], a Constitution Bench of this Court has held that since Section 11 of the Bombay Agricultural Produce Markets Act, 1939 provides that rules will prescribe the maxima and the fees fixed must be within the maxima, till such maxima are fixed by the rules, it would not be possible for the Market Committee to levy fees. Similarly, in *Dhrangadhra Chemical Works Ltd. v. State of Gujarat & Ors.* [(1973) 2 SCC 345], this Court has held that the framing of rules was a mandatory requirement enjoined by Section 60(a)(ii) of the Bombay Municipalities Act, 1901 before imposing a tax by a resolution passed at a general meeting.

(iv) The two letters dated 09.02.2009 and 27.02.2009 of the Government of India, Ministry of Civil Aviation, to DIAL and MIAL respectively can convey only the approvals of the Central Government under Section 22A of the 1994 Act for levy of development fees by DIAL and MIAL respectively but cannot authorize DIAL and MIAL to levy and collect development fees under Section 22A of the 1994 Act because under this provision the Airports Authority only has the power to levy and collect development fees and DIAL and MIAL have no such authority. The two letters dated 09.02.2009 and 27.02.2009 are not saved by Section 6 of the General Clauses Act, 1897 because this provision does not protect any action taken under the authority of the letter.

(v) The public notice dated 23.04.2010 issued by the Regulatory Authority pertaining to levy of development fees by

DIAL regarding the fees of Rs.200/- per departing domestic passenger and Rs.1300/- per departing international passenger on ad hoc basis is without jurisdiction as under the 2008 Act, the Regulatory Authority alone has the power to determine the rate of development fees in respect of major airports after following the procedure laid down in Section 13 of the 2008 Act. There is no public notice issued by the Regulatory Authority so far in respect of the Mumbai Airport. The levy and collection of development fees by DIAL and MIAL at the two airports are, therefore ultra vires and may be restrained by the Court.

Relevant Provisions of Law:

10. Section 12 of the 1994 Act as amended by the Amendment Act of 2003, Section 22 of the 1994 Act, Sections 12A and 22A inserted by the Amendment Act of 2003 with effect from 01.07.2004 and Section 22A as amended by the 2008 Act, which are relevant for deciding the questions raised before us by the parties, are extracted hereinbelow:-

> "12. Functions of the Authority.— (1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.
>
> (2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.
>
> (3) Without prejudice to the generality of the provisions contained in sub-sections (1) and (2), the Authority may—
>
> (a) plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves;
>
> (aa) establish airports, or assist in the establishment of

private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose. (Inserted by the Amendment Act of 2003)

(b) plan, procure, install and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts;

(c) provide air safety services and search and rescue, facilities in co-ordination with other agencies;

(d) establish schools or institutions or centers for the training of its officers and employees in regard to any matter connected with the purposes of this Act;

(e) construct residential buildings for its employees;

(f) establish and maintain hotels, restaurants and restrooms at or near the airports;

(g) establish warehouses and cargo complexes at the airports for the storage or processing of goods;

(h) arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;

(i) make appropriate arrangements for watch and ward at the airports and civil enclaves;

(j) regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves with due regard to the security and protocol functions of the Government of India;

(k) develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air-navigation services,

ground aids and safety services or any facilities thereat;

(l) establish and manage heliports and airstrips;

(m) provide such transport facility as are, in the opinion of the Authority, necessary to the passengers traveling by air;

(n) form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act;

(o) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act;

(p) perform any other function considered necessary or desirable by the Central Government for ensuring the safe and efficient operation of aircraft to, from and across the air space of India;

(q) establish training institutes and workshops;

(r) any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority.

(4) In the discharge of its functions under this section, the Authority shall have due regard to the development of air transport service and to the efficiency, economy and safety of such service.

(5) Nothing contained in this section shall be construed as-

(a) authorizing the disregard by the Authority of any law for the time being in force; or

(b) authorizing any person to institute any proceeding in

respect of duty or liability to which the Authority or its officers or other employees would not otherwise be subject.

22. Power of the Authority to charge fees, rent, etc.- The Authority may,-

(i) With the previous approval of the Central Government, charge fees or rent -

(a) for the landing, housing or parking of aircraft or for any other service or facility offered in connection with aircraft operations at any airport, heliport or airstrip;

Explanation. - In this sub-clause "aircraft" does not include an aircraft belonging to any armed force of the Union and "aircraft operations" does not include operations of any aircraft belonging to the said force;

(b) for providing air traffic services, ground safety services, aeronautical communications and navigational aids and meteorological services at any airports and at any aeronautical communication station;

(c) for the amenities given to the passengers and visitors at any airport, civil enclave, heliport or airstrip;

(d) for the use and employment by persons of facilities and other services provided by the Authority at any airport, civil enclave heliport or airstrip;

(ii) with due regard to the instructions that the Central Government may give to the Authority, from time to time, charge fees or rent from persons who are given by the Authority any facility for carrying on any trade or business at any airport, heliport or airstrip.

Inserted by the Amendment Act of 2003

12A. Lease by the authority.—(1) Notwithstanding

anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit:

Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under sub- section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.

(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease.

Inserted by the Amendment Act of 2003

22A. Power of Authority to levy development fees at airports.-- The Authority may, after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport, the development fees at the rate as may be prescribed and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner, for the purposes of-

(a) funding or financing the costs of upgradation, expansion or development of the airport at which the fees is collected; or

(b) establishment or development of a new airport in lieu of the airport referred to in clause (a); or

(c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

As amended by the 2008 Act

22A. Power of Authority to levy development fees at airports.-- The Authority may,--

(i) after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport other than the major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be prescribed;

(ii) levy on, and collect from, the embarking passengers at major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be determined under clause (b) of sub-section (1) of Section 13 of the Airports Economic Regulatory Authority of India Act, 2008,

and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner, for the purposes of--

(a) funding or financing the costs of upgradation, expansion or development of the airport at which the fees is collected; or

(b) establishment or development of a new airport in lieu of the airport referred to in clause (a); or

(c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

Our conclusions with reasons:

11. The conclusion of the High Court in the impugned judgment that the lessee of the airport has the power of the Airports Authority under Section 22A to levy and collect development fees from the embarking passengers by virtue of sub-section (4) of Section 12A of the Act is contrary to the legislative intent of the Amendment Act of 2003. On a perusal of Section 22A of the 1994 Act inserted by the Amendment Act of 2003, we find that the purposes for which the development fees are to be levied and collected from the embarking passengers at an airport are:

(a) funding or financing the costs of up-gradation, expansion or development of the airports at which the fees is collected, or

(b) establishment or development of a new airport in lieu of the airport referred to in clause (a), or

(c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

Though Airports Authority can utilize the fees levied by it, for all or any of these purposes mentioned in clauses (a), (b) and (c) of Section 22A, what can be assigned by the Airports Authority to a lessee under a lease entered into under Section 12A of the 1994 Act is the power to levy fees for the purposes mentioned in clause (a) of Section 22 A of the 1994 Act.

12. The functions of the Airports Authority under clause (aa) of sub-section (3) of Section 12 also inserted by the Amendment Act of 2003 to establish airports, or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purposes cannot be assigned to the lessee under Section 12A of the 1994 Act. The Amendment Act of 2003 which also inserted Section 12A therefore provides in sub-section (1) of Section 12A that the Airports Authority can make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out "some" of its functions under section 12 as the Airports Authority may, in the public interest or in the interest of better management of airports, deem fit. Obviously, "a lease of premises of an airport" as contemplated in sub-section (1) of Section 12A cannot include establishing an airport or assisting in establishment of private airports as contemplated in clause (aa) of sub-section (3) of Section 12 of the Act.

13. To enable the Airports Authority to perform its statutory function of establishing a new airport or to assist in the establishment of private airports, the legislature has thought it fit to empower the Airports Authority to levy and collect development fees as will be clear from clauses (b) and (c) of Section 22A of the 1994 Act. Such development fees levied and collected under Section 22A can also be utilized for funding or financing the costs of up-gradation, expansion and development of an existing airport at which the fees is collected as provided in clause (a) of Section 22A of the Act and in case the lease of the premises of an existing airport (including

buildings and structures thereon and appertaining thereto) has been made to a lessee under Section 12A of the Act, the Airports Authority may meet the costs of up-gradation, expansion and development of such leased out airport to a lessee, but this can be done only if the rules provide for such payment to the lessee of an airport because Section 22A says that the development fees are to be regulated and utilized in the manner prescribed by the Rules. Since the lessee of an airport cannot be assigned the function of the Airports Authority to establish airports or assist in establishing private airports in lieu of the existing airports at which the development fees is being collected, the lessee cannot under sub-section (4) of Section 12A have the power of the Airports Authority under Section 22A of the 1994 Act to levy and collect development fees. This is because sub-section (4) of Section 12A provides that the lessee can have all those powers of the Airports Authority which are necessary for performance of such functions as assigned to it under sub-section (1) of Section 12A in terms of the lease. Moreover, since we have held that the function of establishment and development of a new airport in lieu of an existing airport and the function of establishing a private airport are exclusive functions of the Airports Authority under the 2004 Act, and these statutory functions cannot be assigned by the Airports Authority under lease to a lessee under Section 12A of the Act, the lease agreements, namely, the OMDA and the State Support agreement could not make a provision conferring the right on the lessee to levy and collect development fees for the purpose of discharging these statutory functions of the Airports Authority. We, therefore, do not think it necessary to refer to the clauses of the OMDA and the State Support Agreements executed in favour of the two lessees to find out whether the right of levying and collecting the development fees has been assigned to the lessees or not.

14. The High Court was not correct in coming to the conclusion in the impugned judgment that the development fees to be levied and collected under Section 22A of the 1994 Act

is in the nature of tariff or charges collected by the Airports Authority for the facilities provided to the passengers and the airlines. It will be clear from a bare reading of Sections 22 and 22A that there is a distinction between the charges, fees and rent collected under Section 22 and the development fees levied and collected under Section 22A of the 1994 Act. The charges, fees and rent collected by the Airports Authority under Section 22 are for the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport. Therefore, when the Airports Authority makes a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions under Section 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority under Section 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. The legal basis of such charges, fees or rent enumerated in Section 22 of the 2008 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport. But there can be no such contractual relationship between the passengers embarking at an airport and the Airports Authority with regard to the up-gradation, expansion or development of the airport which is to be funded or financed by development fees as provided in clause (a) of Section 22A. Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of Section 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to

be based on a statutory provision and for this reason Section 22A has been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in clauses (a), (b) and (c) of Section 22A of the Act. In other words, the object of Parliament in inserting Section 22A in the 2004 Act by the Amendment Act of 2003 is to authorize by law the levy and collection of development fees from every embarking passenger de hors the facilities that the embarking passengers get at the existing airports. The nature of the levy under Section 22A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in *Vijayalashmi Rice Mills & Ors. v. Commercial Tax Officers, Palakot & Ors.* (supra) that a cess is a tax which generates revenue which is utilized for a specific purpose. The levy under Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A.

15. Once we hold that the development fees levied under Section 22A is really a cess or a tax for a special purpose, Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law gets attracted and the decisions of this Court starting from *The Trustees of the Port of Madras v. M/s Aminchand Pyarelal & Ors.*(supra), cited on behalf of the Union of India and DIAL and MIAL on the charges or tariff levied by a service or facility provided are of no assistance in interpreting Section 22A. It is a settled principle of statutory interpretation that any compulsory exaction of money by the Government such as a tax or a cess has to be strictly in accordance with law and for these reasons a taxing statute has to be strictly construed. As observed by this Court in *Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla & Ors.* (supra), it has been consistently held by this Court that whenever there is compulsory exaction of money, there should be specific

provision for the same and there is no room for intendment and nothing is to be read or nothing is to be implied and one should look fairly to the language used. Looking strictly at the plain language of Section 22A of 1994 Act before its amendment by the 2008 Act, the development fees were to be levied on and collected from the embarking passengers "at the rate as may be prescribed". Since the rules have not prescribed the rate at which the development fees could be levied and collected from the embarking passengers, levy and collection of development fees from the embarking passengers was without the authority of law. For this conclusion, we are supported by the Constitution Bench judgment of this Court in *Mohammad Hussain Gulam Mohammad & Anr. v. The State of Bombay & Anr.* (supra). In that case, the Court found that Section 11 of the Bombay Agricultural Produce Markets Act, 1939 provided that the market committee may levy market fees subject to the maxima as prescribed and the Court held that unless the State Government fixes the maxima by rule, it is not open to the committee to fix any fees at all. We are also supported by the decision of a three judges Bench of this Court which held in *Dhrangadhra Chemical Works Ltd. v. State of Gujarat & Ors.* (supra) that the mandatory provision in Section 60(a)(ii) of the Bombay Municipalities Act, 1901 requiring framing of rule for imposition of tax not having been complied with, the imposition of tax was illegal. In Principles of Statutory Interpretation, 12th Edition, at Page 813, Justice G.P. Singh states:

> "There are three components of a taxing statute, viz., subject of the tax, person liable to pay the tax and the rate at which the tax is levied. If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the legislature."

Thus, the rate at which the tax is to be levied is an essential component of a taxing provision and no tax can be levied until

the rate is fixed in accordance with the taxing provision. We have, therefore, no doubt in our mind that until the rate of development fees was prescribed by the Rules, as provided in Section 22A of the 1994 Act, development fees could not be levied on the embarking passengers at the two major airports.

16. The High Court, in our considered opinion, was not correct in coming to the conclusion in the impugned judgment that the exercise of the power to levy and collect development fees under Section 22A was not dependent on the existence of the rules and, therefore, this power could be exercised even if the rules have not been framed prescribing the rate of development fees under Section 22A of the 1994 Act. The High Court has relied upon the decision of this Court in *U.P. State Electricity Board, Lucknow v. City Board, Mussorie & Ors.* (supra). In that case, the High Court was called upon to interpret Section 46(1) of the Electricity (Supply) Act, 1948, which provided that a tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be fixed from time to time by the Board. The High Court held that it only provides that the Grid Tariff shall be in accordance with any regulations made in this behalf and that means that if there were any regulations, the Grid Tariff should be fixed in such regulations and nothing more and, therefore, the framing of regulations under Section 70(h) of the Act cannot be a condition precedent for fixing the Grid Tariff. The language of Section 22A of the 1994 Act is different. It clearly states that the Airports Authority may levy on and collect from the embarking passengers at the airport the development fees at the rate as may be prescribed. Hence, unless the rate is prescribed by the rules, the Airports Authority cannot collect the development fees.

17. The High Court has also relied on the decision of this Court in *Mysore Road Transport Corporation v. Gopinath Gundachar Char* (supra). In that case, the Court was called upon to interpret the provisions of the Road Transport

Corporations Act, 1950. Section 45(1) of that Act provided that a Corporation may, with the previous sanction of the State Government, make regulations, not inconsistent with the Act and the rules made thereunder, for the administration of the affairs of the Corporation and in particular, providing for the conditions of appointment and service. The Court has held that in the absence of regulations framed under Section 45 laying down the conditions of service, the Corporation can still appoint officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit and it cannot be held that unless such regulations are framed under Section 45, the Corporation would have no power to appoint officers and servants and fix the conditions of service of its officers and servants. From the language of Section 22A of the 1994 Act, on the other hand, we find that there is no room whatsoever for the Airports Authority to levy and collect any development fees except at the rate prescribed by the Rules.

18. The High Court has also relied on the decision of this Court in *Sudhir Chandra Nawn v. Wealth-Tax Officer, Calcutta & Ors.* (supra). In that case, Section 7(1) of the Wealth Tax Act, 1957 was challenged as ultra vires the Parliament on inter alia the ground that no rules were framed in respect of the valuation of lands and buildings and this Court repelled the challenge and held that Section 7 only directs that the valuation of any asset other than cash has to be made subject to the rules and does not contemplate that there shall be rules before an asset can be valued and failure to make rules for valuation of a type of asset cannot therefore affect the vires of Section 7. In Section 22A of the 1994 Act, on the other hand, the levy or development fees was to be at the rate as prescribed by the Rules and hence could not be made without the rules. All other decisions starting from T. Cajee v. U. Jormanik Siem & Anr. cited on behalf of the Union of India, DIAL and MIAL on this point are cases where the statutory power could be exercised without the rules or the regulations, whereas the power under Section 22A of the 1994 Act to levy development fees could not be exercised without

the rules prescribing the rate at which development fees was to be levied.

19. Section 22A of the 1994 Act before its amendment by the 2008 Act specifically provided that the development fees may be levied and collected at the rate as may be prescribed by the rules. Hence, the rate of development fees could not be determined by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 communicated to DIAL and MIAL respectively. Under section 22A of the 1994 Act, the Central Government has only the power to grant its previous approval to the levy and collection of the development fees but has no power to fix the rate at which the development fees is to be levied and collected from the embarking passengers. Hence, the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 are ultra vires the 1994 Act and the two letters being ultra vires the 1994 Act are not saved by Section 6 of the General Clauses Act, 1897.

20. After the amendment of Section 22A by the 2008 Act with effect from 01.01.2009, the rate of development fees to be levied and collected at the major airports such as Delhi and Mumbai is to be determined by the Regulatory Authority under clause (b) of sub-section (1) of Section 13 of the 2008 Act and not by the Central Government. The Regulatory Authority constituted under the 2008 Act has already issued a public notice dated 23.04.2010 permitting DIAL to continue to levy the development fees at the rate of Rs.200/- per departing domestic passenger and at the rate of Rs.1,300/- per departing international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination under Section 13 of the 2008 Act. This public notice dated 23.04.2010 has been issued by the Regulatory Authority under the 2008 Act long after the impugned decision of the High Court upholding the levy and it has not been challenged by the appellants. Hence, the question of examining the validity of the said public notice dated

23.04.2010 issued by the Regulatory Authority pertaining to levy and collection of development fees by DIAL does not arise. But no such public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Hence, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order under Section 22A of the 1994 Act as amended by the 2008 Act.

21. Having held that the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 are ultra vires the 1994 Act and that MIAL could not continue to levy and collect of development fees at the major airport at Mumbai without an appropriate order passed by the Regulatory Authority, the question is whether there is need to pass any consequential direction for refund of the development fees collected by DIAL and MIAL pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the development fees levied and collected by MIAL after the amendment of Section 22A by the 2008 Act.

22. This Court has held in M/s Orissa Cement Ltd. v. State of Orissa (AIR 1991 SC 1676) that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier and that the Court has, and must be held to have, a certain amount of discretion to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. In the facts of this case, the development fees have been collected by DIAL and MIAL on the basis of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers at Delhi and Mumbai and these embarking passengers, from whom the development fees have been collected, cannot now be identified nor can they be traced for making the refund to them.

Further there is significantly no prayer for refund in any of the three writ petitions. However, it is necessary to ensure that the development fees levied and collected are utilized only for the specific purposes mentioned in Section 22A of the 1994 Act. In our considered opinion, interests of justice would be met if DIAL and MIAL are directed to account to the Airport Authority that the development fees so far levied and collected by them have been utilized for the purposes mentioned in clause (a) of Section 22A of the 1994 Act.

Reliefs:

23. In view of the foregoing, we allow these appeals as follows:

(i) We hold that development fees could not be levied and collected by the lessees of the two major airports, namely, DIAL and MIAL, on the authority of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers under the provisions of Section 22A of the 1994 Act.

(ii) We declare that with effect from 01.01.2009, no development fee could be levied or collected from the embarking passengers at major airports under Section 22A of the 1994 Act, unless the Airports Economic Regulatory Authority determines the rates of such development fee.

(iii) We direct that MIAL will henceforth not levy and collect any development fee at the major airport at Mumbai until an appropriate order is passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act.

(iv) We direct that DIAL and MIAL will account to the

Airports Authority the development fees collected pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the Airports Authority will ensure that the development fees levied and collected by DIAL and MIAL have been utilized for the purposes mentioned in clause (a) of Section 22A of the 1994 Act.

(v) We further direct that henceforth, any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act shall be credited to the Airports Authority and will be utilized for the purposes mentioned in clauses (a), (b) or (c) of Section 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible.

(vi) Nothing stated herein shall come in the way of any aggrieved person challenging the public notice dated 23.04.2010 issued by the Airports Economic Regulatory Authority in accordance with law.

(vii) The impugned judgment of the High Court is set aside and the Writ Petitions filed by the appellants are allowed with these directions.

(viii) There shall be no order as to costs.

(ix) I.A. No.3 in Civil Appeal arising out of S.L.P. (C) No.23541 of 2009 for impleadment stands rejected.

R.P. Appeals allowed.

NATHA SHANKAR MAHAJAN
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 970 of 2006)

APRIL 28, 2011

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

Penal Code, 1860: s.302 – Conviction based on dying declaration – In the dying declaration, the victim had alleged that her husband-accused suspecting her chastity, beat her up and set her ablaze by pouring kerosene over her body – Court below relied upon the dying declaration and convicted the husband u/s.302 – On appeal, held: There was endorsement made by the doctor on the statement of victim to the effect that she was conscious and in a position to make statement – The doctor had very categorically stated in his evidence that the victim was in a position to understand herself and was in a position to give statement – Dying declaration was recorded by the Magistrate – The evidence of the doctor and the Magistrate was not at all shaken in the cross-examination – The victim also made an oral dying declaration to her father – The courts below did not err in relying upon the dying declaration and convicting the accused – Evidence – Dying declaration.

The prosecution case was that the relations between the accused-husband and his wife were not cordial inasmuch as he suspected her chastity. The accused thrashed his wife whole night and the next morning, set her ablaze. Her screams were heard by the neighbour (PW2) who came there and sent the information to her father that the deceased was burnt. The father came and took the deceased to the hospital. After reaching the hospital, she was treated by the doctor (PW5) who also

arranged for recording her dying declaration. The dying declaration was recorded by the Executive Magistrate (PW3). PW5 also made an endorsement on the dying declaration that the deceased was conscious and was in a position to give a statement. Both the courts below relied on the dying declaration and convicted the accused under Section 302 IPC. The instant appeal was filed challenging the order of conviction.

Dismissing the appeal, the Court

HELD: The evidence of PWs 3 and 5 was not shaken in the cross-examination at all. PW5 had very categorically stated in his evidence that the deceased was in a position to understand herself and was in a position to give statement. Therefore, even if the doctor stated that he was not attentive as to what exactly was told to the PW3, would not matter particularly in view of statement of PW-3 who recorded the dying declaration of the deceased that he recorded the same as per the version of the deceased. In the dying declaration, the deceased had clearly alleged that she was beaten by her husband on account of the suspicion that he had about her chastity and ultimately, he poured kerosene over her body and set her ablaze. She also gave the name of the person with whom she was allegedly in tow. There was one more circumstance which was not adverted to, i.e., the oral dying declaration made by the deceased to her father. As soon as he reached the house of the deceased, he asked her as to how she was burnt. There was no cross-examination of the witness on this point who was examined as PW6. Both the courts below committed no error in relying upon the dying declaration and convicting the accused. [Paras 4-6] [961-C-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 970 of 2006.

From the Judgment & Order dated 24.06.2004 of the High Court of Judicature of Bombay Bench at Aurangabad in Criminal Appeal No. 176 of 1996.

Ranjan Mukherjee, S. Bhowmick for the Appellant.

Shankar Chillarge (for Asha Gopalan Nair) for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR,J. 1. This appeal is against the concurrent judgments of the Sessions Court as also the High Court whereby the accused stands convicted for the offence punishable under Section 302 IPC on the allegation that he committed the murder of his wife Sakhubai by pouring kerosene on her person and setting her ablaze.

2. As per the prosecution case, the relations between the accused and his wife were not cordial inasmuch as the husband suspected the chastity of his wife and believed that she had illicit relations with one Babulal Parsharam Mahajan. It is alleged that on the fateful day i.e. 19.3.1985, the accused thrashed the deceased whole night and ultimately, in the morning, he set her ablaze. Her screams were heard by her neighbour PW2 Bhagwan Mali who came and sent a information to her father Babu Lal Daga Mahajan that the deceased was burnt. It is the father who had taken the deceased to the hospital. After reaching the hospital, she was treated by PW5 Dr. Dagadu Pawar who also arranged for recording her dying declaration. It is the prosecution case that her dying declaration was recorded by PW3 Bhalerao Bhimsing Salunke, an Executive Magistrate. PW5 Dr. Dagadu Pawar also made an endorsement on the dying declaration that the deceased was conscious and was in a position to give a statement. Both the courts below have relied on the dying declaration.

3. Mr. Ranjan Mukherjee, learned counsel appearing for

the accused argued that the sole basis of the conviction in this case is the aforesaid dying declaration and, therefore, if there is any suspicion about this dying declaration, the benefit must go to the accused. That is a correct proposition of law. However, it is also the settled position that where the dying declaration is believable, credit worthy and appeals to the court, the same can be made the sole basis of the conviction. That appears to be the case here.

4. We have gone through the dying declaration ourselves and also seen the evidence of PWs 3 and 5 whose evidence was not shaken in the cross-examination at all. PW5 Dr. Dagadu Pawar has very categorically said in his evidence that the deceased was in a position to understand herself and was in a position to give statement. Therefore, even if the doctor says that he was not attentive as to what exactly was told to the PW3, would not matter particularly in view of statement of PW3 who recorded the dying declaration of the deceased that he recorded the same as per the version of the deceased. In the dying declaration, the deceased had clearly alleged that she was beaten by her husband on account of the suspicion that he had about her chastity and ultimately, he poured kerosene over her body and set her ablaze. She has also given the name of the person with whom she was allegedly in tow.

5. There is one more circumstance which has not been adverted to, i.e., the oral dying declaration made by the deceased to her father. As soon as, he reached the house of the deceased, he asked her as to how she was burnt. There is no cross-examination of this witness on this point who was examined as PW6.

6. Under the circumstances, we feel that both the courts below have committed no error in relying upon the dying declaration and convicting the accused. Therefore, this appeal fails and is dismissed.

D.G. Appeal dismissed.

BUDDHU SINGH

v.

STATE OF BIHAR (NOW JHARKHAND)

(Criminal Appeal No. 349 of 2007)

APRIL 28, 2011

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

Penal Code, 1860: s.304 (part II) – Three accused – First two accused grappled and pinned down the victim – Third accused dealt a blow of axe which landed on the head of the victim – Victim was seriously injured and died in hospital – Courts below convicted accused u/s.302 and awarded life imprisonment – On appeal, held: There could not have been the intention to commit the murder of the victim though the common intention on the part of first two accused could be attributed since they did the overt act of grappling with and pinning down the deceased – Intention of third accused to not commit the murder was also justified by the fact that the accused who dealt a blow of axe did not repeat the assault – The blow could not be said to be intended towards the head of victim – It could have landed anywhere, however it landed on the head of the victim – Therefore, element of intention is ruled out – Conviction modified and converted into s.304 (part II) – Sentence reduced to period already undergone.

The prosecution case was that there was some dispute between the accused persons and the victim-deceased. Accused 'L' was father of 'B' and 'BS'. On the fateful day, accused 'B' and accused 'L' grappled with the victim and pinned him down, while, accused 'BS' dealt an axe blow which landed on the head of the victim. The victim got seriously injured on account of that blow and died in the hospital. The trial court found all the accused guilty under section 302 IPC and awarded life sentence. The High Court affirmed the same. The instant appeals

were filed by the accused challenging the order of conviction.

Partly allowing the appeals, the Court

HELD: There was nothing on record which could be said against the accused 'L' and 'B' though the common intention on their part could be attributed since they had done the overt act of grappling with and pinning down the deceased. Seeing his father and brother grappling with the deceased, accused 'BS' dealt an axe blow. The blow could not be said to be intended towards the head. It could have landed anywhere. However, it landed on the head of the deceased. Therefore, the element of intention is ruled out. Again the defence raised on behalf of the accused that there could not have been the intention to commit the murder of the deceased is justified by the fact that the accused 'BS' did not repeat the assault. Under the circumstances, the prosecution was able to establish the guilt of the accused persons under Section 304 Part II I.P.C. The finding of the High Court is modified and the conviction of the accused is converted from Section 302 IPC to Section 304 Part II IPC and they are sentenced to the period already undergone. [Paras 9, 10] [965-E-H; 966-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 349 of 2007 etc.

From the Judgment & Order dated 18.05.2006 of the High Court of Jharkhand in Cr. App. No. 238 of 2000 R.

WITH

Crl. Appeal No. 1116 of 2007.

Ajit Kumar Pande, S.B. Khan for the Appellant.

Manish Mohan, K.N. Sinha (for Anil Kumar Jha) for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. Criminal Appeal No. 349 of 2007 has been filed by accused Buddhu Singh while Criminal Appeal No. 1116 of 2007 has been filed by his father Ledwa Singh and brother Balchand Singh. The trial court found them guilty under Section 302 IPC and sentenced each one of them to imprisonment for life. The High Court also affirmed the conviction and sentenced awarded by the trial court.

2. The prosecution case is that the deceased Sugendra Singh was suspected to be practising witchcraft and he was aggrieved against the accused persons for not giving to him the feast which he was professionally supposed to be paid on account of getting cured of accused Balchand Singh from some serious illness. The incident seems to have taken suddenly without there being any previous history to it.

3. The allegation is that on 30.7.1995 at about 4 p.m. deceased Surendra Singh was standing in front of house of PW5 Nagru Kharia when accused Balchand Singh pushed him down and accused Buddhu Singh is said to have then dealt an axe blow which landed on the head of the deceased. Accused Ledwa Singh is, thereafter, said to have started kicking the deceased. It is reported that on account of that blow, Sugendra Singh was seriously injured and died in the hospital.

4. The prosecution pressed in service the evidence of three eye witnesses namely; PW 2 Feku Kharia, PW6 – Karia Singh and PW7 Tijo Devi. PWs 2 and 6 turned hostile and refused to support the prosecution. PW7, being the mother of the deceased, however, supported the prosecution case. According to her, she saw the accused Balchand Singh and Ledwa Singh grappling with the deceased while accused Buddhu Singh giving an axe blow on the head of the deceased.

5. We have gone through the evidence of the witnesses very carefully.

6. Mr. Ajit Pandey, learned counsel appearing for the accused persons contended that firstly this was a case of single blow and the blow could not have been intended to be given on the head though it did land on the head. Mr. Pandey further argued that if the intention was to commit the murder, then the accused persons, more particularly accused Buddhu Singh would have repeated the assault which he actually and admittedly did not repeat.

7. Mr. Pandey further contended that once the injury was unintended, the offence could be converted into Section 304 Part II IPC from Section 302 IPC because the accused ought to have the knowledge that a single assault by an axe could result into the death of the deceased.

8. Mr. Manish Mohan, learned counsel appearing for the State supported the judgment and contended that the injury was serious enough and was on a very vital part i.e. head and resulted in the fracture of frontal bone and the death was almost instantaneous, though in the hospital.

9. Considering the overall material, we are of the view that there is hardly anything on record which can be said against the accused Ledwa Singh and Balchand Singh though the common intention on their part could be attributed since they had done the over act of grappling with and pinning down the deceased. Now, seeing his father and brother had been grappling with the deceased, the accused Buddhu Singh dealt an axe blow which could not be said to be intended towards the head. It could have landed anywhere. However, it landed on the head of the deceased. Therefore, the element of intention is ruled out. Again the defence raised on behalf of the accused that there could not have been the intention to commit the murder of the deceased is justified by the fact that the accused Buddhu Singh did not repeat the assault. Under the circumstances, we feel that the prosecution has been able to establish the guilt of the accused persons under Section 304 Part II I.P.C.

10. We, accordingly, modify the finding of the High Court and convert the conviction of the accused from Section 302 IPC to Section 304 Part II IPC and sentence each of them to the period already undergone. Accused Buddhu Singh is stated to be in jail for the last five years whereas other accused persons namely; Ledwa Sngh and Balchand Singh are stated to be in jail for the last ten years. They be released from the jail forthwith unless they are required in any other case.

11. The appeals are partially allowed.

D.G. Appeals partly allowed.

RAM SINGH

v.

CENTRAL BUREAU OF NARCOTICS

(Criminal Appeal Nos. 451-452 of 2005)

APRIL 28, 2011

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

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985.

ss. 8 and 18—'Conscious possession'—Recovery of opium from a room belonging to a hotel—Conviction of the servant of the hotel on the basis of his confessional statements that he brought the opium to the hotel from the house of its owner on his direction and opium tablets were sold to truck drivers—Affirmed by High Court—Held: Control over the goods is one of the tests to ascertain conscious possession so also the title – A servant of a hotel cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control – There is no evidence on record to suggest that the accused was in occupation of the room from where opium was recovered – Further, the evidence clearly points out that title to the opium vested in the owners of the hotel – In the face of the state of evidence it is difficult to hold that the accused was in conscious possession of the opium—Conviction and sentence of accused set aside—Evidence Act, 1872—ss.25 and 26.

EVIDENCE ACT, 1872

ss. 25 and 26 – Confession made to officer of Central Bureau of Narcotics—Held: The officers of the Central Bureau of Narcotics are not police officers within the meaning of ss.

25 and 26 of the Evidence Act and, therefore, confessions made before them are admissible in evidence – Code of Criminal Procedure, 1973—s. 173.

Confession – Evidentiary value of – HELD: A confession, if it is voluntary, truthful, reliable and beyond reproach is an efficacious piece of evidence to establish the guilt of the accused – However, before solely acting on confession, as a rule of prudence, the court requires some corroboration but as an abstract proposition of law it cannot be said that a conviction cannot be maintained solely on the basis of the confession made u/s 67 of the Act.

The appellant, who was working as a servant in a hotel, was arrested in connection with recovery of 2.1 kg. of opium from a room adjoining the kitchen of the hotel. While in custody of the Investigating Officer, namely, the Inspector, Central Bureau of Narcotics (P W-8), the appellant made two confessional statements (Ext. P-12 and Ext. P-15) to the effect that he had been working in the hotel for two months and he brought the opium to the hotel from the house of its owner on his direction; and that the opium tablets used to be sold to the truck drivers. The trial court held that the appellant was in possession of the opium and, accordingly, convicted him u/s 8 read with s.18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced him to 10 years RI and to pay a fine of Rs. 1 lac. The High Court affirmed the conviction and the sentence.

In the instant appeal filed by the accused, the questions for consideration of the Court were: (i) whether the confessions made before the officers of the Central Bureau of Narcotics were admissible in evidence; (ii) whether the confessions made were voluntary in nature and if so without corroboration, could it form the basis

for conviction; and (iii) whether the appellant could be said to be in possession of the opium or selling the same.

Allowing the appeals, the Court

HELD: 1.1 The officers of the Central Bureau of Narcotics are not police officers within the meaning of ss. 25 and 26 of the Evidence Act, 1872 and, therefore, confessions made before them are admissible in evidence. [para 10] [977-A-B]

1.2 The important attribute of police officer is not only to investigate but also to launch prosecution by filing a report or charge-sheet. True it is that s. 53 of the Narcotic Drugs and Psychotropic Act, 1985, confers powers on the Central Government to invest officers of the specified categories, the powers of an officer-in-charge of police station, but that itself shall not make them the police officers within the meaning of ss. 25 and 26 of the Evidence Act. The power to submit report u/s 173 of the Code of Criminal Procedure, 1973 is necessary to make the officers of the Central Bureau of Narcotics police officers within the meaning of ss.25 and 26 of the Evidence Act. The officers with whom lie the powers of search, seizure and investigation under the Act have not been conferred with the power to submit report u/s 173 of the Code. Such officer is required to lay complaint in the Court of Special Judge for prosecuting an accused. Thus, the confessions made by the appellant before PW.6 and PW.8 are admissible in evidence and cannot be thrown out of consideration. [para 8 and 10] [975-A-E; 977-B]

Raj Kumar Karwal vs. Union of India and others, **1990 (2) SCC 409; and** *Kanhaiyalal vs. Union of India,* **2008 (4) SCC 668 – relied on**

2.1 It is evident from s.24 of the Evidence Act that a

confession made by an accused is rendered irrelevant in criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise with reference to the charge against the accused. A confession, if it is voluntary, truthful, reliable and beyond reproach is an efficacious piece of evidence to establish the guilt of the accused. However, before solely acting on confession, as a rule of prudence, the court requires some corroboration but as an abstract proposition of law it cannot be said that a conviction cannot be maintained solely on the basis of the confession made u/s 67 of the Act. [para 12] [977-F-H; 978-A]

2.2 When an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, the same shall be a relevant factor to adjudge as to whether the confession was voluntary or not. In the instant case, the appellant was produced before the court on several dates and at no stage he made any complaint before the Special Judge of any torture or harassment in recording the confession. It is only when his statement was recorded u/s 313 CrPC that he retracted and denied making such a confession and went to the extent of saying that his signatures were obtained on blank pages. In the facts and circumstances of the case, the confessional statements made by the appellant were voluntary in nature and could form the basis for conviction. [para 13] [978-D-G]

M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, **2003 (8) SCC 449 – relied on.**

3.1 In sum and substance the confession of the appellant is that he was working in the hotel for the last two months and brought the opium from the house of the hotel-owner to the hotel, where it was being sold in

tablets to the truck-drivers. In the confession appellant has not stated or for that matter none of the witnesses have deposed that he was involved in selling the opium-tablets. Therefore, the appellant cannot be held guilty for selling opium. [para 15] [980-B-C]

3.2 It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. A servant of a hotel cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control. In the facts of the instant case, it is difficult to hold that opium was in possession of the appellant. There is no evidence on record to suggest that the appellant was in occupation of the room from where opium was recovered. Further, the evidence clearly points out that title to the opium vested in the owners of the hotel. The confession given by the appellant was only that he was servant of the owners of the hotel from where the opium was recovered. In the face of the state of evidence it is difficult to hold that the appellant was in conscious possession of the opium. Section 18 of the Act prescribes punishment for possession and that possession has to be conscious. In the facts of the instant case, it is difficult to hold that the appellant was in possession of the opium and, therefore, his conviction and sentence cannot be sustained. [para 15] [980-D-H; 981-A-B]

Case Law Reference:

1990 (2) SCC 409	**relied on**	**para 8**
2008 (4) SCC 668	**relied on**	**para 9**
2003 (8) SCC 449	**relied on**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 451-452 of 2005.

From the Judgment & Order dated 23.03.2004 of the High Court of Judicature of Madhya Pradesh at Indore in Crl. Appeal No. 1179 & 1523 of 1999.

Sushil Kumar Jain, Puneet Jain, Nil Kumar Verma, Pratibha Jain for the Appellant.

Ashok Kumar Srivastava, Sushma Suri for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant aggrieved by his conviction and sentence is before us with the leave of the Court.

2. According to the prosecution a secret information led to recovery of 2.1 Kgms. of opium by PW.7, Abdul Mazid, the District Opium Officer from a room adjoining the kitchen of a hotel situated at Sagrana on Neemuch-Chittor road. Appellant was working as servant in the said hotel. Jagdish Mawal (PW.6) the then Deputy Commissioner of Narcotics was one of the members of the search party, who had seized the opium, drawn the seizure memo and recorded the statement (Ex.P/12) of the appellant on the same day. PW.8, Mahaveer Singh, at the relevant time was working as Inspector in the Central Bureau of Narcotics and on 19th July, 1997 itself at 23:45 hrs., he was appointed as the Investigating Officer of the case. He produced the appellant before the Special Judge on 20th July, 1997 and at his request appellant was remanded to his custody till 21st July, 1997. He recorded the statement (Ex.P/15) of the appellant on 20th July, 1997. In the statement (Ex.P/12) appellant confessed that the opium seized was brought by him in the hotel. In another confessional statement (Ex.P/15) recorded by the Investigating Officer appellant confessed that he had been working in the hotel for the last two months and

brought the opium to the hotel from the house of its owner on his direction. He further confessed that opium tablets used to be sold to the truck drivers at the rate of Rs.30/- per tola.

3. Opium seized was sent to the Forensic Science Laboratory for examination which found presence of 4.31 per cent of morphine in it. After the confessional statement recorded by the Investigating Officer on 20th July, 1997 he produced the appellant before the Special Judge on 21st July, 1997 along with the case diary and the copy of the same was furnished to him.

4. Both the confessional statements of the appellant recorded by the officers of the Central Bureau of Narcotics were considered admissible in evidence and relying on the same the trial court held that the appellant was in possession of opium and accordingly convicted him under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "Act") and sentenced him to undergo rigorous imprisonment for ten years and fine of Rs.1 lakh, in default to suffer rigorous imprisonment for two years. The order of conviction and sentence has been affirmed by the High Court in appeal.

5. Mr. Sushil Kumar Jain, learned Counsel appearing on behalf of the appellant submits that the two confessional statements made by the appellant before the authorities of Central Bureau of Narcotics are not only inadmissible in evidence but also not voluntary and further not corroborated by any other evidence and, therefore, the order of conviction and sentence is fit to be set aside. He further submits that if the confessional statements are taken in their entirety the appellant cannot be held to be in possession of opium or selling the opium so as to attract the mischief of Section 8/18 of the Act.

6. Mr. Ashok Kumar Shrivastava, learned Counsel appearing on behalf of the respondent, however, contends that confessional statements made by the appellant are admissible

and voluntary and that clearly establish the guilt of the appellant and, therefore, he was rightly convicted and sentenced.

7. In view of the rival submissions questions which fall for determination in this appeal are as follows:

(i) Whether the confessions made before the officers of the Central Bureau of Narcotics are admissible in evidence;

(ii) Whether the confessions made were voluntary in nature and if so without corroboration, can it form the basis for conviction; and

(iii) Whether the appellant can be said to be in possession of the opium or selling the same.

8. In order to answer these questions it is expedient to examine the scheme of the Act. Section 42 of the Act confers on specified categories of officers power of entry, search, seizure and arrest without warrant or authorization. Section 43 thereof confers the power of seizure and arrest. Section 51 of the Act, inter alia, provides application of the provisions of Code of Criminal Procedure to all warrants issued and arrests, searches and seizures made under the Act in so far as they are not inconsistent with its provisions. Power to call for information to the officers specified is conferred by Section 67 of the Act and the confessions in the present case have been recorded in exercise of the said power. Section 25 of the Evidence Act makes confessional statement given by an accused before police officers inadmissible in evidence which cannot be brought on record by the prosecution to obtain conviction. Further Section 26 of the Evidence Act in no uncertain terms provides that the confession made while in custody of police officer cannot be proved against accused to support the criminal charge. Therefore, what needs to be considered is as to whether the officers of the Central Bureau of Narcotics, who had recorded the confessions, are police officers within the meaning of Section 25 and 26 of the

Evidence Act. True it is that Section 53 of the Act confers powers to the Central Government to invest officers of the specified categories, the powers of an officer-in-charge of police station but that itself, in our opinion, shall not make them the police officers within the meaning of Section 25 and 26 of the Evidence Act. The officers with whom lie the powers of search, seizure and investigation under the Act have not been conferred with the power to submit report under Section 173 of the Code of Criminal Procedure. Such officer is required to lay complaint in the Court of Special Judge for prosecuting an accused. In our opinion the power to submit report under Section 173 of the Code of Criminal Procedure is necessary to make the officers of the Central Bureau of Narcotics police officers within the meaning of Section 25 and 26 of the Evidence Act. The important attribute of Police Officer is not only to investigate but also to launch prosecution by filing a report or charge-sheet. In view of the pronouncement of this Court in the case of *Raj Kumar Karwal vs. Union of India and others,* 1990 (2) SCC 409, this question does not need much discussion. This was a case under the Narcotic Drugs and Psychotropic Substances Act itself and on review of large number of authorities, this Court came to the following conclusion in paragraph 22 of the judgment which reads as follows:

> "……The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Section 173 of the Code. That is why this Court has since the decision in Badku Joti Savant v. State of Mysore AIR 1966 SC 1746, accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Section 173, he cannot be described to be a 'police officer' under Section 25, Evidence Act……..."

9. This Court had the occasion to consider this question

further in the case of *Kanhaiyalal vs. Union of India,* 2008 (4) SCC 668, wherein it has been held as follows:

> **"44.** In addition to the above, in Raj Kumar Karwal v. Union of India this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an officer in charge of a police station under Section 53 of the NDPS Act, 1985, are not "police officers" within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.
>
> **45.** Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in Raj Kumar Karwal case with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act."

10. From what has been observed above, the officers vested with the powers of investigation under the Act are not police officers and, therefore, the confessions recorded by such officers are admissible in evidence. Therefore, the question posed at the outset is answered in the affirmative and it is held

that officers of the Central Bureau of Narcotics are not police officers within the meaning of Section 25 and 26 of the Evidence Act and, hence, confessions made before them are admissible in evidence. In view of aforesaid there is no escape from the conclusion that the confessions made by the appellant before PW.6, Jagdish Mawal and PW.8, Mahaveer Singh are admissible in evidence and cannot be thrown out of consideration.

11. Now we proceed to consider the second question set out at the outset and in order to answer that we deem it appropriate to reproduce Section 24 of the Indian Evidence Act which reads as follows:

> **"24.Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

12. From the plain reading of the aforesaid provision it is evident that a confession made by an accused is rendered irrelevant in criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise with reference to the charge against the accused. A confession, if it is voluntary, truthful, reliable and beyond reproach is an efficacious piece of evidence to establish the guilt of the accused. However, before solely acting on confession, as a rule of prudence, the Court requires some corroboration but as an abstract proposition of law it cannot be

said that a conviction cannot be maintained solely on the basis of the confession made under Section 67 of the Act.

13. Bearing in mind the principles aforesaid, now, we proceed to consider the facts of the present case. Appellant's first confession was recorded by PW.6, Jagdish Mawal on 19th July, 1997 and he was produced before the Court on 20th July, 1997 and he made no grievance in regard to the confession recorded. Another confession was recorded on 20th July, 1997 and, thereafter, he was produced before the Special Judge on 21st July, 1997 and a copy of the police diary was handed over to him. This obviously would had contained the confessions made by him. No complaint about the same was made then also. Thereafter appellant was produced before the Court several times but he never retracted his confession. The appellant retracted the confession made by him for the first time in his statement under Section 313 of the Code of Criminal Procedure. In our opinion, when an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, same shall be a relevant factor to adjudge as to whether the confession was voluntary or not. Here in the present case appellant was produced before the Court on several dates and at no stage he made any complaint before the Special Judge of any torture or harassment in recording the confession. It is only when his statement was recorded under Section 313 of the Code of Criminal Procedure that he retracted and denied making such a confession and went to the extent of saying that his signatures were obtained on blank pages. In the facts and circumstances of the case we are of the opinion that the confessional statements made by the appellant were voluntary in nature and could form the basis for conviction. The view which we have taken above finds support from the judgment of this Court in the case of *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* 2003 (8) SCC 449, in which it has been held as follows:

"It has been established that the Customs Office was about 20 km from the place where the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with Accused 2, 3 and 6 were brought to the Customs Office. *Further, Accused 1 and 2 did not know Tamil. A Hindi-knowing officer had to be arranged. There was, under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial Judge under Section 313 of the Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of the appellants' conviction.*"

(underlining ours)

14. Same view has been reiterated by this Court in the case of *Kanhaiyalal* (supra) in which it has been observed as follows:

"Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant."

The second question posed at the outset is thus answered accordingly.

15. Now we proceed to consider the last question, i.e, whether the appellant can be held guilty for being in possession or involved in selling the opium so as to attract the mischief of Section 8/18 of the Act. In sum and substance the confession of the appellant is that he was working in the hotel for the last two months and brought the opium from the house of the hotel-owner to the hotel, where it was being sold in tablets to the truck-drivers. In the confession appellant has not stated or for that matter none of the witnesses have deposed that he was involved in selling the opium-tablets. Therefore, the appellant cannot be held guilty for selling opium. Whether in the state of evidence appellant can be held guilty for possessing the opium only on the ground that he brought the opium from the house of the owner to the hotel is another question which requires adjudication. It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control. Applying the aforesaid principle when we consider the facts of the present case it is difficult to hold that opium was in possession of the appellant. There is no evidence on record to suggest that the appellant was in occupation of the room from where opium was recovered. Further the evidence clearly points out that title to the opium vested in the owners of the hotel. The confession given by the appellant was only that he was servant of the owners of the hotel from where the opium was recovered.

In the face of the state of evidence it is difficult to hold that the appellant was in conscious possession of the opium. Section 18 of the Act prescribes punishment for possession and that possession, in our opinion, has to be conscious. In the facts of the present case it is difficult to hold that the appellant was in possession of the opium and, therefore, his conviction and sentence cannot be sustained.

16. In the result, the appeals are allowed, impugned judgment of conviction and sentence is set aside. Appellant is on bail, his bail bonds are discharged.

R.P. Appeals allowed.

ROOPSENA KHATUN

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1370 of 2007)

APRIL 28, 2011.

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

Penal Code, 1860: s.302 – Murder – Conviction u/ss.302 and 379 – Allegation that accused committed murder of child by drowning her in a pond and thereafter removed silver chain from her person – Conviction based on circumstantial evidence – Circumstances were disclosure statement, extra-judicial confession, recovery of silver chain from the accused and that accused was last seen with the victim – On appeal, held: Prosecution failed to prove the case of murder and theft of silver chain against the accused – The body of the victim was found floating in the pond a day after she went missing – In such case, it could be seen by anybody, therefore, pointing out the corupus delicti by the accused was not of much significance – The exact words of the accused were not uttered by any of the witnesses – Therefore, the so called extra-judicial confession was of no consequence – There was no detail in seizure memo regarding the place from where silver chain was seized nor the chain was identified by the father of the victim – This would put the seizure into extreme suspicion – Moreover, there was no proximity between the time when the victim and the accused were last seen together and the time of the death of the victim – Considering the short distance between the house of the victim and the pond, possibility of accidental drowning not ruled out – Accused was stated to be a frock wearing mohamedan girl on the relevant date and it was not shown as to how such a small girl could have drowned the victim – Sessions judge should have used its discretion and sent the accused for medical examination to ascertain

her exact age, which he failed to do – High Court did not advert to this aspect – Conviction by courts below set aside.

The prosecution case was that the accused committed murder of a child by drowning her in a pond and thereafter removed the silver chain from her person. On the fateful day, the victim left her house for her grandmother house and thereafter she was missing. PW-3 told the father of the victim that he had seen the victim following the accused. The accused was apprehended by the villagers the next day and she confessed that she committed the murder of the victim by drowning her in the pond and that she had also removed the silver chain from her person. The accused pointed out the body of the deceased from the pond. The prosecution relied upon the disclosure statement, the extra-judicial confession allegedly made to the witnesses including the father PW1 and some other witnesses and the recovery of silver chain from the accused. The trial court convicted the accused under Section 302 IPC as also under Section 379 IPC for committing theft of a silver chain from the body of the victim. The High Court affirmed the order of conviction. Aggrieved, the accused filed the instant appeal.

Allowing the appeal, the Court

Held: 1. Insofar as the first circumstance relating to the disclosure of the accused having committed the murder and pointing out the corpus delicti is concerned, both the courts below held that circumstance as a proof against the accused on the basis of the evidence of the witnesses. It is a common knowledge that the body could not have remained under the water for 24 hours. At least from the post-mortem report, it is clear that the body was decomposed. Under such circumstances, the body could have ever remained underneath the water level for

24 hours. It was certainly expected to be floating. In that case, it could be seen by anybody. Therefore, such circumstance loses its significance. [Para 4] [987-B-D]

2. The second circumstance was about the extra-judicial confession. The evidence of the extra-judicial confession is of extremely weak kind. In this case, the exact words of the accused were not uttered by any of the witnesses. Again, if there was any suspicion against the accused, the whole village would have pounced upon her and cursed her of having committed the murder. Under such circumstances, the so called extra-judicial confession made to the witnesses even if they were more than three, would be of no consequence and would not be considered as an incriminating evidence against the accused. [Para 5] [987-E-G]

3. The circumstance of the recovery of the silver chain from the accused was extremely strange. The seizure memo did not suggest the place from where the silver chain from the accused was seized. Under such circumstances, it is very difficult to hold that the accused was carrying the silver chain on her person. The absence of any detail in the seizure memo regarding the place from where the silver chain was seized or also the oral evidence puts the seizure in extreme suspicion. This circumstance cannot be accepted particularly because the said silver chain was also not identified by the PW 1 - father of the deceased. There was no identification parade held regarding the said silver chain which was an extremely common ornament. Therefore, even that circumstance loses its significance. [Para 6] [987-H; 988-A-B]

4. The last circumstance "last seen", if at all can be used against the accused as a circumstance should have been connected with the time of death. Here is the

case when the deceased was seen following the accused at about 10 a.m. on the earlier day whereas the body was found on the next day at about 2.30 p.m. The prosecution did not fix the time of the death also. Therefore, there is no proximity between the time when the deceased and the accused were last seen together and the time of the death of the deceased. At least, the prosecution was not able to establish the same. Therefore, even if that circumstance is viewed as an incriminating evidence, it would be of no significance. [Para 7] [988-C-E]

5. The depth of the pond is not shown. In what manner could a small girl like accused have drowned the deceased is also not shown. Considering the short distance between the house of the deceased and the pond, the possibility of the death being accidental cannot be ruled out. [Para 8] [988-F]

6. The accused in her appeal had mentioned that she was 15 years of age on the date of incident. At least, three witnesses described the girl as frock wearing girl. If she was a frock wearing Mohamedan girl, then, obviously, she could not have been a major on the relevant date. The Sessions Judge should have used its discretion which he was supposed to exercise in law and should have sent the accused for medical examination to ascertain her exact age. The Sessions Judge failed in his duty. The High Court did not advert to this aspect. The judgments of courts below is set aside. [Para 10 and 11] [989-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1370 of 2007.

From the Judgment & Order dated 07.09.2004 of the High Court of Calcutta in Criminal Appeal No. 388 of 2000.

Vibhu Tiwari (for Ravi Prakash Mehrotra) for the Appellant.

Tara Chandra Sharma for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. This appeal is filed by an unfortunate orphan girl against the concurrent judgments of the Sessions Court as also the High Court whereby she stands convicted for the offence punishable under Section 302 IPC as also under Section 379 IPC for committing theft of a silver chain from the body of deceased.

2. The prosecution case is that accused Roopsena Khatun committed murder of a child called Baby Khatun by drowning her in a pond and also removed the silver chain from her person. It is alleged that on 29.7.1999, Baby Khatun left her house for her grand-mother house and thereafter, there was no trace of the girl. PW3 Abdul Quddus told the father of the deceased that he had seen Baby Khatun following the accused on the previous day at 10 a.m. A search was started for her and ultimately, the accused was apprehended by the villagers on the next day at about 12 noon in the jute field. On being asked, the accused is supposed to have confessed that she committed the murder of Baby Khatun by drowning her in the pond and had also removed the silver chain from her person. The matter was reported to the police. At about 4.45/5 p.m., the police arrived at the scene of occurrence and is stated to have seized the silver chain from the accused.

3. The prosecution relied on the following circumstances.

i) The disclosure made by the accused that she had committed the murder and pointed out the body of the deceased from the pond;

ii) The extra-judicial confession allegedly made to the witnesses including the father PW1 and some other witnesses;

iii) The recovery of silver chain from the accused.

iv) Baby Khatun was seen following the accused at 10 A.M. on the earlier day.

4. Insofar as the first circumstance relating to the disclosure of the accused having committed the murder and pointing out the corpus delicti is concerned, both the courts below have held that circumstance as a proof against the accused on the basis of the evidence of the witnesses. It is a common knowledge that the body could not have remained under the water for 24 hours. The body was bound to be floating. At least from the post-mortem report, it is clear that the body was decomposed. Under such circumstances, we do not think that the body could have ever remained underneath the water level for 24 hours. It was certainly expected to be floating. In that case, it could be seen by anybody. Therefore, such circumstance loses its significance.

5. The second circumstance is about the extra-judicial confession. We can imagine the plight of a poor orphan girl who is described as a frock wearing girl by some of the witnesses and was at the mercy of her grand-mother with whom she was living. The evidence of the extra-judicial confession is of extremely week kind. In this case, the exact words of the accused have not been uttered by any of the witnesses. Again, if there was any suspicion against the accused, the whole village would have pounced upon her and cursed her of having committed the murder. Under such circumstances, the so called extra-judicial confession made to the witnesses even if they were more than three, would be of no consequence and we would not consider that as an incriminating evidence against the accused.

6. The circumstance of the recovery of the silver chain from the accused is extremely strange. We have seen the seizure memo which does not suggest the place from where the silver chain from the accused was seized. Under such circumstances,

it is very difficult for us to hold that the accused was carrying the silver chain on her person. The absence of any detail in the seizure memo regarding the place from where the silver chain was seized or also the oral evidence puts the seizure in extreme suspicion. At any rate, we are not prepared to accept this circumstance particularly because the said silver chain has also not been identified by the PW 1 - father of the deceased . There was no identification parade held regarding the aforesaid silver chain which was an extremely common ornament. Therefore, even that circumstance loses its significance.

7. The last circumstance “last seen” if at all can be used against the accused as a circumstance should have been connected with the time of death. Here is the case when the deceased was seen following the accused at about 10 a.m. on the earlier day whereas the body was found on the next day at about 2.30 p.m.. The prosecution has not fixed the time of the death also. Therefore, there is no proximity between the time when the deceased and the accused were last seen together and the time of the death of the deceased. At least, the prosecution has not been able to establish the same. Therefore, even if that circumstance is viewed as an incriminating evidence, it would be of no significance.

8. The depth of the pond is not shown. In what manner could a small girl like accused have drowned the deceased is also not shown. Considering the short distance between the house of the deceased and the pond, the possibility of the death being accidental cannot be ruled out.

9. The least we feel is that the prosecution has not been able to prove the case of murder against the accused or even for the theft of the silver chain from the person of the deceased.

10. Before we part with this case, we must observe that the accused in her appeal before us has mentioned that she was 15 years of age on the date of incident. At least, three witnesses have described the girl as frock wearing girl. If she

was a frock wearing Mohamedan girl, then, obviously, she could not have been a major on the relevant date. In our opinion, the Sessions Judge should have used its discretion which he was supposed to exercise in law and should have sent the accused for medical examination to ascertain her exact age. The Sessions Judge has failed in his duty. The High Court has not adverted to this aspect.

11. Under the circumstances, we do not affirm the judgments of the courts below. We, accordingly, set-aside the judgments of the courts below and allow this appeal. The accused be released from the jail forthwith if she is not required in any other case.

D.G. Appeal allowed.

AGRICULTURAL MARKET COMMITTEE A.P. ETC.
v.
M/S M.K. EXPORTS, A.P. ETC. ETC.
(Criminal Appeal Nos. 1048-1049 etc. of 2011)

APRIL 29, 2011

[R.M. LODHA AND SURINDER SINGH NIJJAR, JJ.]

A.P. Agricultural (Produce and Livestock) Markets Act, 1966 – ss. 12, 12-B(5) and 23 – Non-payment of market fees re-assessed u/s. 12-B(5) by traders – Initiation of criminal proceedings – Petition u/s. 482 Cr.P.C. –Criminal proceedings quashed by the High Court holding that the non-payment of market fees re-assessed u/s. 12-B(5) is not punishable u/s. 23 – On appeal, held: As per the Scheme of the Act, the assessment of market fee u/s. 12-B(1) or re-assessment u/s. 12-B(5) results in levy of fee u/s. 12(1) – Non-payment of the market fees assessed in the original proceedings u/s. 12-B(1) or in the proceedings for re-assessment u/s 12-B(5) would mean default in payment of fee levied under sub-section (1) of s.12 – s. 23 provides for penalty to be imposed against a person who contravenes the provisions of s. 7 or who fails to pay fees levied under sub-section (1) of s.12 – Thus, the High Court erred in quashing the criminal proceedings against the traders – Order passed by the High Court set aside – Code of Criminal Procedure, 1973 – s. 482.

Criminal proceedings were initiated against the respondents-traders for non-payment of market fee assessed under Section 12-B(5) of the A.P. Agricultural (Produce and Livestock) Markets Act, 1966. The respondents filed petitions under Section 482 of the Code of Criminal Procedure, 1973 seeking quashing of the criminal proceedings. The Single Judge of the High

Court allowed the petitions holding that non-payment of market fees re-assessed under Section 12-B(5) is not punishable u/s. 23 of the Act. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 Section 12-A of the A.P. Agricultural (Produce and Livestock Markets Act, 1966 is self-contained. Section 23 of the Act provides for penalty to be imposed against a person who contravenes the provisions of Section 7 or who fails to pay fees levied under sub-section (1) of Section 12. [Paras 17, 18 and 20] [999-C-D; 1000-C]

1.2 The fee is levied by the market committee on sale or purchase of any notified agricultural produce or livestock or products of livestock in the notified market area by virtue of Section 12(1) of the Act. For levy of fee, it is necessary that amount of market fees payable by the trader is assessed by the assessing authority. The procedure for assessment is provided in Section 12-B. The assessment of market fees is done under sub-section (1). Sub-section (5) of that Section, however, provides that if, for any reason, the whole or any part of the turnover of the trader has escaped assessment to market fees or has been under-assessed or assessed at a rate lower than the correct rate, the assessing authority may, at any time within a period of three years from the date on which the assessment order was served on the trader, inter alia, assess the correct amount of market fees payable on the turnover that has been under-assessed after issuing notice to the trader and after making such inquiry as it may consider necessary. The assessing authority, under Section 12-B(5) may also direct the trader to pay penalty, equal to two times the market fees, in addition to the market fees so assessed. As per the Scheme of the Act, it is the assessment of market fee

under Section 12-B(1) or re-assessment under Section 12-B(5) which ultimately results in levy of fee under Section 12(1). The reasoning of the High Court is strange when it says that further assessment of market fees made under Section 12-B(5) is not covered under Section 12(1). The High Court overlooked the explanation appended to Section 12-A which clearly provides that for the purposes of Sections 12-A to 12-G, 'market fees' shall mean fees levied under sub-section (1) of Section 12. Section 12-B and the explanation appended to Section 12-A taken together would leave no manner of doubt that assessment of market fees – whether it is done under Section 12-B(1) or 12-B(5) – is covered by the expression `levy fees' in Section 12(1). In other words, whether assessment of market fees payable by a trader is made under Section 12-B(1) or Section 12-B(5), the market fees so assessed means the fees levied under sub-section (1) of Section 12. The provisions being clear, non-payment of the market fees assessed in the original proceedings under Section 12-B(1) or in the proceedings for re-assessment under Section 12-B(5) would mean default in payment of fee levied under sub-section (1) of Section 12 of the Act. [Para 21] [1000-D-H; 1001-A-D]

1.3 The High Court was clearly in error in quashing the criminal proceedings against the respondents. The judgment of the High Court is set aside. [Paras 23 and 24] [1001-G]

B. Youdhister vs. The Secretary, Agricultural Market Committee, Jogipet and Anr. **(1991) Cri. L.J. 277 – disapproved.**

Case Law Reference:

(1991) Cri. L.J. 277	**Disapproved**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1048-1049 of 2011 etc.

From the Judgment & Order dated 21.04.2010 of the High Court of Andhra Pradesh at Hyderabad in Crl. Petition Nos. 3535 & 3537 of 2010.

WITH

Crl. A. Nos. 1050-1052, 1053-1054 & 1055 of 2011.

D. Bharathi Reddy for the Appellant.

Srinivas R. Rao, Abid Ali Beeran P. (for Sudha Gupta), D. Mahesh Babu, Ramesh Allanki, Savita Dhandha for the Respondent.

R.M. LODHA, J. 1. Leave granted.

2. The Agricultural Market Committee, Bhimavaram have preferred these eight appeals, by special leave, against the common judgment dated April 21, 2010 passed by the High Court of Andhra Pradesh whereby the Single Judge of that Court allowed the petitions filed by the private respondents under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Code') and quashed the criminal proceedings against them for non-payment of market fee assessed under Section 12-B(5) of the A.P. Agricultural (Produce and Livestock) Markets Act, 1966 (for short, 'the Act').

3. For the sake of convenience, we shall notice the facts from one of the appeals, viz., Agricultural Market Committee, A.P. Vs. M/s M.K. Exports, A.P. The respondents – M/s M.K. Exports in that appeal are traders and were given licence by the appellants for doing business in prawns, a notified commodity under the Act. For the assessment years 1998-99 and 1999-2000, the assessment of market fees was done after giving exemption to a certain turnover on purchases effected outside the notified area of the appellants on the basis of the

returns submitted by the respondents under the Act.

4. On May 29, 2002, the appellants issued notices to the respondents to produce books of accounts for the years 1998-99 and 1999-2000 within 7 days of the receipt of the notices to enable them to assess the correct amount of market fees. The notices were issued on the ground that the assessment for that period was done after giving exemption to certain turnover thereby resulting in under-assessment of market fees.

5. The respondents failed to produce the books of accounts. The notices were then issued to the respondents on June 27, 2002 to show cause as to why the exemption given earlier on certain turnover for the assessment years 1998-99 and 1999-2000 be not disallowed; the re-assessment for these two years be not done and the market fees be not collected under Section 12-B(5) of the Act.

6. The respondents challenged the show cause notices dated June 27, 2002 by filing writ petitions before the High Court of Andhra Pradesh. The High Court disposed of the writ petitions on June 14, 2007 and directed the respondents (petitioners therein) to respond to the show cause notices and the appellants were asked to pass appropriate order after considering their replies.

7. The respondents filed their reply and raised certain objections to the re-assessment proceedings initiated under Section 12-B(5) of the Act.

8. The appellants considered the reply submitted by the respondents and vide order dated November 26, 2007 re-determined the turnover for that period and, consequently, re-assessed the market fees. In that order, the appellants also levied penalty equal to two times the market fees due, in addition to market fees so assessed.

9. The respondents challenged the order dated November

26, 2007 by filing revision applications before the Director of Marketing under Section 12-F of the Act. These revision applications were dismissed on March 26, 2008.

10. Thereafter demand notices were issued by the appellants to the respondents to pay the market fees determined under Section 12-B(5). The respondents did not comply with the demand notices. Notices were then issued to the respondents to show cause as to why criminal proceedings be not initiated against them under Section 23 of the Act. The respondents did not respond to the show cause notices nor made any payment of outstanding market fees. The appellants were then constrained to file criminal complaints against the respondents in the Court of the II Additional Judicial First Class Magistrate, Bhimavaram, West Godavari District, A.P.

11. The respondents questioned the complaints in the petitions under Section 482 of the Code before the High Court of Andhra Pradesh and prayed for quashing the criminal proceedings.

12. The only reason that weighed with the High Court in quashing the criminal proceedings against the respondents was that non-payment of market fees re-assessed under Section 12-B(5) is not punishable under Section 23 of the Act. Whether or not the view of the High Court is right in this regard is a question for determination in these appeals.

13. Section 7 of the Act is a regulatory provision. It provides that in a notified area, the trading in a notified agricultural produce, livestock and products of livestock shall be done only after obtaining the licence from the concerned market committee and in accordance with the conditions of such licence. Sub-section (5) thereof provides that a person to whom a licence is granted shall comply with the provisions of the Act, the rules and the bye-laws made thereunder and the conditions specified in the licence.

14. The provision in relation to levy of fees by the market committee is made in Section 12 of the Act. Section 12 reads as under:-

"Section 12 – Levy of fees by the market Committee -(1) The market committee shall levy fees on any notified agricultural produce, live stock or products of live stock purchased or sold in the notified market area at such rate, not exceeding two rupees as may be specified in the bye-laws) for every hundred rupees of the aggregate amount for which the notified agricultural produce, live stock or products of live stock is purchased or sold, whether for cash or deferred payment or other valuable consideration.

Explanation I:- For the purposes of this section, all notified agricultural produce, livestock or products of livestock taken out of a notified market area shall, unless the contrary is proved, be presumed to have been purchased or sold within such area.

Explanation II: In the determination of the amount of fees payable under this Act, fractions of ten paise equal to or exceeding five paise shall be disregarded".

15. Sections 12-A to 12-G were inserted in the Act by Act 4 of 1987. Section 12-A reads as under:-

"12-A. Every trader in the notified area, who is liable to pay fees under Section 12, shall submit such return or returns relating to his turnover in such manner, within such period and to such authority, as may be specified by the market committee in its bye-laws.

Explanation: For the purposes of Sections 12-A to 12-G (both inclusive) the terms, -

(i) "market fees" shall mean the fees levied under sub section (1) of Section 12;

(ii) "turnover" shall mean the aggregate amount for which the notified agricultural produce, livestock or products of lievestock, are purchased or sold, whether for cash or deferred payment or other valuable consideration".

16. The entire machinery for assessment of market fees is provided in Section 12-B. The said Section is as follows:-

"12-B. **Assessment of market fees:** (1) If the assessing authority is satisfied that any return submitted under Section 12-A is correct and complete, it shall assess the amount of market fees payable by the trader on the basis thereof; but if the return appears to it to be incorrect or incomplete, it shall, after giving the trader an opportunity of providing the correctness and completeness of the returns submitted by him and after making such inquiry as it considers necessary, assess to the best of its judgment the amount of market fees due from the trader. An assessment under this section shall however, be made only within a period of three years from the expiry of the year to which the assessment relates.

(2) Where the return submitted by a trader includes the turnover or any of the particulars thereof which would not have been disclosed but for an inspection of accounts, registers or other documents of the trader made by an officer authorized under this Act before the submission of such returns, the Assessing authority may, after giving an opportunity to the trader for making a representation in this behalf, treat such return to be an incorrect or incomplete return within the meaning of sub-section (1) and proceed to take action on that basis.

(3) While making an assessment to the best of Judgment under sub-section (1) the assessing authority may also direct the trader to pay, in addition to the market fees assessed a penalty equal to two times the market fees due

on the turnover that was not disclosed by the trader in his return.

(4) Where any trader liable to pay market fees under this Act,-

(i) fails to submit return before the date specified in that behalf; or

(ii) produce the accounts, registers and other documents after inspection; or

(iii) submits a return subsequent to the date of inspection;

the assessing authority may, at any time within a period of three years from the expiry of the year to which the assessment relates, after issuing a notice to the trader, and after making such inquiry as it considers necessary, assess to the best of its judgment, the amount of market fees due from the trader, on his turnover for that year and may direct him to pay in addition to the market fees so assessed, a penalty equal to two times the market fees due.

(5) Where for any reason, the whole or any part of the turnover of the trader has escaped assessment to market fees or has been under assessed or assessed at a rate lower than the correct rate, the assessing authority may, at any time within a period of three years from the date on which any order of assessment was served on the trader,

(a) determine to the best of its judgement the turnover that has escaped assessment and assess the turnover so determined;

(b) assess the correct amount of market fees payable on the turnover that has been under assessed;

(c) assess at the correct rate the turnover that has been

assessed at a lower rate, after issuing a notice to the trader and after making such inquiry as it considers necessary. The assessing authority, in addition to the market fees so assessed, also direct the trader to pay a penalty equal to two times the market fees".

17. It would be, thus, seen that Section 12-A is self-contained. If assessing authority is satisfied that return submitted under Section 12-A is correct and complete, it shall assess the market fees payable by the trader on the basis thereof. Sub-section (5) of Section 12-B, however, provides for reassessment, inter alia, where the whole or any part of the turnover of the trader has escaped assessment to market fees or has been under- assessed or assessed at a rate lower than the correct rate.

18. Section 12-C(1) provides that market fees assessed under the Act and the penalty levied shall be paid by the trader in such manner and within such time as may be specified in the notice. Sub-section (5) thereof provides that the penalty payable under the Act shall be without prejudice to the institution of any proceedings for an offence under the Act.

19. The provision for penalty and prosecution is contained in Section 23. To the extent it is relevant, it reads as under:-

"23. Penalties:- (I) Whoever contravenes the provisions of Section 7 or fails to pay the fees levied under sub-section (1) of Section 12 shall, on conviction be punished with imprisonment for a term, which shall not be less than six months but which may extend to one year and with fine, which may extend to five thousand rupees, and in the case of a continuing contravention with further fine which may extend to five hundred rupees for every day during which the contravention is continued after conviction thereof;

Provided that the Court may, for adequate and

special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

2. xxxxxx	xxx	xxx	xxx
3. xxxxxx	xxx	xxx	xxx
4. xxxxxx	xxx	xxx	xxx
5. xxxxxx	xxx	xxx	xxx"

20. Section 23 of the Act, thus, provides for penalty to be imposed against a person who contravenes the provisions of Section 7 or who fails to pay fees levied under sub-section (1) of Section 12.

21. The fee is levied by the market committee on sale or purchase of any notified agricultural produce or livestock or products of livestock in the notified market area by virtue of Section 12(1) of the Act. For a levy of fee, it is necessary that amount of market fees payable by the trader is assessed by the assessing authority. The procedure for assessment is provided in Section 12-B. The assessment of market fees is done under sub-section (1). Sub-section (5) of that Section, however, provides that if, for any reason, the whole or any part of the turnover of the trader has escaped assessment to market fees or has been under assessed or assessed at a rate lower than the correct rate, the assessing authority may, at any time within a period of three years from the date on which the assessment order was served on the trader, inter alia, assess the correct amount of market fees payable on the turnover that has been under- assessed after issuing notice to the trader and after making such inquiry as it may consider necessary. The assessing authority, under Section 12-B(5) may also direct the trader to pay penalty, equal to two times the market fees, in addition to the market fees so assessed. As per the Scheme of the Act, it is the assessment of market fee under Section 12-B(1) or re-assessment under Section 12-B(5) which

ultimately results in levy of fee under Section 12(1). We find the reasoning of the High Court strange when it says that further assessment of market fees made under Section 12-B(5) is not covered under Section 12(1). The High Court overlooked the explanation appended to Section 12-A which clearly provides that for the purposes of Sections 12-A to 12-G, 'market fees' shall mean fees levied under sub-section (1) of Section 12. Section 12-B and the explanation appended to Section 12-A taken together would leave no manner of doubt that assessment of market fees – whether it is done under Section 12-B(1) or 12-B(5) – is covered by the expression `levy fees' in Section 12(1). In other words, whether assessment of market fees payable by a trader is made under Section 12-B(1) or Section 12-B(5), the market fees so assessed means the fees levied under sub-section (1) of Section 12. The provisions being clear, non payment of the market fees assessed in the original proceedings under Section 12-B(1) or in the proceedings for re-assessment under Section 12-B(5) would mean default in payment of fee levied under sub-section (1) of Section 12 of the Act.

22. The learned Single Judge of the High Court relied upon an earlier decision of that Court in the case of B. Youdhister Vs. The Secretary, Agricultural Market Committee, Jogipet & Anr1. wherein it was held that since there was no penal provision for the violations of Sections 12-A, 12-B and 12-C, the violators cannot be prosecuted. The view taken in the case of *B. Youdhister*[1], in our opinion, is not correct view and does not lay down the correct law.

23. The High Court, thus, was clearly in error in quashing the criminal proceedings against the respondents.

24. In the result, appeals are allowed and the judgment of the High Court dated April 21, 2010 is set aside.

N.J. Appeals allowed.

1. (1991) Cri. L.J. 277.

PRAHLAD SINGH & ORS.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 3779 of 2011)

APRIL 29, 2011

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

Land Acquisition Act, 1894 – s.16 – Acquisition of appellants' land for the purpose of urbanization – Objections filed by the appellants – Award passed by the Land Acquisition Collector – Appellants filed writ petitions challenging the acquisition proceedings on various grounds including the violation of Regional Plan 2001 wherein the acquired land is shown as part of the Green Belt/Green Wedge; and that the appellants were in continuous possession of the acquired land and were cultivating the same – Dismissal of the writ petitions holding that once the land vested in the State Government, the appellants did not have the locus to challenge the acquisition proceedings – On appeal, held: Section 16 lays down that once the Collector has made an award u/s. 11, he can take possession of the acquired land – Simultaneously, the Section declares that upon taking possession by the Collector, the acquired land shall vest absolutely in the Government free from all encumbrances – Vesting of land u/s. 16 pre-supposes actual taking of possession and till that is done, legal presumption of vesting enshrined in s. 16 cannot be raised in favour of the acquiring authority – Documentary evidence showed that actual and physical possession of the acquired land is still with the appellants and respondent Nos. 3 to 6 have not placed any document before this Court to show that actual possession of the acquired land was taken on the particular date – Therefore, the High Court was not right in holding that the acquired land would be deemed to have vested in the

State Government – Matter is remitted to the High Court for disposal of the writ petition on merits.

Ghaziabad Development Authority v. Delhi Auto and General Finance (Pvt.) Ltd. **(1994) 4 SCC 42;** *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Ltd.* **(1996) 11 SCC 501;** *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* **(1997) 2 SCC 627;** *Municipal Council, Ahmednagar v. Shah Hyder Beig* **(2000) 2 SCC 48;** *Star Wire (India) Ltd. v. State of Haryana* **(1996) 11 SCC 698;** *Swaika Properties (P) Ltd. v. State of Rajasthan* **(2008) 4 SCC 695;** *Sawaran Lata v. State of Haryana* **(2010) 4 SCC 532;** *Balwant Narayan Bhagde v. M.D. Bhagwat* **(1976) 1 SCC 700;** *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* **(1996) 4 SCC 212;** *P.K. Kalburqi v. State of Karnataka* **(2005) 12 SCC 489;** *NTPC v. Mahesh Dutta* **(2009) 8 SCC 339;** *Sita Ram Bhandar Society v. Govt. of NCT,* **Delhi (2009) 10 SCC 501;** *Omprakash Verma v. State of Andhra Pradesh* **(2010) 13 SCC 158;** *Brij Pal Bhargava v State of U.P.* **2011 (2) SCALE 692;** *Banda Development Authority, Banda v. Moti Lal Agarwal* **decided by S.C. on 26.4.2011;** *Nahar Singh v. State of U.P.* **(1996) 1 SCC 434 – referred to**

Case Law Reference:

(1994) 4 SCC 42	**Referred to**	**Para 5**
(1996) 11 SCC 501	**Referred to**	**Para 6, 19**
(1997) 2 SCC 627	**Referred to**	**Para 6, 20**
(2000) 2 SCC 48	**Referred to**	**Para 6, 21**
(1996) 11 SCC 698	**Referred to**	**Para 6**
(2008) 4 SCC 695	**Referred to**	**Para 6, 22**
(2010) 4 SCC 532	**Referred to**	**Para 6, 23**
(1976) 1 SCC 700	**Referred to**	**Para 10**

(1996) 4 SCC 212	**Referred to**	**Para 11**
(2005) 12 SCC 489	**Referred to**	**Para 12**
(2009) 8 SCC 339	**Referred to**	**Para 13**
(2009) 10 SCC 501	**Referred to**	**Para 14**
(2010) 13 SCC 158	**Referred to**	**Para 14**
2011 (2) SCALE 692	**Referred to**	**Para 14**
(1996) 1 SCC 434	**Referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION :Civil Appeal No. 3779 of 2011.

From the Judgment & Order dated 07.05.2010 of the High Court of Punjab & Haryana at Chandigarh in C.W. (P) No. 10396 of 2004.

Rani Chhabra for the Appellants.

Harikesh Singh for the Respondents.

The following order of the Court was delivered

O R D E R

Delay condoned.

Leave granted.

Whether the acquired land can be treated to have vested in the State Government under Section 16 of the Land Acquisition Act, 1894 (for short, "the Act") on the making of an award by the Collector though the actual and physical possession continues with the landowner is the question which arises for consideration in this appeal filed against the order of the Division Bench of the Punjab and Haryana High Court whereby the writ petition filed by the appellants questioning the acquisition of their land was dismissed.

In exercise of the power vested in it under Section 4(1) of the Act, the Government of Haryana issued notification dated 17.4.2002 for the acquisition of the appellants' land along with other parcels of land of village Baloure, Tehsil Bahadurgarh, District Jhajjar for development and utilization thereof for residential, commercial and institutional parts of different sectors of Bahadurgarh.

The predecessors of the appellant and other landowners filed objections under Section 5-A(1) and prayed that their land may not be acquired because they had developed the same for agricultural activities like dairy, gardening etc. by investing huge money. They claimed that the acquisition proceedings were initiated without application of mind and there was no justification to acquire fertile and irrigated land. They also pointed out that land acquired for the same purpose in 1965 was still lying vacant and undeveloped. Another objection taken by the predecessors of the appellant and other landowners was that the area proposed to be acquired falls in the National Capital Region under the National Capital Region Planning Board Act, 1985 (for short, "the 1985 Act") and in the Regional Plan prepared by the National Capital Region Planning Board (for short, "the Board"), land in question has been shown as part of Green Belt/Green Wedge and, as such, the same cannot be acquired for residential, commercial and institutional purposes. In support of this plea, the landowners relied upon an order passed by this Court in C.A. Nos.4384 and 4385 of 1994.

Although, it is not clear from the record as to how the Collector dealt with the objections and submitted recommendations to the State Government, this much is evident that the State Government issued declaration dated 10.4.2003 under Section 6 of the Act reiterating its resolve to acquire the entire area notified under Section 4(1) on 17.4.2002. Thereafter, the Land Acquisition Collector passed award dated 25.6.2004.

Immediately after pronouncement of the award, the predecessors of the appellant and other landowners filed 69 writ petitions questioning the acquisition proceedings on various grounds including non-consideration of their objections, non-application of mind by the Collector and the concerned authorities of the State Government and violation of the provisions of the 1985 Act and Regional Plan 2001 prepared by the Board. They pleaded that being a participating State, the State of Haryana is bound to act in consonance with the provisions of the 1985 Act and it cannot acquire land in violation of Regional Plan 2001. They relied upon the judgment of this Court in Ghaziabad Development Authority v. Delhi Auto & General Finance (Pvt.) Ltd. (1994) 4 SCC 42 and pleaded that the land which has been identified in Regional Plan 2001 as Green Belt/Green Wedge cannot be used for the purpose of urbanization. They also claimed that possession of the acquired land was still with them and they were cultivating the same.

The Division Bench of the High Court did not deal with the grounds on which the appellants questioned the acquisition of their land including the one that the impugned acquisition was contrary to the provisions of the 1985 Act and Regional Plan 2001 and dismissed the writ petitions by observing that once the land has vested in the State Government, the writ petitioners do not have the locus to challenge the acquisition proceedings. The Division Bench relied upon the judgments of this Court in *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Ltd.* (1996) 11 SCC 501, *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* (1997) 2 SCC 627, *Municipal Council, Ahmednagar v. Shah Hyder Beig* (2000) 2 SCC 48, *Star Wire (India) Ltd. v. State of Haryana* (1996) 11 SCC 698, *Swaika Properties (P) Ltd. v. State of Rajasthan* (2008) 4 SCC 695 and *Sawaran Lata v. State of Harayana* (2010) 4 SCC 532 and held as under:

"It is, thus, well settled that no writ petition would be

competent after passing of award because possession of land is taken and it is deemed to vest in the State Government free from all encumbrances. The petitioners would of course be entitled to compensation at the market value prevalent at the time of issuance of notification under Section 4 of the Act in accordance with the award subject to further remedies of reference etc. The petitioners would also be entitled to compensation for the user of the land from the date of possession to the date of notification issued under Section 4. Thus, no ground is made out to accept the contention raised by the petitioners and to quash the acquisition proceedings subject matter of these petitions."

Mrs. Rani Chhabra, learned counsel appearing for the appellants argued that the impugned order is liable to be set aside because the premise on which the High Court dismissed the writ petition, namely, vesting of the acquired land in the State Government is ex facie erroneous. Learned counsel submitted that at no point of time possession of the acquired land was taken by the State authorities and, therefore, the same cannot be treated to have vested in the State Government. Mrs. Chhabra invited our attention to the assertion contained at page 'Y' of the List of Dates and documents marked Annexures-P5 and P6 to show that physical possession of the land is still with the appellants. Learned counsel emphasised that the appellants have been in continuous possession of the land and carrying on agricultural operations and submitted that the High Court gravely erred by declaring that the acquired land will be deemed to have vested in the State Government under Section 16 of the Act. Mrs. Chhabra submitted that the High Court should have examined the important issues raised by the appellants including the violation of the provisions of the 1985 Act and Regional Plan 2001 prepared by the Board in which the acquired land is shown as part of the Green Belt/Green Wedge and decided the writ petition on merits keeping in view the fact that the same remained pending for 10 years and

during that period the landowners had been undertaking agricultural operations.

Learned counsel appearing for the State could not draw our attention to any material to show that actual and physical possession of the acquired land had been taken by the State authorities. He, however, argued that by virtue of Section 16 of the Act the acquired land will be deemed to have vested in the State Government because the Land Acquisition Collector has passed award on 25.6.2004.

We have given our serious thought to the entire matter and carefully examined the records. Section 16 lays down that once the Collector has made an award under Section 11, he can take possession of the acquired land. Simultaneously, the section declares that upon taking possession by the Collector, the acquired land shall vest absolutely in the Government free from all encumbrances. In terms of the plain language of this section, vesting of the acquired land in the Government takes place as soon as possession is taken by the Collector after passing an award under Section 11. To put it differently, the vesting of land under Section 16 of the Act presupposes actual taking of possession and till that is done, legal presumption of vesting enshrined in Section 16 cannot be raised in favour of the acquiring authority.

Since the Act does not prescribes the mode and manner of taking possession of the acquired land by the Collector, it will be useful to notice some of the judgments in which this issue has been considered. In *Balwant Narayan Bhagde v. M.D. Bhagwat* (1976) 1 SCC 700, Bhagwati J., (as he then was), speaking for himself and Gupta J. disagreed with Untwalia J., who delivered separate judgment and observed:

"……We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in

the land are sought to be acquired by it. *There can be no question of taking "symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land.* How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. *But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession.* It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it."

(emphasis supplied)

In *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* (1996) 4 SCC 212, the Court negatived the argument that even after finalization of the acquisition proceedings possession of the land continued with the appellant and observed:

> "It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession".

In *P.K. Kalburqi v. State of Karnataka* (2005) 12 SCC 489, the Court referred to the observations made by Bhagwati, J. in *Balwant Narayan Bhagde v. M.D. Bhagwat* (supra) that no hard and fast rule can be laid down as to what act would be sufficient to constitute taking of possession of the acquired land and observed that when there is no crop or structure on the land only symbolic possession could be taken.

In *NTPC v. Mahesh Dutta* (2009) 8 SCC 339, the Court noted that appellant NTPC paid 80 per cent of the total compensation in terms of Section 17(3A) and observed that it is difficult to comprehend that after depositing that much of amount it had obtained possession only on a small fraction of land.

In *Sita Ram Bhandar Society v. Govt. of NCT, Delhi* (2009) 10 SCC 501 and *Omprakash Verma v. State of Andhra Pradesh* (2010) 13 SCC 158, it was held that when

possession is to be taken of a large tract of land then it is permissible to take possession by a properly executed panchnama. Similar view was expressed in the recent judgment in *Brij Pal Bhargava v. State of UP* 2011(2) SCALE 692.

The same issue was recently considered in C.A. No. 3604 of 2011 – *Banda Development Authority, Banda v. Moti Lal Agarwal* decided on 26.4.2011. After making reference to the judgments in *Balwant Narayan Bhagde v. M.D. Bhagwat* (supra), *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* (supra), *P.K. Kalburqi v. State of Karnataka (supra), NTPC v. Mahesh Dutta* (supra), *Sita Ram Bhandar Society v. Govt. of NCT, Delhi* (supra), *Omprakash Verma v. State of Andhra Pradesh* (supra) and *Nahar Singh v. State of U.P.* (1996) 1 SCC 434, this Court laid down the following principles:

> "(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.
>
> (ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.
>
> (iii) If crop is standing on the acquired land or building/ structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

> (iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.
>
> (v) If beneficiary of the acquisition is an agency/ instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken."

If the present case is examined in the light of the facts which have been brought on record and the principles laid down in the judgment in Banda Development Authority's case, it is not possible to sustain the finding and conclusion recorded by the High Court that the acquired land had vested in the State Government because the actual and physical possession of the acquired land always remained with the appellants and no evidence has been produced by the respondents to show that possession was taken by preparing a panchnama in the presence of independent witnesses and their signatures were obtained on the panchnama.

A reading of the Khasra Girdawari and Jamabandis, copies of which have been placed on record, shows that actual and physical possession of the acquired land is still with the appellants. Jamabandis relate to the year 2005-2006. Copies of notice dated 10/11.2.2011 issued by Uttar Haryana Bijli Vitran Nigam Ltd. relates to appellant No.1 – Prahlad Singh and this, prima facie, supports the appellants' assertion that physical possession of the land is still with them. Respondent Nos. 3 to 6 have not placed any document before this Court to show that actual possession of the acquired land was taken on the

particular date. Therefore, the High Court was not right in recording a finding that the acquired land will be deemed to have vested in the State Government.

The judgments, which have been referred to in the impugned order really do not have any bearing on the case in hand because in all those cases, the Court had found that possession of the acquired land had been taken.

In *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Ltd.* (supra), this Court declined to interfere with the acquisition proceedings on the ground of delay. The facts of that case were that after preparation of the draft development plan for 'G' Ward of the Bombay Municipal Corporation, notification dated 6.7.1972 was issued under Section 126(2) of the Maharashtra Regional and Town Planning Act, 1966 for the acquisition of land needed for implementing the development plan. Respondent Nos.1 and 2, who were in possession of the land as tenants, filed claim for compensation. They were heard by the competent authority in 1979. In the meanwhile, the Bombay Metropolitan Region Development Authority Act, 1974 was enacted by the State Legislature and notifications were issued under that Act. In 1979, City Survey No.503 was de-reserved from the earlier public purpose of locating the extension of Dharavi Sewage Purification Plant and the entire land was to be utilized for residential, commercial, para-commercial and social facilities by the local residents of the area. After the award was made by the Collector, possession of the acquired land was taken. The respondents filed writ petition after lapse of four years from the date of taking possession. The learned Single Judge dismissed the writ petition but the Division Bench allowed the appeal. This Court held that once the award was passed and possession was taken, the High Court should not have exercised its power to quash the award.

In *C. Padma v. Deputy Secretary to the Government of*

Tamil Nadu (supra), the Court held that once the acquired land vested in the State Government and compensation was paid after taking possession, the appellant was not entitled to question the acquisition proceedings.

In *Municipal Council, Ahmednagar v. Shah Hyder Beig* (supra), this Court reversed the judgment of the Bombay High Court on the ground that they had moved the Court after 21 years of the issue of notifications under Section 6 and 16 years from the date of making an award and taking of possession.

The same view was reiterated in *Swaika Properties (P) Ltd. v. State of Rajasthan* (supra). In that case, the writ petition was filed in 1989 after the award was passed and possession of the acquired land was taken.

In *Sawaran Lata v. State of Harayana* (supra), the landowners were denied relief because they had approached the High Court after 8 years of the notification issued under Section 4(1) and about 5 years of the passing of award and taking of possession.

In the result, the appeal is allowed. The impugned order is set aside and the matter is remitted to the High Court for disposal of the writ petition on merits. The parties are left to bear their own costs.

N.J. Appeal allowed.

LAL KISHORE JHA
v.
STATE OF JHARKHAND & ANR.
(SLP (Crl.) No. 4848 of 2011)

MAY 2, 2011

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

Penal Code, 1860 – ss.494, 498A – Complaint by wife under – During trial, accused-husband entered into settlement and in terms of settlement, he accepted to take complainant back even though he had taken a second wife in the meanwhile – On examination, complainant did not press the charges but expressed her willingness to live with her husband and his second wife – However, before the conclusion of trial she filed petition before the trial court stating that accused-husband had breached the terms of settlement and thrown her out of his house – Trial court recalled her for re-examination as a court witness u/s.311 and she fully supported the allegations made by her in the complaint – Conviction of the accused u/ss.494 and 498-A – Appellate court held that the order passed by trial court, recalling the complainant for examination as a court witness was bad and invalid and her evidence as a court witness could not be taken into account for recording the finding of guilt against the accused – Revision – High Court set aside the order of the appellate court and restored the order of the trial court – On appeal, held: In the facts and circumstances of the case, High court took the correct view of the matter and its order cannot be said to be excess of the revisional jurisdiction u/ss.397 and 401 CrPC – Conviction upheld – Code of Criminal Procedure, 1973 – ss. 397 and 401 – Revisional jurisdiction – Scope of.

The wife-complainant filed a complaint against her husband-petitioner under Section 494 and 498A IPC. During the trial, the petitioner entered into a settlement

with complainant. In terms of the settlement, he accepted to take the complainant back at his house even though he had taken a second wife in the meanwhile. The complainant was examined before the trial court and she did not press charges and showed her willingness to live with the petitioner and his second wife. Before the conclusion of trial, she filed a petition before the trial court stating that the petitioner had breached the terms of settlement and thrown her out of his house. The trial court recalled her for re-examination as a court witness under Section 311, Cr.P.C. On her examination as a court witness, she fully supported the allegations made by her in the complaint. The trial court convicted the petitioner under Section 494 and 498A IPC. The appellate court held that the order passed by trial court, recalling the complainant for examination as a court witness was bad and invalid and her evidence as a court witness could not be taken into account for recording the finding of guilt against the accused. In revision, the High Court set aside the order of the appellate court and restored the order of the trial court. Hence the special leave petition.

Dismissing the special leave petition, the Court

Held: : In the facts and circumstances of the case, High court took the correct view of the matter and its order cannot be said to be excess of the revisional jurisdiction u/ss.397 and 401 CrPC. [Para 10] [1018-F-G]

Vimal Singh v. Khuman Singh and Anr. **(1998) 7 SCC 223;** *MahendraPratap Singh v. Sarju Singh* **AIR 1968 SC 707 – held inapplicable.**

Case Law Reference:

(1998) 7 SCC 223	**held inapplicable Para 3**
AIR 1968 SC 707	**held inapplicable Para 3**

CRIMINAL APPEALLATE JURISDICTION : Special Leave Petition (Crl) No. 4848 of 2011.

From the Judgment & Order dated 19.2.2010 of the High Court of Jharkhand at Ranchi in Cr. Rev. No. 933 of 2008.

Nagendra Rai, Smarhar Singh, Shantanu Sagar (for T. Mahipal) for the Appellant.

The following Order of the Court was delivered

O R D E R

1. Delay condoned.

2. Heard Mr. Nagendra Rai, learned senior advocate, appearing for the petitioner.

3. The petitioner is convicted under Sections 494 and 498-A of the Penal Code and is sentenced to rigorous imprisonment for two years on each count. The sentences are directed to run concurrently.

4. Mr. Rai submitted that the petitioner was acquitted by the appellate court and the High Court, while disposing of the revision filed against the order of acquittal, exceeded its jurisdiction in passing an order that resulted into the conviction of the petitioner. He submitted that in exercise of the powers under Section 401 of the Code of Criminal Procedure, 1973, an order of acquittal cannot be converted into an order of conviction and what the High Court could, at best do was to order a retrial of the petitioner. In support of the submission, he relied upon the decisions of this Court in *Vimal Singh v. Khuman Singh & Anr.,* (1998) 7 SCC 223 and *Mahendra Pratap Singh v. Sarju Singh,* AIR 1968 SC 707.

5. We find no merit in the submission of Mr. Nagendra Rai and we are satisfied that the decisions relied upon by him have no application to the facts of this case. All that the High Court has done is to set aside the order passed by the appellate court and restore the order of conviction and sentence passed by the trial court.

6. At this stage, it will be useful to take a brief look at the facts and circumstances that led the High Court to interfere in

the matter. While the trial was going on, the accused purported to enter into some sort of a settlement with the complainant (his wife). In terms of the settlement, he accepted to take her (the complainant) back at his house even though he had taken a second wife in the meanwhile. Hence, when the complainant was examined before the trial court she did not press the charges but expressed her willingness to live with her husband and his second wife. Later on, however, before the conclusion of the trial she filed a petition before the trial court stating that the accused (the husband) had breached the settlement and thrown her out from his house.

7. In those circumstances, the trial court recalled her for re examination as a court witness under Section 311 of the Cr.P.C. On her examination as a court witness, she fully supported the allegations made by her in the complaint. Eventually, the trial court convicted the petitioner under Sections 494 and 498-A of the Penal Code.

8. In appeal, the appellate court held that the order passed by the trial court, recalling the complainant for examination as a court witness was bad and invalid and her evidence as a court witness could not be taken into account for recording the finding of guilt against the petitioner.

9. In revision, the High Court set aside the order of the appellate court on this score and consequently the order of the trial court stood restored.

10. We are fully satisfied that in the facts and circumstances of the case, the High Court took the correct view of the matter and its order cannot be said to be excess of the revisional jurisdiction under Sections 397 and 401 of the Cr.P.C.

11. We find no merit in the special leave petition. It is dismissed.

D.G. Special Leave Petition dismissed.

THE JOINT ACTION COMMITTEE OF AIRLINES PILOTS ASSOCIATIONS OF INDIA & ORS.

v.

THE DIRECTOR GENERAL OF CIVIL AVIATION & ORS.

(Civil Appeal No. 3844 of 2011)

MAY 03, 2011

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

Aircraft Act, 1934 – ss. 4A, 5 and 5A – Executive instructions regarding air safety – Issuance of Circular dated 29.05.2008 by Director General of Civil Aviation (DGCA) to the effect that Civil Aviation Requirements (CAR) dated 27.07.2007 had been kept in abeyance – Pending finalisation of CAR 2007, revival of old Aeronautical Information Circular (AIC) 28/1992 – Validity and propriety of Circular dated 29.05.2008 – Challenge to – Held: CAR 2007 is neither a statute nor a subordinate legislation – They are merely executive instructions which can be termed as special directions – There was a specific order in the form of interim measures, by the competent authority in exercise of statutory powers whereby AIC 28/92 was revived – DGCA has ample power to issue such instructions or directions in exercise of its power under the 1937 Rules – Thus, it cannot be said that the Circular dated 29.5.2008 was either issued illegally or without any authority – More so, the whole exercise was done to bring a new CAR into existence for which process has already been initiated and new CAR is likely to come into existence very soon – Aircraft Rules, 1937 – rr. 42A and 133A – Administrative law.

Administrative law:

Subordinate legislation – Statutory authority keeping subordinate legislation in abeyance – Permissibility of – Held: It might be permissible in exceptional circumstances –

However, such an order being legislative in character, is not warranted to be interfered by the Court/Tribunal.

Executive instructions/Orders/Circulars – Effect of – Held: Executive instructions do not have the force of law but are issued by the competent authority for guidance and to implement the scheme of the Act – It can be altered, replaced and substituted at any time – Law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein.

Executive instructions/Orders/Circulars – Revival of executive instructions – Held: Once the old rule has been substituted by the new rule, it stands obliterated, thus, ceases to exist and under no circumstance, can it be revived in case the new rule is held to be invalid and struck down by the Court – However, position would be different in case a statutory amendment by the Legislature is held to be bad for want of legislative competence, wherein the repealed statutory provisions would revive automatically.

Doctrines/Principles – Doctrine of election – Basis of – Held: Doctrine of election is based on the rule of estoppel – Principle that one cannot approbate and reprobate inheres in it.

Appellants are the Joint Action Committees of the Airlines Pilots Association representing several airlines operating in India. Under Aeronautical Information Circular No. 28/92 Flight Time (FT) and Flight Duty Time Limitation (FDTL) was fixed depending upon the distance of destination and number of landings. The rest period for the pilots stood substantially changed by the Civil Aviation Requirements (CAR) dated 27.07.2007 to the greater benefit of the pilots. The airlines made several representations to respondents-Director General of Civil Aviation (DGCA) and the Central Government that it was

practically not possible for them to ensure compliance of CAR 2007. Some of the appellants challenged the CAR dated 27.07.2007 by filing Writ Petition No. 2176 of 2007. However, the said writ petition was dismissed as withdrawn. Thereafter, respondent No. 1-DGCA issued a Circular dated 29.05.2008 to the effect that CAR dated 27.07.2007 had been kept in abeyance. By a subsequent order dated 02.06.2008, the AIC 28/92 was revived. The appellants filed a writ petition challenging the validity and propriety of the Circular dated 29.05.2008 and the same was dismissed. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not take inconsistent stands and prolong proceedings unnecessarily. [Para 14] [1035--C-D]

1.2. Some of the instant appellants had challenged the CAR 2007, wherein it had been submitted that AIC 28/92 was based on better scientific studies. The same remained in operation for more than 17 years and no one had ever raised any grievance in respect of its contents or application. However, it appears that during the pendency of the said writ petition, grievance of those petitioners stood redressed and, thus, they withdrew the writ petition. They did not even ask the court to reserve

their right to file a fresh petition challenging the same, in case the need arose, as required in the principle enshrined in Order XXIII of the Code of Civil Procedure, 1908. Such a conduct of those appellants in blowing hot and cold in the same breath is not worth approval. [Para 15] [1035-F-H]

R.N. Gosain v. Yashpal Dhir **AIR 1993 SC 352;** *Babu Ram @ Durga Prasad v. Indra Pal Singh (D) by L.Rs.* **(1998) 6 SCC 358;** *P.R. Deshpandey v. Maruti Balaram Haibatti* **(1998) 6 SCC 507;** *Mumbai International Airport Private Limited v. Golden Chariot Airport and Anr.* **(2010) 10 SCC 422 - relied on.**

2. In exceptional circumstances, it may be permissible for the statutory authority to put subordinate legislation in abeyance. However, such an order being legislative in character, is not warranted to be interfered by the Court/Tribunal. [Para 17] [1036-G]

State of A.P. and Ors. v. Civil Supplies Services Assn. and Ors. **(2000) 9 SCC 299 – relied on.**

3. Executive instructions are issued keeping in view the rules and executive business, for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein. [Para 22] [1038-D-E]

Sant Ram Sharma v. State of Rajasthan and Ors. **AIR 1967 SC 1910 – relied on.**

Khet Singh v. Union of India **AIR 2002 SC 1450;** *Union of India and Anr. v. Amrik Singh and Ors.* **AIR 1994 SC 2316 – referred to.**

4. Once the old rule has been substituted by the new rule, it stands obliterated, thus, ceases to exist and under no circumstance, can it be revived in case the new rule is held to be invalid and struck down by the Court, though position would be different in case a statutory amendment by the Legislature, is held to be bad for want of legislative competence. In that situation, the repealed statutory provisions would revive automatically. [Para 23] [1038-G-H; 1039-A]

State of U.P. and Ors. v. Hirendra Pal Singh etc. **JT (2010) 13 SC 610;** *Firm A.T.B. Mehtab Majid and Co. v. State of Madras and Anr.* **AIR 1963 SC 928;** *B.N. Tewari v. Union of India and Ors.* **AIR 1965 SC 1430;** *Indian Express Newspapers (Bombay) Private Ltd. and Ors. v. Union of India and Ors.* **AIR 1986 SC 515;** *West U.P. Sugar Mills Association and Ors. v. State of U.P. and Ors.* **AIR 2002 SC 948;** *Zile Singh v. State of Haryana and Ors.* **(2004) 8 SCC 1;** *State of Kerala and Anr. v. Peoples Union for Civil Liberties, Kerala State Unit and Ors.* **(2009) 8 SCC 46 – referred to.**

5.1. The CAR 2007 is neither a statute nor a subordinate legislation. The provisions contained in Sections 4A, 5 and 5A of the Aircraft Act, 1934 and Rules 42A and 133A of the Aircraft Rules, 1937 make it evident that the same are merely executive instructions which can be termed as "special directions". The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. [Para 18] [1036-H; 1037-A-B]

State of M.P. and Anr. v. M/s. G.S. Dall and Flour Mills **(1992) Supp. 1 SCC 150 – relied on.**

5.2. It is not a case of automatic revival of AIC 28/92, but there is a specific order by the competent authority

in exercise of statutory powers whereby the AIC 28/92 has been revived. Since the instructions which have been issued under the letter dated 02.06.2008 are merely in the form of interim measures, the question of the applicability of the principles of natural justice does not arise. The suspension of CAR 2007 had created a vacuum, and it was, therefore, necessary for the DGCA to take an appropriate decision during the finalisation of the CAR, pursuant to the report to be submitted by a Committee constituted by the Government. The appellants did not challenge the subsequent order dated 02.06.2008, by virtue of which AIC 28/92 dated 10.12.1992 came into force which had also been nothing but special directions and remained in force from 1992 to 2007. [Para 24] [1039-B-D]

5.3. The appellants contended before the High Court that as the order dated 02.06.2008 was in continuation of the Circular dated 29.05.2008, it was not necessary for the appellants to challenge the said order separately. In absence of the challenge to the same, it is immaterial to determine as to whether the same had been issued by the competent authority or not, as it is not the case of statutory rules i.e. subordinate legislation. The question of following any procedure for replacement is not warranted. The contention was raised before the High Court that the Circular dated 29.05.2008 has been issued by the authority having no competence, thus, cannot be enforced. It is settled law that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the Statutory Authority. Such person cannot provide for any guideline or direction to the authority under the statute to act in a particular manner. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and

decision making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. [Paras 25, 26 and 28] [1039-E; 1040-D-H; 1041-D-E]

The Purtabpur Co. Ltd. v. Cane Commissioner of Bihar and Ors. **AIR 1970 SC 1896;** *Chandrika Jha v. State of Bihar and Ors.* **AIR 1984 SC 322;** *Tarlochan Dev Sharma v. State of Punjab and Ors.* **AIR 2001 SC 2524;** *Manohar Lal (D) by L.Rs. v. Ugrasen (D) by L.Rs. and Ors.* **AIR 2010 SC 2210;** *Commissioner of Police, Bombay v. Gordhandas Bhanji* **AIR 1952 SC 16;** *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Ors.* **AIR 2004 SC 1159;** *Pancham Cha and and Ors. v. State of Himachal Pradesh and Ors.* **AIR 2008 SC 1888 – relied on.**

5.4. It cannot be said that the Circular dated 29.5.2008 was either issued illegally or without any authority. Admittedly, the DGCA is competent to issue special directions and the same had been issued by him, though may be with the consultation of some other authorities. However, it cannot be denied that the DGCA was involved in the process. The authority which had been in consultation with the DGCA had been provided for under the business rules and it cannot be held by any stretch of imagination that the Ministry of Civil Aviation is not an authority concerned with the safety measures involved. The authorities are competent to issue the said regulations. Exercise of the power is always referable to the source of power and must be considered in conjunction with it. In view of the fact that the source of power exists, there is no occasion for the court to link the exercise of power to another source which may invalidate the exercise of power. [Para 28] [1041-E-H]

5.5. After keeping the CAR 2007 in abeyance, an Expert Committee was constituted which held a large number of meetings with various stakeholders. The final report was submitted by the Expert Committee to the Government in September 2010 for consideration. The Government accepted FDTL Committee report and advised the DGCA to issue draft CAR for consultation and the same was put on the DGCA website inviting comments or objections within a period of 30 days. It is a question of challenging the public policy, the public authorities must be given a very long rope, full freedom and full liberty in framing policies, though the discretion of the authorities cannot be absolute and unqualified, unfettered or uncanalised. The same can be the subject matter of judicial scrutiny only in exceptional circumstances where it can be shown to be arbitrary, unreasonable or violative of the statutory provisions. More so, the courts are not well equipped to deal with technical matters, particularly, where the decisions are based on purely hyper-technical issues. The court may not be able to consider competing claims and conflicting interests and conclude on which way the balance tilts. More so, the whole exercise was done to bring a new CAR into existence for which the process has already been initiated and a draft CAR was put on the DGCA website giving opportunity to all concerned to submit their objections/suggestions within a period of 30 days and a new CAR is likely come into existence very soon. [Para 29] [1042-B-G]

5.6. The finding recorded by the High Court that even assuming that there is a challenge to the communication dated 02.06.2008 in the petition, the same is to be considered as devoid of substance as the DGCA has ample power to issue such instructions or directions in exercise of its power under the Rule 133A r/w Rule 29C

of the Rules 1937, is accepted. Since, the appellants have not been able to point out any provision even for issuance of instructions for such interregnum period, the provisions of CAR of 13.10.2006 would be attracted in the matter. [Para 30] [1043-C-D]

Case Law Reference:

AIR 1993 SC 352	**Relied on.**	**Para 14**
(1998) 6 SCC 358	**Relied on.**	**Para 14**
(1998) 6 SCC 507	**Relied on.**	**Para 14**
(2010) 10 SCC 422	**Relied on.**	**Para 14**
(2000) 9 SCC 299	**Relied on.**	**Para 17**
(1992) Supp.1 SCC 150	**Relied on.**	**Para 18**
AIR 2002 SC 1450	**Referred to.**	**Para 19**
AIR 1967 SC 1910	**Relied on.**	**Para 20**
AIR 1994 SC 2316	**Referred to.**	**Para 21**
JT (2010) 13 SC 610	**Referred to.**	**Para 23**
AIR 1963 SC 928	**Referred to.**	**Para 23**
AIR 1965 SC 1430	**Referred to.**	**Para 23**
AIR 1986 SC 515	**Referred to.**	**Para 23**
AIR 2002 SC 948	**Referred to.**	**Para 23**
(2004) 8 SCC 1	**Referred to.**	**Para 23**
(2009) 8 SCC 46	**Referred to.**	**Para 23**
AIR1970 SC 1896	**Relied on.**	**Para 26**
AIR 1984 SC 322	**Relied on.**	**Para 26**
AIR 2001 SC 2524	**Relied on.**	**Para 26**

AIR 2010 SC 2210	**Relied on.**	**Para 26**
AIR 1952 SC 16	**Relied on.**	**Para 27**
AIR 2004 SC 1159	**Relied on.**	**Para 27**
AIR 2008 SC 1888	**Relied on.**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3844 of 2011.

From the Judgment & Order dated 14.8.2008 of the High Court of Judicature, Bombay in W.P. No. 1687 of 2008.

K.K. Venugopal, Sanjay Singhvi, Prashanto C. Sen, Nitin S. Tambwekar, B.S. Sai, Pooja Dhar, Pallav Kumar, Nitin Dahiya, K. Rajeev for the Appellants.

Parag P. Tripathi, ASG, T.S. Doabia, L. Nageswara Rao, Chander Udai Singh, Binu Tamta, Kunal Bahari, Anuj Bhandari, Sushma Suri, Gopal Jain, Nina Gupta, Ratna Dhingra, Sanjay Gupta, Bina Gupta, Rishi Maheshwari, Megha Mukherjee, Suman Jyoti Khaitan for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal has been preferred against the judgment and order dated 14.8.2008 passed by the High Court of Judicature at Bombay dismissing the Writ Petition No. 1687 of 2008, wherein the appellants had challenged the validity and propriety of a Circular issued by the Director General of Civil Aviation, (hereinafter called as 'DGCA'), respondent No.1 dated 29.5.2008, to the effect that Civil Aviation Requirements (hereinafter called as the 'CAR') dated 27.7.2007 had been kept in abeyance.

3. Facts and circumstances giving rise to this case are that the appellants are the Joint Action Committees of the Airlines Pilots Association representing several airlines operating in

India. The dispute relates to the Flight Time (FT) and Flight Duty Time Limitation (FDTL), as there is some variance between the Aeronautical Information Circular (hereinafter called as 'AIC') No.28/92 and the CAR 2007. Vide AIC 28/92, FT and FDTL had been defined and fixed depending upon the distance of destination and number of landings. The rest period for the pilots stood substantially changed by the CAR 2007 to the greater benefit of the pilots. However, a large number of representations had been made by the airlines to the DGCA and the Central Government, respondents herein, to the effect that it was practically not possible for them to ensure compliance of CAR 2007 and thus, the same was kept in abeyance. By a subsequent order dated 2.6.2008, the AIC 28/92 was revived.

4. Appellants challenged the Circular dated 29.5.2008 before the High Court on the grounds, *inter-alia,* that even if CAR 2007 is kept in abeyance, the AIC 28/92, which stood obliterated, could not be revived; the CAR 2007 had been kept in abeyance by the order of the Authority, which did not have the competence to interfere in the functioning of the DGCA, respondent No. 1. The statutory authority i.e. DGCA alone is competent to pass the appropriate order in the matter. The Circular dated 29.5.2008 has seriously jeopardised the safety of passengers and the same was passed in flagrant violation of the principles of natural justice. However, the High Court did not accept the submissions of the appellants, rather rejected the same in an elaborate judgment. Hence, this appeal.

5. Shri K.K. Venugopal, learned senior counsel appearing for the appellants has agitated all the issues raised before the High Court. Once AIC 28/92 stood obliterated, the question of its revival/application/enforcement on putting the CAR 2007 in abeyance could not arise. More so, the orders by the DGCA make it abundantly clear that the same had been passed on instructions from the competent authority. The order stood vitiated as the same had not been passed by the DGCA on its

own. Law does not permit the keeping of the subordinate legislation in abeyance without following the procedure, prescribed for its enactment. The Circular dated 29.5.2008 had been issued in violation of the guidelines stipulated for issuance of the CAR. The judgment and order impugned herein is liable to be set aside and the appeal deserves to be allowed.

6. On the contrary, Shri Parag P. Tripathi, learned ASG, Shri C.U. Singh and Shri L. Nageshwar Rao, learned senior counsel appearing for the respondents, have submitted that the writ petition filed by the appellants before the High Court was not maintainable as none of the necessary parties had been impleaded therein. However, the respondents, i.e. the airlines got themselves impleaded in the petition. The AIC and CAR fall within the category of executive instructions which simply provide the guidelines for persons working in the department. The said administrative instructions do not have any statutory force and thus can be kept in abeyance, altered or replaced by another executive instructions. Some of the appellants themselves challenged the CAR dated 27.7.2007 by filing Writ Petition No.2176 of 2007 on the grounds that the said CAR revealed shocking deviations and selective exclusions from international safety requirements in respect of FDT and FTL. It has further been submitted therein that the amendment to FDT and FTL in the said CAR was neither in conformity with the existing safety rules, nor with settled principles and procedures adopted by the similar international regulatory authorities. However, the said writ petition stood dismissed as withdrawn vide order dated 31.1.2008. Once the CAR dated 27.7.2007 has been put under suspension, the same is also under challenge by the appellants which also include some of the petitioners in Writ Petition No. 2176 of 2007. Their conduct is tantamount to approbate and reprobate which is not permissible in law. The DGCA had communicated vide letter dated 29.5.2008 its decision to keep the CAR 2007 in abeyance on the basis of advice/decision taken by the

competent authority, i.e. the Central Government. The Hon'ble Minister was the competent authority under the Business Rules 1961. The DGCA himself had also participated in the process. The order dated 2.6.2008, providing that AIC 28/1992 would be effective once again, was not challenged by the appellants for the reasons best known to them. An order which is not under challenge, could not be quashed. Thus, no fault can be found with the impugned judgment and order. The appeal lacks merit and is liable to be dismissed.

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

Relevant Statutory Provisions:

8. It may be necessary to make reference to relevant provisions of the Aircraft Act, 1934 (hereinafter referred to as 'Act 1934'). Section 4A of the Act 1934 provides for safety oversight functions that the DGCA shall perform the safety oversight functions in respect of matters specified in this Act or the rules made thereunder. Section 5 empowers the Central Government to make rules. Sections 5(2) and 5-A of the Act 1934 read as under:

> (2) Without prejudice to the generality of the foregoing power, such rules may provide for-
>
> ……..
>
> (m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life.
>
> *5A. Power to issue directions.-(*1) The Director-General of Civil Aviation or any other officer specially empowered in this behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of this Act and the rules made thereunder, with respect to any of the matters specified in clauses (aa), (b), (c), (e), (f),(g), (ga), (gb), (gc), (h), (i), (m) and (qq) of sub-section (2) of section 5, to any person or persons using any aerodrome or engaged in the aircraft operations, air traffic control, maintenance and operation of aerodrome, communication, navigation, surveillance and air traffic management facilities and safeguarding civil aviation against acts of unlawful interference, in any case where the Director-General of Civil Aviation or such other officer is satisfied that in the interests of the security of India or for securing the safety of aircraft operations it is necessary so to do.
>
> (2) Every direction issued under sub-section (1) shall be complied with by the person or persons to whom such direction is issued.

Section 14 provides that rules shall be made after publication.

9. The provisions of the Aircraft Rules, 1937 (hereinafter referred to as 'Rules 1937') read as under:

> *"3(22)- "Flight time"-*
>
> (i) in respect of any aeroplane, means the total time from the moment of the aeroplane first moves for the purpose of taking off until the moment it finally comes to rest at the end of the flight; and
>
> ……..
>
> ……
>
> *29C. Adoption of the Convention and Annexes.-* The Director-General may lay down standards and procedures not inconsistent with the Aircraft Act 1934 (22 of 1934) and the rules made thereunder to carry out the Convention and any Annex thereto.
>
> *42A. Pilot not to fly for more than 125 hours during any*

period of 30 consecutive days.

133A. Direction by Director-General- (1) The Director-General may, *through Notices* to Airmen (NOTAMS), Aeronautical Information Publication, Aeronautical Information Circulars (AICs), Notice to Aircraft Owners and Maintenance Engineers and publication entitled Civil Aviation Requirements issue *special directions* not inconsistent with the Aircraft Act, 1934 (22 of 1934) or these rules, relating to the operation, use, possession, maintenance or navigation of aircraft flying in or over India or of aircraft registered in India.

(2) *The Civil Aviation Requirements* under sub-rule (1) shall be issued after placing the draft on the website of the Directorate General of Civil Aviation for a period of thirty days for inviting objections and suggestions from all persons likely to be affected thereby:

Provided that the Director General may, in the public interest and by order in writing, dispense with the requirement of inviting such objections and suggestions.

(3) Every direction issued under sub-rule (1) shall be complied with by the persons or persons to whom such direction is issued." (Emphasis added)

10. The case requires to be considered in the light of the aforesaid submissions, the factual foundation laid by the parties and the relevant statutory provisions.

11. Admittedly, a Writ Petition No. 2176 of 2007 was filed by some of the present appellants seeking the following reliefs:

"(a) That this Hon'ble Court be pleased to hold and declare that the impugned amendment dated 27.7.2007 of Civil Aviation Requirements with the subject "Flight Duty Time and Flight Time Limitations – Flight Crew Members" is illegal, irrational and inconsistent with the settled

principles of law and practice.

(b) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, directing the respondent DGCA, not to proceed with the impugned amendment dated 27.7.2007 without conducting a thorough scientific study by an expert committee consisting of Aviation Medical Specialists under the guidance of an impartial medical authority such as DGCA-Air, IAF who has no commercial or vested interests.

(c) That pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to direct the respondent to maintain status quo in respect of Flight Duty Time Limitations (FDTL) and Flight Time Limitations (FTL) as on June 2007."

12. The same was withdrawn vide order dated 31.1.2008 and the order runs as under:

"The learned counsel for the petitioners submits that the grievance has already been redressed and he does not want to pursue the petition. Petition dismissed as not pressed."

The appellants/writ petitioners therein had also submitted that AIC 28/92 was a most scientific and properly formulated direction and CAR 2007 was based on a draft which revealed shocking deviations and selective exclusions from safety regulations in respect of FDT and FTL, adopted/accepted internationally.

13. In *R.N. Gosain v. Yashpal Dhir,* AIR 1993 SC 352**,** this Court observed as under:–

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of

election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

14. The doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. (Vide: *Babu Ram @ Durga Prasad v. Indra Pal Singh (D) by L.Rs.,* (1998) 6 SCC 358; *P.R. Deshpandey v. Maruti Balaram Haibatti,* (1998) 6 SCC 507; and *Mumbai International Airport Private Limited v. Golden Chariot Airport & Anr.,* (2010) 10 SCC 422).

15. In view of the above, it is clearly evident that some of the present appellants, had challenged the CAR 2007, wherein it had been submitted that AIC 28/92 was based on better scientific studies. The same remained in operation for more than 17 years and no one had ever raised any grievance in respect of its contents or application. However, it appears that during the pendency of the said writ petition, grievance of those petitioners stood redressed and, thus, they withdrew the writ petition. They did not even ask the court to reserve their right to file a fresh petition challenging the same, in case the need arose, as required in the principle enshrined in Order XXIII of the Code of Civil Procedure, 1908. Such a conduct of those appellants in blowing hot and cold in the same breath is not worth approval.

16. The appellants have raised the issue as to whether order dated 29.5.2008, keeping the CAR 2007 in abeyance could be passed without following the procedure prescribed in CAR dated 13.10.2006.

CAR dated 13.10.2006 provides for a detailed procedure for the promulgation of CAR. Clause 3.3 provides that whenever a change is effected to a CAR, it shall be termed as a revision and effective date of the revision of CAR shall be indicated therein. According to clause 4 thereof, if a new CAR or a revision to the existing CAR is proposed to be issued, the draft of the proposed CAR/revision shall be posted on DGCA's website or circulated to all the persons likely to be effected thereby inviting their objections/suggestions. Objections so received shall be analysed, considered and incorporated in case the same are found to be acceptable, before the promulgation of CAR.

17. In *State of A.P. & Ors. v. Civil Supplies Services Assn. & Ors.,* (2000) 9 SCC 299, the government had issued a notification that provided*, inter-alia*, that certain rules which had earlier been framed by the government would be kept in abeyance. The Administrative Tribunal quashed the same directing the government to frame the rules in a particular manner and to give partial effect to the rules kept in abeyance. However, on appeal, this Court set aside the order of the Tribunal and held that the Tribunal could neither have given directions to the Government to frame rules in any particular manner, nor to give partial effect to the rules kept in abeyance, as the order had exclusively been legislative in character.

Thus, in exceptional circumstances, it may be permissible for the statutory authority to put subordinate legislation in abeyance. However, such an order being legislative in character, is not warranted to be interfered by the Court/ Tribunal.

18. The CAR 2007 is neither a statute nor a subordinate

legislation. Provisions contained in Sections 4A, 5 & 5A of the Act 1934 and Rules 42A & 133A of the Rules 1937, make it evident that the same are merely executive instructions which can be termed as "special directions". The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. (Vide: *State of M.P. & Anr. v. M/s. G.S. Dall & Flour Mills* (1992) supp. 1 SCC 150).

19. In *Khet Singh v. Union of India,* AIR 2002 SC 1450, this Court considered the scope and binding force of the Executive instructions issued by the Narcotic Bureau, New Delhi and came to the conclusion that such instructions are binding and have to be followed by the investigating officer, coming within the purview of Narcotic Drugs and Psychotropic Substances Act, 1985, even though such instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by them during the investigation of the crime.

20. A Constitution Bench of this Court in *Sant Ram Sharma v. State of Rajasthan & Ors.,* AIR 1967 SC 1910 held as under:

> "It is true that Government cannot amend or supersede statutory rules by administrative instructions, *but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions* not inconsistent with the rules already framed." (Emphasis added)

Thus, an executive order is to be issued keeping in view the rules and executive business, though the executive order may not have a force of law but it is issued to provide guidelines to all concerned, who are bound by it.

21. In *Union of India & Anr. v. Amrik Singh & Ors.,* AIR 1994 SC 2316, this Court examined the scope of executive

instructions issued by the Comptroller and Auditor General for making the appointments under the provisions of Indian Audit and Accounts Department (Administrative Officers, Accounts Officers and Audit Officers) Recruitment Rules, 1964, and came to the conclusion that the CAG of India had necessary competence to issue departmental instructions on matters of conditions of service of persons serving in Department, being the Head of the Department, in spite of the statutory rules existing in this regard. The Court came to the conclusion that an enabling provision is there and in view thereof, the CAG had exercised his powers and issued the instructions which are not inconsistent with the statutory rules, the same are binding for the reason that the provision in executive instructions has been made with the required competence by the CAG.

22. Thus, it is evident from the above that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein.

23. This Court in *State of U.P. & Ors. v. Hirendra Pal Singh etc.,* JT (2010) 13 SC 610, considered a large number of judgments particularly in *Firm A.T.B. Mehtab Majid & Co. v. State of Madras & Anr.,* AIR 1963 SC 928; *B.N. Tewari v. Union of India & Ors.,* AIR 1965 SC 1430; *Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors.,* AIR 1986 SC 515*; West U.P. Sugar Mills Association & Ors. v. State of U.P. & Ors.,* AIR 2002 SC 948; *Zile Singh v. State of Haryana & Ors.*, (2004) 8 SCC 1; and *State of Kerala & Anr. v. Peoples Union for Civil Liberties, Kerala State Unit & Ors.,* (2009) 8 SCC 46, and came to the conclusion that once the old rule has been substituted by the new rule, it stands obliterated, thus ceases to exist and under no circumstance, can it be revived in case the new rule is held to be invalid and

struck down by the Court, though position would be different in case a statutory amendment by the Legislature, is held to be bad for want of legislative competence. In that situation, the repealed statutory provisions would revive automatically.

24. It is not a case of automatic revival of AIC 28/92, but there is a specific order by the competent authority in exercise of statutory powers whereby the AIC 28/92 has been revived. Since the instructions which have been issued under the letter dated 2.6.2008 are merely in the form of interim measures, the question of the applicability of the principles of natural justice does not arise. The suspension of CAR 2007 had created a vacuum, and it was, therefore, necessary for the DGCA to take an appropriate decision during the finalisation of the CAR, pursuant to the report to be submitted by a Committee constituted by the Government. The appellants did not challenge the subsequent order dated 2.6.2008, by virtue of which AIC 28/92 dated 10.12.1992 came into force which had also been nothing but special directions and remained in force from 1992 to 2007.

25. In the High Court it was sought to be contended on behalf of the appellants that as the order dated 2.6.2008 was in continuation of the Circular dated 29.5.2008, it was not necessary for the appellants to challenge the said order separately. The High Court held:

> "We are afraid the contention is not well-founded. While the Circular dated 29.5.2008 relates to the subject of suspension of CAR of 2007, the letter dated 2.6.2008 refers to instructions to the effect that AIC 28/92 would be effective till CAR is approved by following the procedure laid down in CAR of 13.10.2006. The subject matter of two documents being different, merely because the second document is in continuation of the first document, it cannot be said that the challenge to the first document would ipso facto include challenge to the second document.

> The letter dated 2.6.2008 is not the effect of the Circular dated 29.5.2008, but the same has been issued in exercise of powers under Rule 133A of the Rules 1937 to meet the circumstances which have resulted on account of CAR 2007, being suspended. The cause for issuance of the letter dated 2.6.2008 is not directly flowing from the Circular dated 29.5.2008, but it was issued for the consequences which followed the issuance of the Circular dated 29.5.2008. Being so, in case the appellants wanted to challenge the communication dated 2.6.2008, they ought to have challenged the same by raising specific ground in that regard by laying proper factual foundation in support of such ground and only then, they could have invited the order in that regard from the court."

In absence of the challenge to the same, it is immaterial to determine as to whether the same had been issued by the competent authority or not, as it is not the case of statutory rules i.e. subordinate legislation. The question of following any procedure for replacement is not warranted.

26. The contention was raised before the High Court that the Circular dated 29.5.2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the Statutory Authority. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide: *The Purtabpur Co., Ltd. v. Cane Commissioner of Bihar & Ors.,* AIR 1970 SC 1896; *Chandrika Jha v. State of Bihar & Ors.,* AIR 1984 SC 322; *Tarlochan Dev*

Sharma v. State of Punjab & Ors., AIR 2001 SC 2524; and *Manohar Lal (D) by L.Rs. v. Ugrasen (D) by L.Rs. & Ors.,* AIR 2010 SC 2210).

27. Similar view has been re-iterated by this Court in *Commissioner of Police, Bombay v. Gordhandas Bhanji,* AIR 1952 SC 16; *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia & Ors.*, AIR 2004 SC 1159; and *Pancham Chand & Ors. v. State of Himachal Pradesh & Ors.,* AIR 2008 SC 1888, observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the Constitutional scheme.

28. In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner.

It cannot be said that the Circular dated 29.5.2008 was either issued illegally or without any authority. Admittedly, the DGCA is competent to issue special directions and the same had been issued by him, though may be with the consultation of some other authorities. However, it cannot be denied that the DGCA was involved in the process. The authority which had been in consultation with the DGCA had been provided for under the business rules and it cannot be held by any stretch of imagination that the Ministry of Civil Aviation is not an authority concerned with the safety measures involved herein. The authorities are competent to issue the said regulations. Exercise of the power is always referable to the source of power and must be considered in conjunction with it. In view of the fact that the source of power exists, there is no occasion for the Court to link the exercise of power to another source which may invalidate the exercise of power.

29. The High Court has observed that in the instant case, the reviving of AIC 28/92 is in question, even the keeping in abeyance of the CAR, whether by the DGCA or other competent authority, is in issue. However, it is merely an interregnum arrangement till the new CAR comes into picture. After keeping the CAR 2007 in abeyance, an Expert Committee was constituted which held a large number of meetings with various stakeholders. The final report has been submitted by the Expert Committee to the Government in September 2010 for consideration. The Government has accepted FDTL Committee report and advised the DGCA to issue draft CAR for consultation and the same has been put on the DGCA website inviting comments or objections within a period of 30 days. It is a question of challenging the public policy and it is well settled that public authorities must be given a very long rope, full freedom and full liberty in framing policies, though the discretion of the authorities cannot be absolute and unqualified, unfettered or uncanalised. The same can be the subject matter of judicial scrutiny only in exceptional circumstances where it can be shown to be arbitrary, unreasonable or violative of the statutory provisions. More so, the courts are not well equipped to deal with technical matters, particularly, where the decisions are based on purely hyper-technical issues. The court may not be able to consider competing claims and conflicting interests and conclude on which way the balance tilts.

More so, the whole exercise has been done to bring a new CAR into existence for which the process has already been initiated and a draft CAR was put on the DGCA website giving opportunity to all concerned to submit their objections/ suggestions within a period of 30 days and a new CAR is likely to come into existence very soon.

30. The High Court held that DGCA is directly under the control of Civil Aviation Ministry and considering the rules of business, the Government being the appropriate authority to formulate necessary policy in relation to the subject matter in

issue, and the Government in its wisdom having decided after taking into consideration all the representations made from various sections, has appointed a Committee to formulate CAR in relation to the matters enumerated under order dated 29.5.2008, and on that count, the DGCA in exercise of its power under Rule 133A r/w Rule 29C of the Rules 1937 issued the Circular dated 29.5.2008, and therefore, no fault can be found with the same.

Being so, we are in agreement with the finding recorded by the High Court that even assuming that there is a challenge to the communication dated 2.6.2008 in the petition, the same is to be considered as devoid of substance as undisputedly, the DGCA has ample power to issue such instructions or directions in exercise of its power under the Rule 133A r/w Rule 29C of the Rules 1937. Since, the appellants have not been able to point out any provision even for issuance of instructions for such interregnum period, the provisions of CAR of 13.10.2006 would be attracted in the matter.

31. In view of the above, we do not find any force in the appeal, it is accordingly dismissed. No order as to costs. Before parting with the case, we would like to point out that in the facts and circumstances of the case, as the process to bring new CAR in existence is going on, the same should be concluded expeditiously in accordance with law.

N.J. Appeal dismissed.

BHAIYAMIYAN @ JARDAR KHAN & ANR.
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 802 of 2004)

MAY 3, 2011

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

Penal Code, 1860: s.376(2)(g) – Gang rape – Allegation of – FIR lodged 60 hours after the incident at a police station about 22 km away from place of incident though police station of the village where incident took place was only 7 km away – Medical examination conducted in hospital 55 kms away on insistence of the prosecutrix who refused to be medically examined at place where FIR was lodged – As per medical evidence, no injury was found on person and there was no evidence of rape – Trial court found that prosecution case was doubtful and ordered acquittal – High Court held that order of trial court was perverse and convicted the accused u/s.376(2)(g) – On appeal, held: Explanation for delay in lodging FIR was unbelievable – Prosecution could not explain why prosecutrix insisted in medical examination at hospital 55 kms away – As per medical report, there was no injury on her genital and no evidence to show that she had been raped – Cumulative effect of evidence showed that view of trial court was possible – High Court ought not to have interfered with the decision of trial court – Conviction set aside – Appeal against acquittal.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 802 of 2004.

From the Judgment & Order dated 22.4.2004 of the High Court of Madhya Pradesh at Jabalpur Bench at Gwalior in Criminal Appeal No. 111 of 1992.

Ashok Mathur for the Appellants.

Vibha Dattaa Makhija for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal arises out of the following facts:

At about 10.00 a.m. on the 30th August 1984 the prosecutrix (PW.1) had gone to relieve herself and as she was returning home, she was waylaid by the appellants who carried her to a nearby field and thereafter raped her and while leaving threatened her with dire consequences if she revealed what had happened to anyone. She however returned home and told her parents about the rape. Accompanied by her parents she then went to the police outpost at Pathriya to lodge a report but no police official was found present therein. A report was then lodged the next day at about 12.15 p.m. by PW.1 at Sironj Police Station about 22 k.m. away from the place of incident though the police station of village Kasbatal was Unarasital only 7 k.m. away.. The prosecutrix was accordingly sent for her medical examination to the hospital at Vasoda. Information was also sent to police Station Unarasital along with the medical examination report Ex.P.A. and the subsequent investigation was conducted by the police of police station Unarasital who seized the petticoat of the prosecutrix and sent it for examination.

On the completion of the investigation the accused were charged under Sec.376 (2)(g) of the IPC for having committed gang rape on PW.1. The Trial Court, vide its judgment dated the 6th January, 1992 observed that in the light of the fact that the FIR had been lodged after a delay of about 60 hours and that the statement of the prosecutrix was full of contradictions and as the statements of her father and mother (PW2 and PW.3) were based on the information given by her to them, no reliance could be placed on their evidence as well. The Court

also found that in the light of the fact that the prosecutrix had declined to be medically examined at Sironj, where the First Information Report had been lodged, and had insisted that she be examined at Vasoda which was 55 k.ms. away, cast a doubt on the prosecution story. The court further observed that as per the medical evidence no injury had been found on her person though she had been raped by two persons and as such there was no evidence to suggest that rape had been committed. On a cumulative assessment of the prosecution evidence the Trial Court acquitted the accused.

An appeal was thereafter filed by the State before the High Court. The High Court has given a finding that the decision of the Trial Court was perverse and called for interference. The High Court has relied on the evidence of PW.1 and her parents as also on some part of the evidence of Dr. Mamta Sthapak-PW.7 who had medically examined the prosecutrix after about 24 hours. The High Court has accordingly allowed the appeal and sentenced the accused to 10 years R.I. with a fine of Rs.25,000/- under Section 376(2)(g) of the IPC, and in default of payment of fine, RI for two years.

The matter is before us in the above background.

At the very outset we must remark that the High Court's interference in an appeal against acquittal is somewhat circumscribed and if the view taken by the Trial Court was possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been in Trial Court, it might have taken a different view. In other words, if two views are possible and the Trial Court has taken one, the High Court should not interfere in the judgment of the Trial Court.

We have examined the evidence in the light of the above principle. We first see that the First Information Report had been lodged after about 60 hours of the incident. The prosecution case is that PW.1 accompanied by her parents had gone to police post Patharia attached to Police Station Unarasital

immediately after the incident but had found no police official present therein and had then gone to police station Sironj and lodged a report at 12 noon the next day. We find that the explanation for this delay is somewhat difficult to believe. A police post may have a few police officials posted in it, but police station Unarasital was a full fledged police station which would invariably be manned. Moreover, even if no one was found in the police post on the first day, at that particular point of time the effort of the prosecutrix ought to have been to lodge a report later at Police Station Unarasital, but she chose to go to police Station Sironj and recorded her statement and the investigation was thereafter referred to police station Unarasital. We are also indeed surprised that the High Court has made light of the fact that the prosecutrix had declined to undergo her medical examination at Sironj and had insisted for her medical examination at Vasoda, 55 k.m. away. The prosecution has not been able to furnish any explanation as to why the prosecutrix had insisted on being examined at Vasoda.

We have also examined the medical report. Dr. Mamta Sthapak-PW.7 found no injury on her genetalia and deposed that there was no evidence to show that she had been raped as the tear in her hymen was an old one. The prosecutrix also stated that at the time of her medical examination at Vasoda her vagina had been stitched. The doctor found no stitch on her person.

We are therefore of the opinion that on a cumulative assessment of the evidence, as given above, the finding of the Trial Court could have been given under the circumstances and the High Court's interference was, therefore, not called for. The appeal is accordingly allowed, the conviction of the appellants is set aside and they are acquitted.

The appellants are on bail; their bail bonds shall stand discharged.

D.G. Appeal allowed.

DILJIT SINGH BEDI

v.

SHIROMANI GURUDWARA PRABHANDHAK COMMITTEE, SRI AMRITSAR

(Civil Appeal No. 3848 of 2011)

MAY 3, 2011

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

Sikh Gurudwaras Act, 1925: s.69 – Termination of an employee of respondent-SGPC – Validity of – In a local newspaper some photographs of the employee appeared with a woman in embarrassing position – Inquiry conducted against him by Sub-committee constituted by SGPC – Explanation tendered by employee that the woman in photographs was his wife and someone took those photograph from his bedroom – Explanation accepted by Sub-committee and it recommended reinstatement – Executive Committee of SGPC resolved to reinstate him – However, employee submitted his resignation which was accepted by President of SGPC – Thereafter employee made representation that resignation was obtained from him by coercion and misrepresentation – Secretary of SGPC relieved the employee from service on the ground that resolution to reinstate the employee in service was not confirmed by the Executive Committee – Writ petition by employee dismissed by High Court on the ground that the employee brought bad name to the entire community and defamed SGPC – On appeal, held: Only the Executive Committee of the SGPC has the statutory power u/s.69 to remove any employee of the SGPC – Acceptance of the resignation of the employee by the President of the SGPC was, therefore, of no legal consequence – Employee was terminated from service by way of punishment for allegations of misconduct – Hence, it was not a case of termination simpliciter but a dismissal for

misconduct – Executive Committee of the SGPC can terminate the services of any employee for misconduct, only when such misconduct is established in an inquiry – The inquiry report showed that the Sub-Committee had accepted the explanation of the employee – Thus, without a finding in an inquiry that the employee was guilty of conduct which had defamed the SGPC, the High Court could not have taken a view that the employee brought a bad name to the SGPC – The order issued by the Secretary of the SGPC terminating the services of the appellant is, therefore, not legally valid and is quashed – Employee reinstated in service, without any back wages in view of fact that he had offered to resign – Service law – Dismissal from service.

The appellant was working as an Assistant Secretary of the SGPC. A news item appeared in the local newspaper in November 2007 with some photographs of the appellant with a woman in embarrassing position. The SGPC constituted a Sub-Committee to hold an inquiry against the appellant and the appellant was asked to appear before the Sub-Committee. The appellant submitted his explanation that the woman in the photographs was his wife and he did not know how someone took those photographs from his bedroom. The Sub-Committee accepted the explanation of the appellant and submitted an inquiry report recommending that the appellant be re-instated in his post. On the basis of the inquiry report, the Executive Committee of the SGPC in its meeting on 01.01.2008 resolved to reinstate the appellant in service. On 04.01.2008, however, the appellant submitted his resignation and the resignation was accepted by the President of the SGPC by order dated 04.01.2008. The appellant then made a representation complaining that his resignation was obtained by coercion and misrepresentation and by order dated 28.02.2008 issued by the Secretary of the SGPC,

order dated 04.01.2008 of the President of SGPC accepting the resignation of the appellant was cancelled and the appellant was relieved from service on the ground that the resolution to re-instate the appellant in service was not confirmed by the Executive Committee in the meeting on 18.02.2008. Aggrieved by order dated 28.02.2008, the appellant filed writ petition before the High Court. The High Court dismissed the writ petition holding that the appellant had not only defamed the SGPC but also brought a bad name to the entire community and the order dated 28.02.2008 relieving the appellant from service was rightly passed. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. Only the Executive Committee of the SGPC has the statutory power under Section 69 of the Sikh Gurudwaras Act, 1925 to remove any employee of the SGPC. Therefore, the acceptance of the resignation of the appellant by the President of the SGPC was of no legal consequence. Moreover, the fact remained that the Executive Committee of the SGPC cancelled order of the President of the SGPC accepting the resignation of the appellant and instead relieved the appellant from service. Therefore, this was not a case of resignation from service by the appellant but of termination of service of the appellant by the Executive Committee of the SGPC. [Para 7] [1056-D-F]

2.1. The order dated 28.02.2008 issued by the Secretary, SGPC whereby the appellant was relieved from service did not state the reasons for the decision of the Executive Committee taken in the meeting held on 18.02.2008 to relieve the appellant from service. No counter affidavit was filed by the SGPC before the High Court in reply to the writ petition. The writ petition was

dismissed *in limine* by the High Court after the counsel for the SGPC placed before the High Court the cuttings of the local dailies *'Punjab Kesari'* and '*Jag Bani'* both of 04.01.2008 containing photographs of the appellant in embarrassing positions with a woman. In the reply filed in this Court, the SGPC stated that the appellant was working on an important post of Assistant Secretary of the SGPC and was supposed to maintain highest standards and that the High Court, therefore, correctly passed the order maintaining the termination of the appellant. The SGPC further stated in the reply that since the appellant has himself admitted his guilt in the writ petition filed by him, he cannot claim any violation of his right to natural justice and no prejudice was caused to him. From these facts, it is clear that the appellant was terminated from service by way of punishment for allegations of misconduct. Hence, this is not a case of termination simpliciter but a dismissal for misconduct. [Para 8] [1056-G-H; 1057-A-D]

2.2. The Executive Committee of the SGPC has in exercise of its powers under the Act framed the Service Rules for the employees of the SGPC prescribing their service conditions which include their appointment and removal from service. Rule 4 of the Service Rules, which relates to dismissal from service states that an employee of the SGPC can be dismissed from service for bad character only after the charges of misconduct are established in an inquiry conducted by an inquiry committee. Thus, though the Executive Committee of the SGPC may have the power under Section 69 of the Act and the Rules made thereunder to terminate the services of any employee of the SGPC, it can terminate the services of any employee for misconduct, only when such misconduct is established in an inquiry. It appears from the inquiry report that the Sub-Committee had

accepted the explanation of the appellant that the photographs which were published in the local newspapers were of his wife. Thus, without a finding in an inquiry that the appellant was guilty of conduct which had defamed the SGPC, the High Court could not have taken a view that the appellant had brought a bad name to the SGPC and he had been rightly relieved from service. The order dated 28.02.2008 issued by the Secretary of the SGPC terminating the services of the appellant is, therefore, not legally valid and is accordingly quashed. The impugned order of the High Court is set aside. The appellant will be forthwith reinstated in service. On the facts and circumstances, particularly having regard to the fact that the appellant had offered to resign on 04.01.2008, the appellant will not be entitled to any backwages. [Paras 9-11] [1057-E-F; 1059-B-G]

Mewa Singh and others v. Shiromani Gurdwara PrabandhakCommittee **(1999) 2 SCC 60 – relied on.**

Case Law Reference:

(1999) 2 SCC 60	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3848 of 2011.

From the Judgment & Order dated 3.4.2008 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 5587 of 2008.

S.R. Sharma, Balaji Srinivasan for the Appellant.

Jaspal Singh, Satinder S. Gulati, Kamaldeep Gulati for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Delay condoned in filing rejoinder affidavit.

2. Leave granted.

3. This is an appeal against the order dated 03.04.2008 of the High Court of Punjab and Haryana dismissing the writ petition CWP No.5587 of 2008 of the appellant challenging his termination from service under the Shiromani Gurudwara Prabhandhak Committee (for short 'the SGPC').

4. The relevant facts very briefly are that the appellant was working as an Assistant Secretary of the SGPC at Amritsar when a news item was published in the local dailies in November 2007 with some photographs of the appellant with a woman in embarrassing positions. The SGPC constituted a Sub-Committee to hold an inquiry against the appellant and the appellant was asked to appear before the Sub-Committee on 22.11.2007 at 10.00 A.M. in the Meeting House, Sri Guru Nanak Niwas, Sri Amritsar. The appellant submitted his explanation that the photographs were that of himself and his wife and he did not know how someone has taken these from his bedroom. The Sub-Committee accepted the explanation of the appellant and submitted an inquiry report dated 01.12.2007 recommending that the appellant be reinstated in his post. On the basis of the inquiry report of the Sub-Committee, the Executive Committee of the SGPC in its meeting on 01.01.2008 resolved to reinstate the appellant in service. On 04.01.2008, however, the appellant submitted his resignation and the resignation was accepted by the President of the SGPC by order dated 04.01.2008. The appellant then made a representation complaining that his resignation was obtained by coercion and misrepresentation and by order dated 28.02.2008 issued by the Secretary of the SGPC, the order dated 04.01.2008 of the President of the SGPC accepting the resignation of the appellant was cancelled and the appellant was relieved from service on the ground that the resolution of the Executive Committee adopted on 01.01.2008 to reinstate

the appellant in service was not confirmed by the Executive Committee in the meeting on 18.02.2008. Aggrieved by the order dated 28.02.2008 issued by the Secretary, SGPC, relieving the appellant from service, the appellant filed writ petition, CWP No.5587 of 2008, before the High Court. By the impugned order dated 03.04.2008, the High Court dismissed the writ petition after holding that the appellant had not only defamed the SGPC but also brought a bad name to the entire community and the order dated 28.02.2008 relieving the appellant from service had been rightly passed.

5. Learned counsel for the appellant submitted that the woman, who was with the appellant in the photographs, was appellant's wife and the inquiry report submitted by the Sub-Committee would show that the explanation of the appellant that the concerned woman was his wife had been accepted and on the basis of the inquiry report submitted by the Sub-Committee the appellant had been fully exonerated and reinstated in service by the Executive Committee of the SGPC by the resolution dated 01.01.2008. He further submitted that the order dated 04.01.2008 of the President of the SGPC accepting the resignation of the appellant had also been cancelled pursuant to the representation of the appellant that the resignation had been obtained from the appellant by coercion and misrepresentation. He argued that the Executive Committee of the SGPC had actually dismissed the appellant from service for alleged misconduct by resolution dated 18.02.2008 without any finding in any inquiry that the appellant was guilty of such misconduct.

6. Learned counsel for the respondent, on the other hand, submitted relying on the reply filed by the respondent that the appellant had in fact tendered his resignation from his post on 04.01.2008. He referred to the resignation dated 04.01.2008 of the appellant annexed to the reply as Annexure R-2 to show that he had resigned from the post with a view to ensure that the image of the Shiromani Gurudwara Prabandhak was not

sullied. He submitted that the President of the SGPC accepted the resignation of the appellant on 04.01.2008 after deducting a month's pay in lieu of notice with effect from 04.01.2008 according to rules and this would be evident from the order dated 04.01.2008, copy of which has been annexed to the reply as Annexure R-3. He submitted that under the Sikh Gurudwaras Act, 1925 (for short 'the Act'), and in particular Section 69 thereof, the Executive Committee of the SGPC has the power to appoint and punish the employees of the SGPC and in exercise of this power the Executive Committee of the SGPC resolved to terminate the services of the appellant by resolution adopted on 18.02.2008. He submitted that the High Court has therefore rightly sustained the order of termination of the services of the appellant and this is not a fit case in which this Court should in exercise of its power under Article 136 of the Constitution interfere with the impugned order passed by the High Court.

7. The first question which we are called upon to decide in this case is whether the appellant had resigned from the post of Assistant Secretary of the SGPC or whether his services were terminated by the Executive Committee of the SGPC. It appears from Annexure R-2 annexed to the reply of the respondent that on 04.01.2008 the appellant had submitted his resignation to the President of the SGPC and it further appears from the Annexure R-3 annexed to the reply of the respondent that the resignation of the appellant had been accepted by the President of the SGPC, but on 28.02.2008 the Secretary of the SGPC issued an order stating that the Executive Committee of the SGPC in its resolution no. 173 dated 18.02.2008 cancelled the order dated 04.01.2008 of the President accepting the resignation of the appellant. The order dated 28.02.2008 of the Secretary of the SGPC extracted hereinbelow:-

"SHIROMANI GURDWARA PARBANDHAK COMMITTEE
SRI AMRITSAR

Copy of Office Order No.4073 dated 28.02.2008

Executive Committee vide its Resolution No.173 dated 18.02.2008 while not confirming the Resolution No.130 dated 01.01.2008 of reinstating in service Sh. Diljit Singh, Assistant Secretary under suspension (s/o Lal Singh) Publishing Department, Shiromani Committee has instead relieved him from service and has cancelled office order No.3465 dated 4.1.2008 vide which the President had accepted his resignation. Therefore he should be considered as relived from service.

S/d Secretary,
Shiromani Gurdwara Parbandhak Committee
Sri Amritsar"

Only the Executive Committee of the SGPC has the statutory power under Section 69 of the Act, to remove any employee of the SGPC. Therefore the acceptance of the resignation of the appellant by the President of the SGPC is of no legal consequence. Moreover, the fact remains that the Executive Committee of the SGPC has cancelled the order dated 04.01.2008 of the President of the SGPC accepting the resignation of the appellant and has instead relieved the appellant from service. We are thus of the considered opinion that this was not a case of resignation from service by the appellant but of termination of service of the appellant by the Executive Committee of the SGPC.

8. The second question which we have to decide in this case is whether the termination of service of the appellant by the Executive Committee of the SGPC by resolution dated 18.02.2008 was legally valid. The order dated 28.02.2008 issued by the Secretary, SGPC quoted above does not state the reasons for the decision of the Executive Committee taken in the meeting held on 18.02.2008 to relieve the appellant from

service. No counter affidavit was filed by the SGPC before the High Court in reply to the writ petition. It appears from the impugned order that the writ petition was dismissed *in limine* by the High Court after the counsel for the SGPC placed before the High Court the cuttings of the local dailies *'Punjab Kesari'* and '*Jag Bani'* both of 04.01.2008 containing photographs of the appellant in embarrassing positions with a woman. In the reply filed in this Court, the SGPC has stated in para 5 that the appellant was working on an important post of Assistant Secretary of the SGPC and was supposed to maintain highest standards and that the High Court has therefore correctly passed the order maintaining the termination of the appellant. In para 6 of the reply, the respondent has further stated that since the appellant has himself admitted his guilt in the writ petition filed by him, he cannot claim any violation of his right to natural justice and no prejudice has been caused to him. From these facts, it is clear that the appellant was terminated from service by way of punishment for allegations of misconduct. Hence, this is not a case of termination simpliciter but a dismissal for misconduct.

9. The Executive Committee of the SGPC has in exercise of its powers under the Act framed the Service Rules for the employees of the SGPC prescribing their service conditions which include their appointment and removal from service. Rule 4 of the Service Rules, which relates to dismissal from service, is quoted in *Mewa Singh and others* v. *Shiromani Gurdwara Prabandhak Committee* [(1999) 2 SCC 60] at page 64 and is reproduced hereinbelow:

> "4. Dismissal:- (a) The employee can be dismissed in accordance with the below-mentioned rule by this appointment authority, but appeal against the dismissal by the President shall lie to the Executive Committee within 30 days from the date of dismissal.
>
> (b) Any employee under the control of management of any department of the Gurdwara under the Shiromani Gurdwara Prabandhak Committee may prefer an appeal against any punishment of suspension, dismissal, fine, warning, etc. within 30 days from the date of issuance of the order:
>
> (i) any employee of the Shiromani committee can be dismissed or degraded for his bad character, dishonesty, drinking or becoming a 'patit' but before he is dismissed or degraded, the allegations in the form of a written charge-sheet shall be supplied to him along with the statement of allegations on the basis of which the charges are leveled against him. Representation against these charges shall be received from the employee within a reasonable time and in case he denies these charges or prays for holding an enquiry or the Executive Committee deems it fit, these charges shall be got enquired into in the presence of the employee and for each item of the charge-sheet which has not been admitted, evidence shall be recorded in his presence and the employee shall be entitled to cross-examine these witnesses. In case an employee wishes to produce his defence, the same shall be entertained, but in case if the Enquiry Committee feels that certain evidence is not necessary, it shall not be permitted to be produced for the reasons to be recorded in writing. Action shall be taken against the employees only when the charge is established.
>
> (ii) In case the employees wish to produce any record or document in their defence, he shall be permitted to do so and if he asks for the copies of these documents, the same shall be supplied to him without any objection and he shall be permitted to inspect the record free of cost.
>
> (iii) Every employee who has been dismissed or degraded or removed shall be supplied with the copies of the report of the Enquiry Committee and also the final decision of the Executive Committee free of cost.

(iv) (a) The record pertaining to the dismissal or degradation of an employee shall not be destroyed for three years, rather it shall be kept in safe custody.

(b) If an employee is reinstated on exoneration after his suspension, he shall be entitled to the arrears of salary of the suspension period."

10. We find on a reading of Rule 4 of the Service Rules that an employee of the SGPC can be dismissed from service for bad character only after the charges of misconduct are established in an inquiry conducted by an inquiry committee. Thus, though the Executive Committee of the SGPC may have the power under Section 69 of the Act and the Rules made thereunder to terminate the services of any employee of the SGPC, it can terminate the services of any employee for misconduct, only when such misconduct is established in an inquiry. It appears from the inquiry report dated 01.12.2007 of the Sub-Committee constituted by the Executive Committee of the SGPC that the Sub-Committee had accepted the explanation of the appellant that the photographs which were published in the local newspapers were of his wife. Thus, without a finding in an inquiry that the appellant was guilty of conduct which had defamed the SGPC, the High Court could not have taken a view in the impugned order that the appellant had brought a bad name to the SGPC and he had been rightly relieved from service.

11. The order dated 28.02.2008 issued by the Secretary of the SGPC terminating the services of the appellant is therefore not legally valid and is accordingly quashed. The impugned order of the High Court is set aside. The writ petition and this appeal are allowed. The appellant will be forthwith reinstated in service. On the facts and circumstances, particularly having regard to the fact that the appellant had offered to resign on 04.01.2008, the appellant will not be entitled to any backwages. There shall be no order as to costs.

D.G. Appeal allowed.

STATE OF U.P. & ORS.

v.

RAKESH KUMAR KESHARI & ANR.

(Civil Appeal No. 3935 of 2011)

MAY 04, 2011

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

CONSTITUTION OF INDIA, 1950:

Articles 14 and 226—Writ Petition challenging order of state Government by which it returned the panel list of candidates for appointment of Assistant District Government Counsel (Criminal) to District Magistrate and directed him to re-advertise the posts—High Court setting aside the order of the Government and directing the Government to make the appointments from the panel submitted by District Magistrate—Held: In the matter of engagement of A.D.G.C. (Criminal) a concept of public office does not come into play. The choice is that of the Government; and none can claim a right to be appointed because it is a position of great trust and confidence—The directions given by the High Court in the impugned Judgment run contrary to the well-settled principles of law and, therefore, cannot be upheld – The Judgment of the High Court is set aside.

JUDICIAL REVIEW:

Appointment/renewal of Assistant District Government Counsel (Criminal) – Judicial review of—Principles explained—Recommendation by District Magistrate and the District Judge to renew the term of two incumbents—Government asking the District Magistrate to advertise the posts—Posts advertised and two incumbents also applied—Two panel lists sent by the District Judge submitted by District Magistrate to Government—Government asking the District

Magistrate to re advertise the posts—In the writ petition filed by the two incumbents High Court setting aside the order of State Government and directing it to make the appointments from the lists sent by District Magistrate—Held: In view of provisions of para 7.06, 7.07 and 21.07 of the L.R. Manual and in view of poor performance of the incumbents the decision of the State Government not to accept the recommendation of the District Magistrate cannot be said to be arbitrary—The right of the State Government to engage, disengage and renew the term of its counsel and Law Officers in keeping with the need to best safeguard the public interest and monetary considerations, suitability of the incumbent and the interest of the Government as the client, will have to be upheld—L.R. Manual—Para 7.06, 7.07 and 21.07.

Respondents nos. 1 and 2 were appointed as Assistant District Government Counsel (Criminal) on contract basis. The District Judge, by communication dated 31.07.2002, recommended to the District Magistrate to extend their terms. Accordingly, the District Magistrate, by communication dated 31.07.2002, recommended to the State Government to extend the terms of the respondents. However, the posts were advertised and the respondents also applied for the said posts. Applications from 29 candidates were received. The District Judge sent to the District Magistrate two panels of candidates, each containing 5 names stating that the work, conduct and legal knowledge of the remaining candidates was satisfactory. Thereupon, the District Magistrate addressed a communication dated 01-05-2004 to the Special Secretary, Government of U.P., Lucknow informing him that he agreed with the view of the District Judge that the work, conduct and legal knowledge of all the candidates was satisfactory and he was forwarding necessary data of 29 candidates. The Special Secretary and Upper Legal Remembrancer, by order dated 7.9.2004

directed the District Magistrate to submit another panel/ list for appointment to the posts of ADGC (Criminal), but the District Magistrate declined to submit another list stating that a panel list had already been submitted. The Special Secretary and Upper Legal Remembrancer by letter dated 18.3.2005 returned the first panel list sent by the District Magistrate without assigning any reason and directed the District Magistrate to readvertise the posts of A.D.G.C. (Criminal). The District Magistrate re-advertised the said posts on 1.4.2005. The respondents filed a writ petition before the High Court seeking to quash the order dated 18.03.2005 as well as the advertisement dated 01.04.2005. It was further prayed that the appellants be directed to consider the recommendations of the District Magistrate made on 01.05.2004 with which a panel list was sent which included the names of the respondents for appointments to the posts of A.D.G.C. (Criminal); and that the appellants be directed not to interfere with the functioning of the respondents as A.D.G.C.

The High Court allowed the writ petition, set aside the order dated 7.9.2004 holding that unless the panel submitted by the District Magistrate in consultation with the District Judge was rejected by the State Authorities on some disclosed grounds, it was not open to the State Government to ask the District Magistrate to constitute the revised panel, and directed the District Magistrate to furnish, after consultation with the District Judge, better particulars in respect of only those ten candidates whose names were included in the two panels; and the Government was directed to make appointments therefrom in accordance with law. Aggrieved, the State Government filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. The limited scope of judicial review is (i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies (ii) A petition for judicial review would lie only on certain well- defined grounds (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself was perverse or illegal (iv) A mere wrong decision without anything more is not enough to attract the power of judicial review (v) The supervisory jurisdiction conferred on a Court is limited to see that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice and (vi) the Court shall not ordinarily interfere with a policy decision of the State. [para 13] [1075-A-D]

1.2. In view of the provisions of para 7.06, 7.07 and 21.07 of the L.R. Manual as well as in view of poor performance of the respondents as A.D.G.C. – the percentage of success in cases handled by respondent no. 1 being nil and the percentage of respondent no. 2 being only 17 – the Court is of the opinion that the right of the State Government to engage, disengage and renew the terms of its Counsel and Law Officers in keeping with the need to best safeguard the public interest and monetary considerations, suitability of the incumbent and the interest of the Government as the client, will have to be upheld. The decision of the State Government not to accept the recommendation made by the District Magistrate cannot be said to be arbitrary. [para 9, 11 and 15] [1071-C-H; 1071-A-H; 1072-C-H; 1073-A; 1077-A-C]

State of U.P. & Anr. Vs. Johri Mal **(2004) 4 SCC 714 – relied on.**

Special Reference No. 1 of 1998, **(1998) 7 SCC 739 – held inapplicable.**

2.1. In the matter of engagement of A.D.G.C. (Criminal) a concept of public office does not come into play. The choice is that of the Government; and none can claim a right to be appointed because it is a position of great trust and confidence. Article 14, however in a given case, may be attracted to a limited extent if the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law. [para 15] [1077-B-D]

2.2. It was not open to the respondents to file the writ petition under Article 226 of the Constitution for compelling the appellants to utilize their services as Advocates irrespective of choice of the State. It was for the State to select its own Counsel. In view of the poor performance of the respondents in handling/conducting criminal cases, this Court is of the opinion that the High Court committed a grave error in giving direction to the District Magistrate to forward better particulars of 10 candidates whose names were included in the two panels prepared pursuant to advertisement dated 16.01.2004 and in setting aside order dated 7.9.2004 of the Principal Secretary to the Chief Minister, U.P. calling upon the District Magistrate to send another panel/list for appointment to the two posts of A.D.G.C. (Criminal). The directions given by the High Court in the impugned Judgment run contrary to the well-settled principles of law and, therefore, cannot be upheld. The Judgment of the Division Bench of High Court is set aside. [para 17-19] [1078-E-H; 1079-A-B]

Case Law Reference:

(2004) 4 SCC 714	**relied on**	**para 12**
(1998) 7 SCC 739	**held inapplicable**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3935 of 2011.

From the Judgment & Order dated 11.7.2005 of the High Court of Allahabadin Writ Petition No. 28444 of 2005.

Rajeev K. Dubey, Kamlendra Mishra for the Appellants.

Rameshwar Prasad Goyal for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal by Special Leave is directed against Judgment dated 11.07.2005 rendered by the Division Bench of High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 28444 of 2005 by which order dated 07.09.2004 of the Principal Secretary to the Chief Minister, Uttar Pradesh directing the District Magistrate to submit another panel/list for appointment to the two posts of the Assistant District Government Counsel (Criminal) in Ghazipur District of the State of U.P. is set aside and District Magistrate, Ghazipur is directed to consult the District Judge and thereafter to furnish better particulars in respect of 10 persons whose names had been included in the two panels dated 01-05-2004 with the consultation of the District Judge, whereas the State Government is directed not to consider revised panel unless the panel submitted by the District Magistrate in consultation with the District Judge is rejected on some disclosed grounds.

3. Backgrounds facts sans unnecessary details are as under:-

The respondents nos. 1 and 2 were appointed on contract basis, to the vacant posts of Assistant District Government Counsel (Criminal) ("A.D.G.C." for short), in Ghazipur District of State of U.P. on 22.10.2001. As the terms of the appointment of the respondents were up to 10.10.2002, the District Judge, Ghazipur after being satisfied with the work and conduct of the respondents had recommended to the District Magistrate,

Ghazipur to get extended their terms by communication dated 31.07.2002. The District Magistrate, Ghazipur had recommended to the State Government to extend the terms of the respondents vide communication dated 31.07.2002. The Post of Assistant A.D.G.C. (Criminal) on which the respondents were working were advertised by the then District Magistrate, Ghazipur. In pursuance of the said advertisement, the respondents also applied for the post in question. Their applications were forwarded by the District Judge, Ghazipur to the then District Magistrate along with his Report. However, no action whatsoever was taken by the appellants either for renewing the terms of the respondents on the recommendation dated 31-07-2002 of the District Magistrate or for appointing them on the post of Assistant A.D.G.C. (Criminal) pursuant to the above mentioned advertisement. Again by advertisement dated 16.01.2004 the District Magistrate, Ghazipur had advertised the post of A.D.G.C. (Criminal) under the Judgeship of Ghazipur. The respondents had again applied for the post of A.D.G.C. (Criminal) along with other candidates. Pursuant to the advertisement dated 16-01-2004, applications from 29 candidates were received. From the record it is evident that two letters dated 07-02-2004 and 01-03-2004 were addressed by the District Magistrate to the District Judge, Ghazipur for regular appointment of two A.D.G.C. (Criminal). In response to those two letters, the District Judge, Ghazipur by communication dated 07-04-2004 informed the District Magistrate that after obtaining opinion of the other Judicial Officers two panels of candidates, each containing 5 names were prepared. By a letter dated 19-04-2004, the District Magistrate had suggested to the District Judge to change/alter the two panels but District Judge had vide communication dated 28-04-2004, informed the District Magistrate that, it would not be in the fitness of things to change or alter the two panels which were prepared after taking much pains. However, by the said communication, the District Judge also mentioned that the work, conduct and legal knowledge of the remaining

candidates were satisfactory. Thereupon, the District Magistrate, Ghazipur addressed a communication dated 01-05-2004 to the Special Secretary, Government of U.P., Lucknow informing him that the two posts of A.D.G.C.(Criminal) were advertised and 29 applications were received regarding which approval of the District Judge was obtained on 28-04-2004. It was further stated in the said letter that the District Judge, Ghazipur had mentioned that the work, conduct and legal knowledge of all the candidates were satisfactory and as he was agreeing with the view of the District Judge, Ghazipur expressed in respect of 29 candidates, he was forwarding necessary data of 29 candidates. By the letter dated 01-05-2004 the District Magistrate had requested the Special Secretary to take necessary action of making appointments to the two posts of A.D.G.C. (Criminal). Instead of acting upon recommendation made by the District Magistrate to make appointments of suitable candidates whose names were mentioned in the panel, the Special Secretary and Upper Legal Remembrancer, Government of Uttar Pradesh, Lucknow, by an order dated 07-09-2004 directed the District Magistrate to submit another panel/list for appointment to the posts of A.D.G.C. (Criminal). The District Magistrate by his letter dated 14.02.2005 declined to submit another list stating that a panel list had already been submitted by him. After the receipt of the letter dated 14.02.2005 the Special Secretary and Upper Legal Remembrancer returned the first panel list sent by the District Magistrate on 01-05-2004 without assigning any reason and directed the District Magistrate, Ghazipur to advertise the posts of A.D.G.C. (Criminal), afresh for appointment vide letter dated 18.03.2005. According to the respondents there was no occasion to advertise the posts of A.D.G.C. (Criminal) at all in view of the recommendation made by the District Magistrate on 01-05-2004.

4. Pursuant to the direction contained in the letter dated 18.03.2005, the District Magistrate again re-advertised the aforesaid posts vide advertisement dated 01.04.2005. The

respondents were of the view that action of the appellants in not considering the recommendations made by the District Magistrate on 01-05-2004, pursuant to the earlier advertisement dated 16.01.2004 and returning the same and further compelling the District Magistrate to re-advertise the posts was illegal, arbitrary and not in accordance with law. Therefore, they approached the High Court of Judicature at Allahabad by filing Civil Misc. Wirt Petition No. 28444 of 2005. In the writ petition, the prayer was to quash order date 18.03.2005 issued by the Special Secretary and Upper Legal Remembrancer Government of Uttar Pradesh, Lucknow by which the District Magistrate was directed to re-advertise the posts as well as advertisment dated 01.04.2005 issued by the District Magistrate, Ghazipur to fill up two posts of A.D.G.C. (Criminal). Another prayer which was sought was to direct the appellants to consider the recommendations of the District Magistrate made on 01.05.2004 with which a panel list was sent which included the names of the respondents for appointments to the posts of A.D.G.C. (Criminal). The respondents had also prayed to direct the appellants not to interfere with their functioning as A.D.G.C. (Criminal) under the Judgeship of District Ghazipur.

5. On service of notice the appellants had filed the reply and contested the claim made by the respondents.

6. The Division Bench which heard the Writ Petition had perused original records. On perusal of original records, the High Court found that two panels had been submitted for two posts and after going through the same, the state authorities had considered it proper to seek revised panel/proposal by order dated 07-09-2004 of the Principal Secretary to the Chief Minister. Having noticed this, the High Court took into consideration, the submission made by the learned counsel for the respondents that instead of sending the new names, it would be desirable that in respect of those ten candidates, whose names had been included in the aforesaid two panels, better

particulars were sent to the State Government and the State Government was asked to decide the two names after considering better particulars.

The abovestated submission found favour with the High Court and the High Court has set aside order dated 07-09-2004 holding that unless the panel submitted by the District Magistrate in consultation with the District Judge is rejected by the State Authorities on some disclosed grounds, it is not open to the State to ask the District Magistrate to constitute the revised panel. By the impugned Judgment, the High Court while allowing the Writ Petition filed by the respondents has directed the District Magistrate, Ghazipur after consultation with District Judge to furnish better particulars in respect of only those ten candidates whose names were included in the two panels whereas the Government is directed to make appointments therefrom in accordance with law, giving rise to the present appeal.

7. This Court has heard the learned Counsel for the parties at length and considered the documents forming part of the appeal.

8. The vital issue raised in the appeal relates to the right of the State Government to engage, disengage and renew the terms of its Counsel and Law Officers in keeping with the need to best safeguard the public interest, monetary consideration, suitability of the incumbent and the interest of the Government as the client. It may be mentioned that the entire gamut of this exercise is governed by L.R. Manual which is governing the conduct of legal affairs of the State of Uttar Pradesh since last several decades, in matters relating to the engagement, disengagement and renewal of Government Counsel and Law Officers for the State Government. The specific issue raised in the appeal involves the question as to whether a legally enforceable right to claim renewal of appointment to the post of A.D.G.C. (Criminal) is available to the respondents and what is the scope of judicial review in this regard. As observed

earlier the High Court has regarded the right to renewal of appointment as a legally enforceable one and therefore has chosen to interfere with the decision of the State Government seeking to fill the post by direct selection instead of renewing the terms of the respondents as was claimed by them in the Writ Petition.

9. Before considering the question mentioned above, it would be relevant to reproduce some of the provisions of the L.R.Manual relating to the appointment and renewal of the term of the Government Counsel. They are as under:-

"7.06 Appointment and renewal

(3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause.

7.07 Renewal of term

(1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the statement of work done by him in Form No. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the

term of a District Government Counsel is made for a specified period only, the reasons therefore shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel-

(i) The District Judge shall give an estimate of the quality of the counsel's work from the judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct.

(ii) The District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-appoint a Government Counsel, the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.

21.07. The appointment of Public Prosecutor or Additional Public Prosecutor shall be made for a period of three years but the State Government may terminate such appointment at any time without notice and without

assigning any reasons. The State Government may extend the period of appointment from time to time, and such extension of term shall not be treated as a new appointment."

10. At this stage it would be relevant to notice certain facts emerging from the reply affidavit filed by the appellants before the High Court. The reply inter alia mentions that though the District Magistrate had recommended renewal of tenure of the respondents, he had furnished information regarding the work done by the respondents in Form 4 perusal of which indicated that the respondent no.1 Mr. Rakesh Kumar Keshari had appeared in 25 cases in all and that in all those 25 cases the accused were acquitted, whereas the respondent no.2 Mr. Kripa Shankar Rai had appeared in 28 cases out of which in 26 cases the accused were acquitted. The reply stated that the percentage of success in cases handled by Mr. Keshari was Nil whereas in the case of Mr. Rai the percentage was only 17 and therefore when the matter of renewal of their tenure was considered by the Government, the Government had decided not to extend the terms of those Government Counsel whose success rate was very low. It was stated in the reply that on the basis of this decision the terms of the respondents were not extended and after expiry of their term they had ceased to work on their respective posts. It was further mentioned in the reply that on so many occasions the respondents had approached the Government for extension of their terms and many recommendations were forwarded to the Government but since the performance of the respondents was not found to be satisfactory, a decision was taken not to renew their terms and to issue advertisement for selection of better candidates.

11. In view of the provisions quoted from the L.R. Manual above as well as in view of poor performance of the respondents as A.D.G.C. (Criminal) in Ghazipur District, this Court is of the opinion that the right of the State Government to engage, disengage and renew the terms of its Counsel and

Law Officers in keeping with the need to best safeguard the public interest and monetary considerations, suitability of the incumbent and the interest of the Government as the client, will have to be upheld.

12. This question has been considered by a three Judge Bench of this Court in *State of U.P. & Anr. Vs. Johri Mal* (2004) 4 SCC 714, almost in similar circumstances. The respondent therein was appointed as D.G.C. (Criminal) at Meerut on 07.01.1993. His term was renewed on 12.03.1996 and he was again appointed in the same capacity on 17.09.1997 for one year. However, subsequent thereto, despite his request his term was not renewed and on 18.09.1998 he was relieved from the charge of the said post. The vacancy was, thereafter, advertised. The respondents had thereupon filed Writ Petition before the Allahabad High Court challenging order dated 18.09.1998 on the ground that as the District Magistrate and the District Judge had found his conduct and work satisfactory and had recommended for renewal of his term, the renewal ought to have been granted as a matter of course. The High Court had held that there was no good or cogent reason for rejecting the recommendation of the District Judge. Therefore, the High Court had directed the State Government to renew the respondent's term as D.G.C. (Criminal). After referring to the decision of nine-Judge Bench of this Court in Special Reference No. 1 of 1998, Re. (1998) 7 SCC 739, wherein it is ruled that the opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court, has to be formed by a collegium consisting of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court, the High Court had further opined that the District Judge should not make the recommendation alone but should constitute the 5 Member Collegium headed by himself for that purpose. Although the State had pointed out to the High Court that the respondent's case was not recommended by the District Judge or the District Magistrate, the High Court had directed that the question of

renewal of the respondent's term be considered afresh by the Collegium. The State had then filed appeals before this Court. The State Government had contended before this Court that the High Court had proceeded on wrong premise that the recommendation for renewal of the respondent's term as D.G.C. (Criminal) had been made by the District Magistrate and since the appointment of Public Prosecutor was governed by the provisions of the Criminal Procedure Code and renewal thereof by the U.P. Legal Remembrancer's Manual, the High Court committed a manifest error in directing the Constitution of Collegium. It was also argued by the State before this Court that the professional engagement of a lawyer could not be equated with the appointment in a civil post as there exists a relationship of client and a lawyer between the State and the Public Prosecutor. On behalf of the respondent it was submitted that the High Court had felt the need to constitute a Collegium as the action on the part of the State in the appointment and/or renewal of the term of D.G.C.s was found to be arbitrary. It was also contended that the Public Prosecutors were looking after the prosecution work and therefore the office held by them was public in nature.

13. Allowing the appeal filed by the State this Court has held that for a public law remedy enforceable under Article 226 of the Constituion, the actions of the authority need to fall in the realm of a public law - be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. This Court has further held that the question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. After holding that the power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent, this Court has, in terms, ruled that the power of judicial review is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the Constitution to the other organs of the State and has further cautioned that the Court shall not ordinarily

interfere with a policy decision of the State. The Court also held that the decisions and actions which do not have adjudicative disposition would not strictly fall for consideration before a judicial review court. According to this Court the limited scope of judicial review is (i) Courts, while exercising the power of judicial review, do not sit in an appeal over the decisions of administrative bodies (ii) A petition for judicial review would lie only on certain well- defined grounds (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself was perverse or illegal (iv) A mere wrong decision without anything more is not enough to attract the power of judicial review (v) The supervisory jurisdiction conferred on a Court is limited to seeing that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice and (vi) the Court shall not ordinarily interfere with a policy decision of the State.

14. After referring to the L.R. Manual this Court has specifically held that appointment of a Public Prosecutor or a District Counsel would be professional in nature. This Court in the said case, noticed the concession made on behalf of the respondent therein that the holder of the office of the Public Prosecutor does not hold a civil post and thereafter has held that by holding a post of District Counsel or the Public Prosecutor no status is conferred on the incumbent. This Court in the said case has further ruled that so long as in appointing a Counsel, the procedure laid down in L.R. Manual is followed and a reasonable or fair procedure is adopted, the Court would normally not interfere with the decision. What is emphasized by this Court is that the nature of the office held by a lawyer vis-à-vis, the State being in the nature of professional engagement, the Courts are normally chary to overturn any decision unless an exceptional case is made out. According to this Court the question as to whether the State is satisfied with the performance of its Counsel or not is primarily a matter between it and the Counsel and the extension of tenure of

Public Prosecutor or the District Counsel should not be compared with the right of renewal under a licence or permit granted under a statute. What is laid down as firm proposition of law is that an incumbent has no legally enforceable right as such and the action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia only on the ground that the same was arbitrary. It is also held that the Court normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of the Public Prosecutor or a District Counsel and the Jurisdiction of the Courts in a case of this nature would be to invoke the doctrine of "Wednesburry unreasonableness". This Court further held that L.R. Manual contains executive instructions and is not law within the meaning of Article 13. After emphasizing that a Public Prosecutor is not only required to show his professional competence but is also required to discharge certain administrative functions, it is held that the respondent therein had no effective control over A.D.G.C.s for taking steps and therefore action on the part of the State was not wholly without jurisdiction requiring interference by the High Court in exercise of its power of judicial review while setting aside the direction given by the High Court to constitute the five member Collegium headed by the District Judge to make recommendation for appointment to the post of D.G.C. (Criminal), this Court had to take pains to explain to all concerned that the appointment of District Government Counsel cannot be equated with the appointments of the High Court and Supreme Court Judges and a distinction must be made between professional engagement and a holder of high public office. This Court has explained that various doctrines and the provisions of the Constitution which impelled the Supreme Court in Special Reference Case, (1998) 7 SCC 739 to give meaning of 'Consultation' as 'Concurrence' and wherein the Chief Justice of India will have a primacy, cannot be held to be applicable in the matter of consultation between the District Magistrate and the District Judge for the purpose of preparation of a panel of the District Government Counsel.

15. Applying the principles of law laid down by this Court in the above quoted decision, this Court finds that the decision of the State Government not to accept the recommendation made by the District Magistrate cannot be said to be arbitrary. There is no manner of doubt that the A.D.G.C. (Criminal) are not only officers of the Court but also the representatives of the State. They represent the interest of the general public before a Court of law. The holders of the post have a public duty to perform. However, in the matter of engagement of A.D.G.C. (Criminal) a concept of public office does not come into play. The choice is that of the Government and none can claim a right to be appointed because it is a position of great trust and confidence. Article 14, however in a given case, may be attracted to a limited extent if the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law.

16. This position is again made clear in an unreported decision of this Court dated November 11, 2010 rendered in Civil Appeal No. 3785 of 2003. In the said case the State of U.P. by its order dated 03.06.2002 had rejected the request of the respondent Satyavrat Singh for renewal of the extension of his term as District Government Counsel (Criminal). The respondent had challenged the same in the Writ Petition. The Allahabad High Court had quashed the order 03.06.2002 refusing renewal of the term of the respondent as District Government Counsel (Criminal) and had directed the State Government to renew the term of the respondent as Government Counsel. While allowing the appeal filed by the State Government this Court has held as under:-

> "It is difficult to discern as to how the High Court has upheld the unstatable proposition advanced by the respondent for extension of his term as Government Counsel. We wish to say no more in this matter since the subject matter that arises for our consideration is squarely covered by the

> decision of this Court in State of U.P. and another Vs. Johri Mal 2004 (4) SCC 714. This Court took the view that in the matter of engagement of a District Government Counsel, a concept of public office does not come into play. The choice of a counsel is for the Government and none can claim a right to be a counsel. There is no right for appointment of a Government Counsel.
>
> The High Court has committed a grave error in renewing the appointment of the respondent as Government Counsel.
>
> Needless to state that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot compel the State to utilize the services of an advocate irrespective of its choice. It is for the State to select its own counsel.
>
> The impugned order of the High Court is set aside. The appeal is accordingly, allowed."

17. Thus it was not open to the respondents to file Writ Petition under Article 226 of the Constitution for compelling the appellants to utilize their services as Advocates irrespective of choice of the State. It was for the State to select its own Counsel. In view of the poor performance of the respondents in handling/conducting criminal cases, this Court is of the opinion that the High Court committed a grave error in giving direction to the District Magistrate to forward better particulars of 10 candidates whose names were included in the two panels prepared pursuant to advertisement dated 16.01.2004 and in setting aside order dated 07-09-2004 of the Principal Secretary to the Chief Minister, U.P. calling upon the District Magistrate to send another panel/list for appointment to the two posts of A.D.G.C. (Criminal).

18. The directions given by the High Court in the impugned

Judgment run contrary to the well-settled principles of law and therefore cannot be upheld. Thus, the appeal deserves to be allowed.

19. For the foregoing reasons the appeal succeeds. The Judgment dated 11.07.2005 rendered by the Division Bench of High Court of Allahabad in Civil Misc. Writ Petition No. 28444 of 2005 is set aside. The appeal accordingly stands disposed of. In peculiar facts of the case there shall be no orders as to cost.

R.P. Appeal allowed.

DUNLOP INDIA LIMITED

v.

A.P. RAHNA AND ANR.

(Civil Appeal No. 3911 of 2011)

MAY 4, 2011

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

Kerela Buildings (Lease and Rent Control) Act, 1965:

s.11(4)(v) – Eviction on the ground that tenant ceased to occupy the premises for six months without reasonable cause – Held: If the premises is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant had ceased to occupy the premises – The initial burden to show that the tenant has ceased to occupy the premises continuously for 6 months is always on the landlord – Once such evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of 6 months – In the instant case, the tenant did not produce any evidence to prove physical occupation of the premises or any business transaction – It also failed to produce any evidence to show that there was reasonable cause for non occupation of the suit premises – The tenant was declared a sick company – It had neither pleaded nor any evidence was produced to show that the financial stringency was due to the reasons beyond its control – Therefore, so called financial stringency cannot be construed as reasonable cause within the meaning of s.11(4)(v) – The finding of courts below that the landlord had succeeded in making out a case for eviction u/s.11(4)(v) and there was no reasonable cause for the tenant to have ceased to occupy the suit premises continuously for a period of six months is upheld – Rent and eviction.

s.11(4)(v) – Financial difficulty of the tenant whether reasonable cause for non-occupation of the tenanted premises – Held: If the suit premises is let out for industrial or commercial/business purpose and the same is not used for the said purpose continuously for a period of six months, the tenant cannot plead financial crunch as a ground to justify non-occupation of the building unless cogent evidence is produced by him to prove that he could not carry on the industrial or commercial/business activity due to fiscal reasons which were beyond his control – Legal possession of the building by the tenant by itself, is not sufficient for refusing an order of eviction unless the tenant proves that there was reasonable cause for his having ceased to occupy the building – Sick Industrial Companies (Special Provisions) Act, 1985 – s.22(1).

Applicability of s.22(1) of SICA, 1985 to eviction proceedings – Held: Prohibition contained in s.22(1) does not operate as a bar to the maintainability of a petition filed for eviction of tenant – Sick Industrial Companies (Special Provisions) Act, 1985 – s.22(1).

***Res judicata**: Eviction petitions on the ground that tenant ceased to occupy the premises continuously for six months from June 1998 without any reasonable cause – Rent Control Court decreed the suit – Appellate Court set aside the decree – High Court affirmed the same – Meanwhile another set of eviction petitions filed on the ground that tenant ceased to occupy the premises from September 2001 continuously for six months without any reasonable cause – Held: The second set of rent control petitions were not barred by res judicata because the period of non-occupation was different in the two petitions and even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes.*

Words and phrases:

Word "occupy" – Connotation of, in the context of s.11(4)(v) of the Kerela Buildings (Lease and Rent Control) Act, 1965.

Occupy and legal possession – Distinction between.

The respondents-landlord filed the eviction petitions against the appellant-tenant on the various grounds under the Kerela Buildings (Lease and Rent Control) Act, 1965 including the ground prescribed under Section 11(4)(v) of the Act alleging that the appellant had ceased to occupy the suit premises from June, 1998. The Rent Control Court held that the appellant had ceased to occupy the suit premises continuously for six months without reasonable cause and, therefore, allowed the petitions and directed the appellant to vacate the premises. The Appellate Court set aside the eviction order passed by the Rent Control Court. The High Court dismissed the revision petitions filed by the respondents.

During the pendency of the revisions before the High Court, the respondents filed fresh eviction petitions under Sections 11(2)(b), 11(3), 11(4)(i), 11(4)(v). This time, the respondents pleaded that the appellant had ceased to occupy the premises since September 2001 without any reasonable cause. The petitions were allowed by the Rent Control Court which was confirmed by the Appellate Court. The High Court, however, allowed the revision petitions filed by the appellant and remitted the matter to the Rent Control Court for fresh adjudication. After remand, the appellant filed written statement and claimed that the petitions filed by the respondents were liable to be dismissed as barred by *res judicata* because earlier eviction petitions filed by them on similar grounds were dismissed by the Appellate Court and the High Court. On merits, the plea of the appellant was that due to financial constraints, the appellant could not run its business

effectively and profitably and it was declared sick under the Sick Industrial Companies (Special Provisions) Act, 1985 by BIFR and appeal against the same was pending before the AAIFR. The Rent Control Court, Appellate Court and the High Court concurrently held that the appellant had ceased to occupy the premises since September 2001, and that the pendency of the proceedings under the SICA, 1985 could not be construed as a reasonable cause for non-occupation of the premises. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1.1. The word "occupy" used in Section 11(4)(v) of the Kerela Buildings (Lease and Rent Control) Act, 1965 is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the Court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/ commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was reasonable cause for his having ceased to occupy the building. [Para 17] [1107-D-F]

Paulina Joseph v. Idukki District Wholesale Co-operative ConsumerStores Ltd. **(2006) 1 KLT 603 – approved.**

1.2. The initial burden to show that the tenant has ceased to occupy the building continuously for 6 months

is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing the petition, the tenant was not occupying the building continuously for 6 months. Once such evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of 6 months. No strait-jacket formula can be evolved for determining as to what is the reasonable cause and each case is required to be decided keeping in view the nature of the lease, the purpose for which the premises are let out and the evidence of the parties. If the building, as defined in Section 2(1) is let out for industrial or commercial/business purpose and the same is not used for the said purpose continuously for a period of six months, the tenant cannot plead financial crunch as a ground to justify non occupation of the building unless cogent evidence is produced by him to prove that he could not carry on the industrial or commercial/business activity due to fiscal reasons which were beyond his control. If the tenant does not use the building for the purpose for which it is let out, he cannot be said to be occupying the building merely because he has put some furniture or articles or machinery under his lock and key. [Para 18] [1107-G-H; 1108-A-D]

Ram Dass v. Davinder **(2004) 3 SCC 684: 2004 (3) SCR 518 – relied on.**

Brown v. Brash **(1948) 1 All. E.R. 922 – referred to.**

*Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikarm***AIR 1973 Bom. 210;** *Ananthasubramania Iyer v. Sarada Amma* **1978 KLT 338;** *Mathai Antony v. Abraham* **(2004) 3 KLT 169;** *Kurian Thomas v. Sreedharan Menon* **(2004) 3 KLT 326;** *Simon & Ors. v. Rappai* **(2008) 2 KLJ 488 – approved.**

1.3. In this case, the Rent Control Court, after detailed scrutiny of the pleadings and the evidence of the parties recorded a finding that while the landowners (respondents) succeeded in proving that the tenant (appellant) had ceased to occupy the suit premises for a period exceeding six months, the latter could not prove that it was occupying the premises or that non occupation thereof was for a reasonable cause. The Rent Control Court took cognizance of the appellant's plea that it was carrying on business activities from the suit premises with reduced staff strength but discarded the same by observing that the relevant records like the attendance register, muster roll, wage register had not been produced and no evidence was adduced to prove payment of electricity bills and sale and purchase of goods. The High Court also analysed the pleadings and evidence of the parties and concurred with the findings recorded by the Rent Control Court. As against this, the appellant did not produce any evidence to prove physical occupation of the premises or any business transaction. It also failed to produce any evidence to show that there was reasonable cause for non occupation of the suit premises. [Para 28] [1119-D-G]

2. The arguments that the second set of rent control petitions should have been dismissed as barred by *res judicata* because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions was not tenable for the reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June, 1998, in the second set of petitions, the period of non occupation commenced from September, 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found

acceptable by the Appellate Authority because till 2.8.1999, the premises were found kept open and alive for operation. The Appellate Authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September, 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building on 1.10.2001 that the company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1.10.2001; that no activity had been done in the premises with effect from 1.10.2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the Appellate Authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause. [Para 29] [1119-H; 1120-A-G]

3.1. The appellant was declared a sick industrial company on 22.6.1998 and the Operating Agency was appointed under Section 17(3) of the 1985 Act to examine the viability of the company. After several hearings, the BIFR passed order directing the appellant to sort out all pending issues with secured creditors, Central/State Governments, TIIC, KSIIDC and TNSEP and submit a revised comprehensive and fully tied up rehabilitation scheme to the Operating Agency. For the next about five

years, no tangible step was shown to have taken by the appellant for revival of its business activities. In August and November, 2006, the appellant filed applications before the BIFR seeking its permission for issue of two crore equity shares of Rs. 10/- each fully paid up at par to the company's promoters and/or its associates on private placement basis against full consideration to be utilized for rehabilitation. Thereupon, the BIFR passed order dated 16.3.2007. Three appeals were filed against that order. The AAIFR dismissed the appeals and held that in view of the various orders, the net worth of the appellant has turned positive and it can no longer be treated as sick industrial company. Before the Rent Control Court, the appellant had neither pleaded nor any evidence was produced to show that financial stringency was due to the reasons beyond its control and on that account, the suit premises could not be used from September, 2001 onwards for the purpose specified in the lease deeds. Therefore, the so called financial stringency cannot be construed as reasonable cause within the meaning of Section 11(4)(v). [Para 32] [1124-E-G; 1125-A-E]

3.2. The order passed by the AAIFR has no bearing on the decision of the issues raised by the respondents in the context of Section 11(4)(v) of the 1965 Act because what was required to be considered by the Rent Control Court was whether as on the date of filing the petition the appellant had ceased to occupy the premises continuously for a period of six months without reasonable cause. The improvement in the financial health of the appellant after many years cannot impinge upon the concurrent finding recorded by the Rent Control Court and the Appellate Authority that the respondents had succeeded in making out a case for eviction under Section 11(4)(v) and that there was no reasonable cause

for the appellant to have ceased to occupy the suit premises continuously for a period of six months. [Para 33] [1125-E-H]

Shree Chamundi Mopeds Ltd. v. Church of South India TrustAssociation **(1992) 3 SCC 1: 1991 (1) Suppl SCR 46 ;** *GujaratSteel Tube Co. Ltd. v. Virchandbhai B. Shah* **(1999) 8 SCC 11: 1999(3) Suppl. SCR 624 ;** *Carona Ltd. v. Parvathy Swaminathan and Sons* **(2007) 8 SCC 559: 2007 (10) SCR 656 – referred to.**

Case Law Reference:

(2006) 1 KLT 603	**approved**	**Para 13, 26**
2004 (3) SCR 518	**relied on**	**Para 20**
(1948) 1 All. E.R. 922	**approved**	**Para 21**
AIR 1973 Bom. 210	**approved**	**Para 22**
(2004) 3 KLT 326	**approved**	**Para 25**
1978 KLT 338	**approved**	**Para 23**
(2004) 3 KLT 169	**approved**	**Para 24**
(2008) 2 KLJ 488	**referred to**	**Para 27**
1991 (1) Suppl. SCR 46	**referred to**	**Para 30**
1999 (3) Suppl. SCR 624	**referred to**	**Para 31**
2007 (10) SCR 656	**referred to**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3911 of 2011.

From the Judgment & Order dated 27.7.2009 of the High Court of Kerala at Ernakulam in RCR No. 134 of 2009.

WITH

C.A. 3912 of 2011.

R.F. Nariman, C. Mukund, Ashok Jain, Pankaj Jain, Bijoy Kumar Jain for the Appellant.

S. Gopakumaran Nair, C.A. Sundaran, N.M. Mohamed Ayub, K.N. Madhusoodhanan (for T.G. Narayanan Nair), Romy Chacko, Jasaswani Mishra for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals are directed against judgment dated 27.7.2009 of the Division Bench of the Kerala High Court whereby the revisions filed by the appellant against the order passed by District Judge, Ernakulam (hereinafter referred to as, "the Appellate Authority") under Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (for short, "the 1965 Act") were dismissed and the direction given by IIIrd Additional Munsiff and Rent Control Court, Ernakulam (for short, "the Rent Control Court") for vacating the suit premises was confirmed.

3. A.B. Abdul Khader (predecessor of the respondents) leased out the suit premises comprised in Survey Nos.341/1 and 2 situated at Ernakulam village to the appellant for its godown and office for a period of 10 years with effect from 1.12.1966. After 2 years and about 2 months, the parties executed two lease deeds dated 3.2.1969, which were duly registered. For the sake of reference, the relevant portions of the lease deed executed in respect of Survey No.341/1 measuring 83 cents are extracted below:

"THIS DEED OF LEASE made on the Third day of February One Thousand Nine Hundred and Sixty Nine corresponding to the Fourteenth day of Magha One

thousand Eight Hundred and Ninety One of the Sakha Era BETWEEN A.B. ABDUL KHADER son of Alumkaparambli Bava, Indian National, Businessman, aged Forty five years, residing at Alumkaparampil, Chittor Road, Ernakulam in the City of Cochin in Ernakulam District in Kerala State (hereinafter called "the Lessor" which expression shall unless excluded by or repugnant to the context include his heirs, executors, administrators and assigns) of the One Part AND DUNLOP INDIA LIMITED, formerly THE DUNLOP RUBBER COMPANY (INDIA) LIMITED, a Company duly incorporated in India having its Registered office at Dunlop House, 57-B Free School Street, Calcutta, herein represented by its duly constituted attorney G.S. Krishna son of Govindarajapuram Subramaniam, Indian National, Business, Executive, aged Forty four years, residing at 26, Dr. Hedge Road, Nangumbakkam in the City of Madras (hereinafter called "the Lessee" which expression shall unless excluded by or repugnant to the context include its successors and assigns) of the Other Part.

WITNESSES as follows:-

1. In consideration of the rent hereinafter reserved and of the covenants on the part of the Lessee hereinafter stipulated, the Lessor hereby demises unto the Lessee all those pieces of parcels of land situate in Ernakulam Town comprised in Survey Number 341 Sub Division 1 (part) admeasuring 83 cents equivalent to 33 acres 58.844 sq. meteres together with the buildings and structures erected thereon more particularly described in the Schedule hereunder written together with all the fixtures, fittings, pathways, passages, rights and privileges appurtenant thereto TO HOLD the same unto the Lessee for a term of ten years from 1st December 1966 paying therefore during the continuance of the lease a monthly rent of Rs.4,000/- (Rupees Four Thousand) only on the days and in the

manner and subject as hereunder provided.

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) The Lessee shall permit the Lessor or his authorised agents with or without workmen during business hours to enter upon the demised premises for the purpose of viewing the condition thereof and from time to time for the purpose of effecting the necessary repairs and maintenance as hereunder provided.

(d) The Lessee shall deliver up the said demised premises on termination of the lease in as good order and condition as they were in at the time when the lease hereby created commenced subject to determination due to normal wear and tear and defects, if any, for want of proper repair and maintenance which is the liability of the lessor as hereinafter mentioned.

2. The Lessor hereby covenants with the Lessee as follows:-

(a) Subject to the due observance and performance of the terms, covenants and conditions by the Lessee herein on their part to be observed and performed the lessee shall have the right during the continuance of the lease to use the premises without interruption by the Lessor or any person claiming under or in trust for him.

(b) xxx xxx xxx

(c) xxx xxx xxx

3. Provided always and it is mutually agreed by and between the parties hereto as follows:

(a) Notwithstanding the period of lease herein before

provided the Lessee shall have the option to terminate the lease by giving three months notice in writing to the Lessor at any time during the continuance of this Lease.

(b) The lessees shall have the option to renew the lease for a further period of ten years at the same rent and other terms, covenants and conditions as existed during the initial period of ten years save and except the Clause for renewal provided the Lessee gives notice in writing to the Lessor three months before the expiry of the initial period of ten years of the Lessee's intention to exercise the option.

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) xxx xxx xxx

(g) The Lessee shall be at liberty at its own costs to construct at any time and at any place of the demised premises counters, strong rooms and safe deposit vaults and to fix, erect, bring in or upon or fasten to the demised premises and to alter and rearrange from time to time, furniture fixtures and fittings which the Lessee may require for its business such as partition screens, counters, platforms, shelves, cases, cupboards, heavy safes, cabinets, lockers, strong room doors, vault doors, cabinets of any size and weight, steel collapsible gates, ventilators, grills, shutters, sunblinds, gas and electric fittings, stoves, light, fans, air conditioners, sinks and other equipment, fittings, articles and things all of which the Lessee shall be at liberty to remove at any time at its pleasure, before the expiration or sooner determination of the tenancy without objection on the part of the Lessor and the Lessee shall make good the damage, if any, which may be thereby

caused to the demised premises."

4. The appellant exercised the option for extension of the term of lease but did not vacate the premises at the end of extended period. After the death of A.B. Abdul Khader, respondent No. 1 became owner of the property comprised in Survey No. 341/1 while respondent No. 2 became owner of the property comprised in Survey No.341/2. They filed Rent Control Petition Nos.45 and 146 of 1999 for eviction of the appellant on the grounds specified in Section 11(2)(b), 11(3), 11(4)(i) and 11(4)(v) of the 1965 Act. By an order dated 11.4.2001, the Rent Control Court allowed both the petitions and directed the appellant to vacate the premises. The appeals preferred against that order were allowed by the Appellate Authority and the order of eviction was set aside. While reversing the finding recorded by the Rent Control Court that the appellant had ceased to occupy the suit premises continuously for six months without reasonable cause, the Appellate Authority observed as under:

> "I find merit in the submission of the learned counsel for the appellant that suspension of business activity on account of extreme financial crunch, at the same time keeping the unit open and alive for operation cannot amount to cessation of occupation without valid reasons. Ext. C1(a) notice conveys eloquently that there was no intention to abandon possession and the tenant did continue occupation. Business activity was not being run on account of peculiar circumstances. Till 2.8.1999 the premises were kept open and alive for operation. It is important to note that the employees of the tenant were not directed not to come to the establishment on any day prior to 2.8.1999. I am of the opinion that Ext.C1(a) read as a whole can never convey to a prudent mind that there was cessation of occupation. Physical inability to carry on business activity on account of financial difficulties and the closing down of the production in the factories cannot ipso

> fact, in the facts and circumstances of the case, lead to the conclusion that the management of the tenant (which had kept the unit open and alive for operation till 2.8.1999) had ceased to occupy the building till 2.8.1999. Cessation to occupy had a physical ingredient as also a mental ingredient. Reading of Ext. C1(a) as a whole, I am unable to agree that there was such objectionable cessation of occupation. Though it indicates that there was no business activity and the establishment remained defunct and idle, there was still the intention to occupy and the hope that it will be possible to resume even business activity. The inevitable conclusion flowing from Ext.C1(a) is that the employees were continuing to attend the offices in the petition schedule building till 2.8.1999. At any rate, it would be impossible to come to a conclusion that there was cessation of occupation prior to 2.8.1999 though I would readily agree that there was no business activity in the petition schedule building for some period of time even prior to 2.8.1999. I am in these circumstances of the opinion that Ext. C1(a), the trump card on which the landlords place reliance cannot deliver any crucial advantage or assistance to the landlords in their attempt to establish cessation of occupation."

The Appellate Authority also referred to the Commissioner's report but refused to rely upon the same by recording the following reasons:

> "The inspection by the commissioner was on 10th September and monsoon season had preceded such inspection. Some wild growth as indicated in Ext. C1 (assuming that Ext. C1 can be legally taken cognizance of), is not, according to me, sufficient to establish cessation of occupation. In the light of the very specific statement in Ext. C1(a) that inspite of the extreme financial crunch, the management had till 2.8.1999 kept the unit open and alive for operation and that Ext.C1(a) notice was being issued

on 2.8.1999 as management was convinced that there is no prospect of running the company immediately must definitely convey to the court that there was no cessation of occupation prior to 2.8.1999 at any rate. The wild growth perceived by the commissioner and reported in Ext. C1 cannot in these circumstances tilt the scales in favour of the landlords. I am in these circumstances of the opinion that the learned Rent Control Court erred in coming to the conclusion that the landlords have succeeded in proving cessation of occupation for a period of 6 months immediately prior to the filing of the petitions without reasonable cause. I am unable to concur with the conclusion of the learned Rent Control Court on this aspect. I am in these circumstances satisfied that the challenge raised on this ground also deserves to be upheld."

5. Civil Revision Petition Nos.579 and 580 of 2002 filed by the respondents were dismissed by the Division Bench of the High Court vide judgement dated 18.12.2006. The High Court agreed with the Appellate Authority that the evidence produced by the landlord was not sufficient for recording a finding that the tenant had ceased to occupy the premises for a continuous period of six months without reasonable cause.

6. During the pendency of the revisions before the High Court, the respondents filed fresh rent control petitions which came to be registered as RCP Nos.109 of 2002 and 38 of 2003 for eviction of the appellant under Section 11(2)(b), 11(3), 11(4)(i) and 11(4)(v). This time, the respondents pleaded that the appellant herein has ceased to occupy the premises since September, 2001 without any reasonable cause. Both the petitions were allowed by the Rent Control Court vide order dated 11.2.2004, which was confirmed by the Appellate Authority by dismissing the appeals preferred by the appellant. However, Civil Revision Petition No.368 of 2005 filed by the appellant was allowed by the High Court vide order dated

18.12.2006 and the matter was remitted to the Rent Control Court for fresh adjudication of the rent control petitions after giving opportunity to the appellant to file counter statement and adduce evidence.

7. After remand, the appellant filed written statement and claimed that the petitions filed by the respondents were liable to be dismissed as barred by *res judicata* because Rent Control Petition Nos. 45 and 146 of 1999 filed by them on similar grounds were dismissed by the Appellate Authority and the High Court. On merits, it was pleaded that due to financial constraints, the appellant could not run its business effectively and profitably and it was declared sick under the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, "the 1985 Act") by the Board for Industrial and Financial Reconstruction (BIFR) in Case No.14 of 1998 and the appeal filed against the order of BIFR was pending before Appellate Authority for Industrial and Financial Reconstruction (AAIFR). It was also averred that due to financial crisis, the staff strength was reduced to bare minimum but there was no cessation of occupation of the suit premises.

8. On the pleadings of the parties, the Rent Control Court framed the following issues:

"(1) Whether the petition is barred by resjudicata and also u/s.15 of the Act?

(2) Whether RW1 is having any authority to represent the respondent?

(3) Whether there is a commercial lease between the parties as alleged?

(4) Whether the Petitioners are entitled for an order of eviction u/s.11(2)(b) of the Act?

(5) Whether the Respondent ceased to occupy the

petition schedule buildings continuously for six months?

(6) Whether there is any reasonable cause for the cessation of occupation if any?

(7) Whether the Petitioners are entitled for an order of eviction u/s 11(4)(v) of the Act?

(8) Relief and costs?"

9. After considering the pleadings and evidence of the parties, the Rent Control Court held that the petitions filed by the respondents were not barred by *res judicata* and Section 15 of the 1965 Act cannot be invoked for denying relief to them because two sets of rent control petitions were based on different causes. However, the respondents' plea that the appellant was in arrears of rent was rejected on the ground that no evidence had been produced by them to prove the same. The Rent Control Court then considered the question whether the appellant had ceased to occupy the suit premises since September, 2001 without reasonable cause and answered the same in affirmative. The Rent Control Court referred to the evidence produced by the parties including the reports Exhibits C1 and C2 produced by Advocate Commissioners PW2 and PW3 and recorded the following observations:

"(i) From Ext.C1 report filed by PW2 it can be seen that the two entrance gates on the northern side of the petition schedule property in O.S. 109/02 is found rusted and closed. The boundary fencing on the northern side is found damaged.

(ii) The land surrounding the side petition schedule building is fully covered with grass and shrubs and PW2 the commission even found it difficult to walk through the premises. The sheds in the said property were seen in dilapidated condition and the commissioner could not go

near to the shed as it was covered with tall bushes and shrubs.

(iii) The eastern wall of the petition scheduled building in RCP 109/02 had to rusted shutters which was seen closed.

(iv) It is also reported that the commissioner could not enter into the buildings as it was closed. On looking through the glass window PW2 could see some furniture inside the building which are full of dust, damaged and unfit for use. Though the service line of electric connection to the petition schedule building was there commissioner verified and found that the electric connection being disconnected.

(v) PW3 is the advocate commissioner who had inspected the petition schedule building RCP No.38/03 and filed Ext.C2 report it can be seen that the petition schedule building in RCP 38/2003 was lying closed at the time of both the inspections made by PW3. The commissioner has also noted the notice fixed in the front shutter of the petition schedule building by Sri A.K. Agarwal Company Secretary on 1.10.2001 stating that the Respondent company is a sick industrial company under the Sick Industrial Companies (Special Provisions) Act and operations at Kochi has been suspended w.e.f. 1.10.2001 onwards. It is also mentioned in ex.C2 that the front shutters and the shutters provided at the eastern side are full of dust and the same were rusted due to non use, and the entire compound around the petition schedule building are full of bush and the bushes are seen at some places grown on to the petition schedule building and some other places grown to the roof of petition schedule building.

(vi) The commissioner has also noted five calendars for year 2001 seen inside the rooms in the petition schedule building. PW3 also has noted that the switchboard provided at the eastern and western wall of the petition schedule building were not having electricity supply. It is

also noted that the four iron gates provided for the compound were covered with dust and rust due to non use.

(vii) Even though the condition of the petition schedule buildings happened to be as noted by PW2 and PW3 to a limited extent to non-maintenance and repairs it cannot be found that it happened only due to non-maintenance and repairs.

(viii) The calendars for the year 2001 noted by PW3 inside the petition schedule building in RCP No.38/03 and the notice dated 01.10.2001 affixed at the front shutter of the same building clearly shows that both the petition schedule buildings were not been opening from 1.10.2001 towards till the inspection date. Since the petition schedule buildings were not opened since September, 2001 the inability of the Petitioner to carry out the repairs and maintenance also is to be looked into."

(emphasis supplied)

10. The Rent Control Court then considered the plea of the appellant that on account of pendency of the proceedings under the 1985 Act, the staff strength was reduced to bare minimum but discarded the same on the ground that staff attendance register, muster roll, wages register maintained in the office as also the document showing purchase and sale of the goods, payment of electricity charges etc. had not been produced showing payment of the dues since September, 2001 and observed:

"The specific case of RW1 is that due to the proceedings under the provisions of Sick Industrial Companies (Special Provisions) Act, the staff strength of the Respondent company was reduced to bare minimum at the petition schedule buildings. According to RW1 even though there were such proceedings respondent was functioning in the schedule buildings with minimum staff. *During cross examination RW1 admitted that the staff attendance register, muster roll wages register etc are maintaining in the petition schedule buildings. She also admitted that they are maintaining stock register in the petition schedule buildings. But none of there documents are produced before court. According to RW1 she omitted to produce these documents.* Had these documents for the relevant period come in illegible/- the details regarding the strength of the staff and the business being carried on is the petition schedule buildings would have been revealed. *She also admitted that documents are maintained regarding the purchase and sale done in the petition schedule buildings but those documents are also not produced before court. ……. The specific case of PW1 is that the electric connection was disconnected more than 1½ years before. But according to RW1 the electricity connection was disconnected only two months prior to her examination before court.* If there was actually electric supply to the petition schedule buildings and the Respondents had paid the electricity charge definitely RW1 could have produced the electricity bill pertaining to the petition schedule buildings. *Though RW1 stated that she can produce the electricity bill from 2001 September onwards pertaining to the petition schedule buildings neither of them has been produced till now. From all these it can be seen that the Respondents were not occupying the petition schedule buildings from 2001 September onwards, and they had ceased to occupy the petition schedule buildings continuously for more than six months.*

According to RW1 respondent could not conduct the business in full swing in the petition schedule building due to BIFR and AAIFR proceedings. Ext.B9 is the order of AAIFR, New Delhi in appeal No.1/02 wherein the Respondent is the appellant. On perusal of Ext.B9 it can be seen that several reliefs and concessions were given

to the Respondent company by the AAIFR. But as per ext.B9 no restriction is seen imposed on the work of respondent company all together or particularly in the schedule buildings at Cochin. …..... *As already observed respondents could not produce any of the mandatory prescribed registers such as stock register, day book, muster roll, attendance register wages register etc. to show that any business were being carried out in the petition schedule buildings even with minimum staff. Even it was specifically put to RW1 that due to the proceedings before BIFR and AAIFR, whether the board of directors was resolved to reduce the staff strength she answered that the staff were told not to come and they have agreed for the same. It is something unbelievable. RW1 has produced Ext.B13 series to B25 series invoices to show that they are conducting business to the scheduled property. But on going through ext.B13 series to ext.B25 series it cannot be found that those transactions were made through Kaloor Office where in the petition schedule building situates as these invoices were given to the Chennai office of respondent.* The learned counsel for the Petitioner has pointed out that in ext.B11 series and B12 series after the Chennai address of the Respondent company it is seen typed in another machine in Ext.B11 series and written in another handwriting in Ext.B12 series, "through Kaloor Office Cochin". The same and address of the purchasing dealer in all these documents are the Chennai address of the Respondent company. Ext.B11 series to ext.B25 series cannot be relied on to show that business was being conducted in scheduled buildings. *It is also to be noted that ExtB11 series to B25 series are of the year 2006 and these do not in any help the Respondents to show that any business was being conducted in the petition schedule building in between September, 2001 and filing of these RCPs. It is also admitted by RW1 that copy of invoice are to be given at the check post. But ext.B11 to B25 series produced are having 4 to 6 copies of each invoices. If while passing the sales tax check post copy of invoices were given as stated there would not have been such number of copies at in ext. B11 to B25 series. Therefore the genuineness of these documents are also doubtful.* On a perusal of the entire evidence it can be seen that the Respondent has failed to prove that the cessation of occupation of petition schedule buildings for the continuous period of more than six months were due to the restrictions imposed by BIFR and AAIFR. Hence these points are found in favour of the Petitioners."

(emphasis supplied)

11. On the basis of above analysis of the pleadings and evidence, the Rent Control Court concluded that the appellant had ceased to occupy the suit premises since September, 2001 without any reasonable cause and, accordingly, directed it to vacate the premises.

12. The Appellate Authority independently examined the pleadings and evidence of the parties and reiterated the finding recorded by the Rent Control Court that the appellant had ceased to occupy the premises since September, 2001 and that the pendency of the proceedings under the 1985 Act cannot be construed as a reasonable cause for non occupation of the premises.

13. The Division Bench of the High Court, though not required in law to do so, minutely scrutinized the evidence produced by the parties and concurred with the Rent Control Court and the Appellate Authority that the respondents had succeeded in making out a case for eviction of the appellant under Section 11(4)(v). The High Court referred to the expression "reasonable cause" used in Section 11(4)(v), the judgment in *Paulina Joseph v. Idukki District Wholesale Co-operative Consumer Stores Ltd.* (2006) 1 KLT 603 and observed:

"Interpreting the scope and meaning of "reasonable cause" provided in section 11(4)(v) of the Act a Division Bench of this Court in Paulina Joseph vs Idukki District Wholesale Co-operative Consumer Stores Ltd., (2006 (1) KLT 603) held that if there is a plausible explanation to the question why the business was not run in the premises continuously, it may be a relevant fact in considering whether there was reasonable cause for cessation of occupation. But it is held that existence of such reasonable cause depends on the facts and circumstances of each cases. It is further held that the occupation of the building depends on the purpose for which it is let and the purpose for which it is used. The nature of the business and the requirement of the physical presence or otherwise of the tenant in the building for the conduct of the business is a relevant fact. But in this case on considering the facts the requirement of physical presence is highly essential to observe that the tenant company is continuing in occupation, because the tenanted premises is occupied as their office and godown. The burden to prove that there is reasonable cause for non occupation is solely on the tenant when it is proved that there is cessation of physical occupation.

The question to be examined is whether on the facts of this case the tenant was successful in proving any such reasonable cause. The rent control petitions were filed during the years 2002 and 2003. It has come out in evidence that the tenant ceased to occupy the premises since last so many years from the date of filing of the rent control petition itself. Further it has come out in evidence that since the lapse of more than six years from filing of rent control petitions, still as on today, it is conceded that the company could not resume business of physical occupation at the tenanted premises. Therefore we have no hesitation to hold that the tenant was not successful in establishing any genuine intention or hope of reviving the physical occupation not it was successful it establishing

any reasonable cause for the cessation of occupation."

14. Shri R.F. Nariman, learned senior counsel for the appellant argued that the impugned judgment and the orders passed by the Rent Control Court and the Appellate Authority are liable to be set aside because the Rent Control Petition Nos. 109 of 2002 and 38 of 2003 were barred by *res judicata.* Learned senior counsel submitted that the issue whether the appellant had ceased to occupy the building continuously for six months without reasonable cause had already been decided against the respondents in the proceedings arising out of Rent Control Petition Nos.45 and 146 of 1999 and, as such, the second set of petitions filed on the same cause were not maintainable. He further submitted that even though two sets of rent control petitions related to different periods, the evidence produced by the respondents to prove their case with reference to Section 11(4)(v) was substantially the same and the Rent Control Court committed serious error by passing an order of eviction ignoring the contrary finding recorded by the Appellate Authority and the High Court in the earlier round of litigation and this error was repeated by the Appellate Authority and the High Court while dismissing the appeals and revisions filed by the appellant. Shri Nariman argued that the finding recorded by the Rent Control Court and the Appellate Authority that the appellant had ceased to occupy the suit premises continuously for six months without reasonable cause was based on misreading of evidence and the High Court committed serious error by approving the same ignoring the finding recorded in the earlier round of litigation, which had become final. Learned senior counsel emphasized that due to pendency of proceedings under the 1985 Act, the appellant could not effectively use the suit premises, but that did not justify a conclusion that it had ceased to occupy the premises. He then submitted that the pendency of case under the 1985 Act was, by itself, sufficient for recording a finding that there was reasonable cause for the appellant to have ceased to occupy the suit premises. Shri Nariman invited our attention to order dated 3.3.2008 passed

by AAIFR vide which the appeals filed against the order of the BIFR were dismissed and argued that the impugned order may be set aside because the appellant's financial condition has considerably improved.

15. S/Shri S. Gopakumaran Nair and C.A. Sundaram, learned senior counsels for the respondents argued that the concurrent findings recorded by the Rent Control Court and the Appellate Authority on issue Nos.5, 6 and 7, which have been approved by the High Court, do not suffer from any legal infirmity warranting interference by this Court. Learned senior counsel candidly admitted that the order of eviction passed in the earlier round of litigation was reversed by the Appellate Authority and the revisions filed by the respondents were dismissed by the High Court, but argued that the findings recorded in those proceedings could not be treated as *res judicata* qua the petitions filed in 2002/2003 because the same were based on a different cause. Learned counsel pointed out that in the first round, the respondents had sought eviction under Section 11(4)(v) by alleging that the appellant had ceased to occupy the suit premises from June, 1998 and in the second set of petitions, eviction was sought on the ground that the appellant had ceased to occupy the premises from September, 2001. Learned counsel pointed out that while the respondents had succeeded in proving that the suit premises were vacant since September, 2001, the appellant could not produce any tangible evidence to prove occupation of the premises or that there was reasonable cause for its having ceased to occupy the suit premises. They emphasized that the Rent Control Court and the Appellate Authority had rightly discarded the evidence of RW1 on the issue of continued occupation of the suit premises because she failed to produce the staff attendance register, muster rolls, wage registers, electricity bills and payment thereof as also documents showing purchase and sale of the goods from the suit premises.

16. We have considered the respective submissions.

Section 11(1) contains a non obstante clause and declares that notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of the Act. The first proviso to Section 11(1) carves out an exception and lays down that nothing contained in this section shall apply to a tenant whose landlord is the State Government or the Central Government or other public authority notified under this Act. Second proviso to Section 11(1) carves out another exception and lays down where the tenant denies the title of the landlord or claims right of permanent tenancy, the Rent Control Court shall decide whether the denial or claim is bonafide and if it records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and such court can pass a decree for eviction on any of the grounds enumerated in Section 11 even though the Court may find that such denial does not involve forfeiture of the lease or that the claim is unfounded. Section 11(4)(v) of the Act which has bearing on this case reads as under:

> "(1) to (3) xxx xxx xxx
>
> (4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building,-
>
> (i) to (iv) xxx xxx xxx
>
> (v) if the tenant ceases to occupy the building continuously for six months without reasonable cause."

The definition of the term "building" contained in Section 2(1) is as under:

> "(1). "building" means any building or hut or part of a building or hut, let or to be let separately for residential or non residential purpose and includes–
>
> (a) the garden grounds well's tanks and

structures if any, appurtenant to such building, hut, or part of such building or hut, and let or to be let along with such building or hut;

(b) any furniture supplied by the landlord for use in such building or hut or part of a building or hut

(c) any fittings or machinery belonging to the landlord, affixed to or installed in such building or part of such building, and intended to be used by the tenant for or in connection with the purpose for which such building or part of such building let or to be let,

but does not include a room in a hotel or boarding house…."

17. The word "occupy" used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the Court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was reasonable cause for his having ceased to occupy the building.

18. The initial burden to show that the tenant has ceased to occupy the building continuously for 6 months is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing the petition, the tenant was not occupying the building continuously for 6 months. Once such

evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of 6 months. No strait-jacket formula can be evolved for determining as to what is the reasonable cause and each case is required to be decided keeping in view the nature of the lease, the purpose for which the premises are let out and the evidence of the parties. If the building, as defined in Section 2(1), is let out for industrial or commercial/business purpose and the same is not used for the said purpose continuously for a period of six months, the tenant cannot plead financial crunch as a ground to justify non occupation of the building unless cogent evidence is produced by him to prove that he could not carry on the industrial or commercial/business activity due to fiscal reasons which were beyond his control. If the tenant does not use the building for the purpose for which it is let out, he cannot be said to be occupying the building merely because he has put some furniture or articles or machinery under his lock and key.

19. At this stage, we may notice some precedents which throw some light on the true interpretation of the expressions "occupy" and "reasonable cause" used in Section 11(4)(v) of the 1965 Act.

20. In *Ram Dass v. Davinder* (2004) 3 SCC 684, this Court interpreted Section 13(2)(v) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 in terms of which an order of eviction could be passed against the tenant if he is shown to have ceased to occupy the premises continuously for a period of 4 months without reasonable cause. Respondent Davinder was tenant in the shop belonging to appellant-Ram Dass. The appellant filed a petition for eviction of the respondent on the ground that he had ceased to occupy the shop for a continuous period of 4 months without any reasonable cause. The Rent Controller analysed the pleadings of the parties and evidence produced by them and held that the appellant has been able to prove that the respondent had

ceased to occupy the premises for a continuous period of more than 4 months and there was no reasonable cause for doing so. The plea of the respondent that he had kept the shop closed intermittently due to sickness was not accepted by the Rent Controller. The Appellate Authority, on an independent evaluation of the evidence, confirmed the finding of the Rent Controller. The High Court allowed the revision filed by the respondent and set aside the orders of the Rent Controller and the Appellate Authority. This Court reversed the order of the High Court and restored the one passed by the Rent Controller. The Court highlighted the distinction between the terms "possession" and "occupy" in the context of Rent Control Legislation in the following words:

> "The terms "possession" and "occupy" are in common parlance used interchangeably. However, in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession of by being present in it. The rent control legislations are the outcome of paucity of accommodations. Most of the rent control legislations, in force in different States, expect the tenant to occupy the tenancy premises. If he himself ceases to occupy and parts with possession in favour of someone else, it provides a ground for eviction. Similarly, some legislations provide it as a ground of eviction if the tenant has just ceased to occupy the tenancy premises though he may have continued to retain possession thereof. The scheme of the Haryana Act is also to insist on the tenant remaining in occupation of the premises. Consistently with what has been mutually agreed upon, the tenant is expected to make useful use of the property and subject the tenancy premises to any permissible and useful activity by actually being there. To the landlord's plea of the tenant having ceased to occupy the premises it is no answer that the tenant has a right to possess the tenancy premises and he has continued in juridical possession thereof. The Act protects the tenants from eviction and enacts specifically

> the grounds on the availability whereof the tenant may be directed to be evicted. It is for the landlord to make out a ground for eviction. The burden of proof lies on him. However, the onus keeps shifting. Once the landlord has been able to show that the tenancy premises were not being used for the purpose for which they were let out and the tenant has discontinued such activities in the tenancy premises as would have required the tenant's actually being in the premises, the ground for eviction is made out. The availability of a reasonable cause for ceasing to occupy the premises would obviously be within the knowledge and, at times, within the exclusive knowledge of the tenant. *Once the premises have been shown by evidence to be not in occupation of the tenant, the pleading of the landlord that such non-user is without reasonable cause has the effect of putting the tenant on notice to plead and prove the availability of reasonable cause for ceasing to occupy the tenancy premises."*
>
> (emphasis supplied)

21. In *Brown v. Brash* (1948) 1 All. E.R. 922, the Court of appeal was called upon to examine correctness of an order passed by the County Court Judge, who upheld the tenant's claim to possession of the premises and awarded damages against the appellant for trespass. The facts of that case were that the premises were let out to the tenant in 1941 on a quarterly rent of 26 pounds. In 1945, the tenant was convicted and sentenced to serve 2 years' imprisonment for stealing 6 tones of tea. While going to jail, the tenant left physical occupation of the premises to his mistress and two illegitimate children. In March 1946, the tenant's mistress left the premises and dropped the two children with his mother. In the meanwhile, the landlord sold the premises. The purchaser filed an action in July 1946 for eviction of the tenant on the ground that he had abandoned possession. The County Court Judge held that the tenant had not abandoned possession and that even though he

failed in some of his obligations under the tenancy, it was not reasonable to make an order for possession against him. In December 1946, the purchaser of the original landlord transferred the premises to the appellant. After release from prison, the tenant brought an action for possession and damages for trespass. His claim was allowed by the County Court Judge, who directed the appellant to return the premises to the respondent-tenant and also pay damages. The Court of appeal reversed the order of the County Court Judge and held:

> "We are of opinion that a "non-occupying" tenant prima facie forfeits his status as a statutory tenant. But what is meant by "non-occupying"? The term clearly cannot cover every tenant who for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend 24 hours in all weathers under his own roof for 365 days in the year. Clearly, for instance, the tenant of a London house, who spends his week-ends in the country, or his long vacation in Scotland, does not necessarily cease to be in occupation. *Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The question is one of fact and of degree.* Assume an absence sufficiently prolonged to have this effect. *The legal result seems to us to be as follows:-(1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a de facto intention on his part to return after his absence.* (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for 5 or 10 years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit

> and policy of the Acts as affirmed in Keeves v. Dean (1) and Skinner v. Geary (3), (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, i.e., instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in Brown v. Draper (4). Apart from authority, in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an "animus possidendi" but a "corpus possessionis," viz., some visible state of affairs in which the animus possidendi finds expression. (5) If the caretaker (to use that term for short) or the furniture be removed from the premises otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not. A man's possession of a wild bird, which he keeps in a cage, ceases if it escapes notwithstanding that his desire to retain possession of it continues and that its escape is contrary thereto. We do not think in this connection that it is open to the tenant to rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action. *The tenant, it is true, had not intended to go to prison. He committed intentionally the felonious act which in the events which have happened landed him there, and thereby put it out of his power to assert possession by visible acts after Mar. 9,1946. He cannot, in these circumstances, we feel,*

be in a better position than if his absence and inaction had been voluntary."

(emphasis supplied)

22. In *Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikarm,* AIR 1973 Bom. 210, the learned Single Judge of the Bombay High Court interpreted Section 13(1)(k) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 the language of which is somewhat similar to Section 11(4)(v) of the 1965 Act. The learned Single Judge referred to order passed by Chagla, C.J. in Civil Revision Application No.1527/1953 decided on July 30, 1954 and observed:

"As observed by Chagla, C. J., in the above case, physical possession by a tenant himself was not necessary. Physical possession by other members of the family also is not necessary if there was reasonable cause for their remaining absent from the premises. The question is one of fact and degree. If there is evidence on record to show that the tenant had something more than a vague wish to return and that he had a real hope coupled with the practicable possibility of its fulfilment within a reasonable time, it cannot be said that he had no reasonable cause for not using the premises. In every case it is the duty of the Court to satisfy itself that the tenant had no reasonable cause. *Absence may be sufficiently prolonged or unintermittent to compel the inference prima facie of a cesser of occupation. The onus is on the tenant in such a case to repel the presumption and to establish that his possession had not ceased or that he had ceased to occupy on account of reasonable cause.* In my judgment, this can be established if the tenant proves notwithstanding the intention on his part to return after his absence, his helplessness in remaining absent from the premises.

It is true that the tenant should have made proper attempts to discharge the onus in the present case by producing the

orders, if not before the trial Court, at least before the Appellate Court. That, however, as stated above, does not permit the Courts to brush aside the requirements of Section 13(1)(k). It is a matter for not awarding the costs. The Court cannot ignore the nature of the tenant's services and his liability to be transferred when deciding the question under Section 13(1)(k). I do not propose to lay down that in every case where a Government servant is transferred and he goes on paying rent in respect of the premises, he had reasonable cause for not using the premises for the purpose for which they were let. The question will depend on the facts and circumstances of each case. *The tenant must couple and clothe his inward intention to return, with some formal, outward and visible sign of it, as for instance by installing some caretaker or representative, be it a relative or not with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming.* It may also be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation, furniture. *As stated by Asquith L. J., in Brown v. Brash and Ambrose,* (1948) 2 KB 247, the tenant must prove not only animus possidendi but a corpus possessionis."

(emphasis supplied)

23. In *Ananthasubramania Iyer v. Sarada Amma* 1978 KLT 338, the learned Single Judge of the Kerala High Court held:

"The physical absence of the tenant from the building for more than six months would raise a presumption that he had ceased to occupy the building and that he had abandoned it and that it was for the tenant to dislodge the presumption and establish that he had the intention to continue to occupy the tenanted premises."

24. The word "occupy" appearing in Section 11(4)(v) of the

1965 Act has been interpreted by the Kerala High Court in large number of cases. In *Mathai Antony v. Abraham* (2004) 3 KLT 169, the Division Bench of the High Court referred to several judgments including the one of this Court in *Ram Dass v. Davinder* (supra) and observed:

> "The word "occupy" occurring in S. 11(4)(v) has got different meaning in different context. The meaning of the word "occupy" in the context of S. 11 (4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. Landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression "occupy" in S.1l (4)(v) instead of "possession". Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes "enjoyment". The word "occupy" sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere "physical possession" would satisfy the word "occupy" within the meaning of S.11 (4)(v) of the Act. In our view mere physical possession of premises would not satisfy the meaning of "occupation" under S. 1l (4)(v). The word "possession" means holding of such possession, animus possidendi, means, the intention to exclude other persons. The word "occupy" has to be given a meaning so as to hold that the tenant is actually using the premises and not mere physical presence or possession. A learned single Judge of this Court in Abbas v. Sankaran Namboodiri (1993(1) KLT 76) took the view that the word occupation is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party

> (Radhakrishnan, J.), in Rajagopalan v. Gopalan (2004 (1) KLT SNP.54) interpreting S. 11 (4)(v) took the view that occupation in the context of S.l 1(4) means only physical occupation, which requires further explanation. Occupation in the context of S. 11(4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under S.11(4)(v) of the Act. S.11(4) uses the words "put the landlord in possession" and not "occupation", but 11 (4)(v) uses the words "the tenant ceases to occupy". In S. 11 (4)(v) in the case of landlord the emphasis is on "possession" but in the case of tenant the emphasis is on "occupation". The word "occupy" has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user."

25. In *Kurian Thomas v. Sreedharan Menon* (2004) 3 KLT 326, the High Court held as under:

> "Once landlord could establish the tenant has ceased to occupy the premises continuously for six months prior to the filing of the petition he is entitled to get order of eviction under that section. The word "occupation" must be understood to be not mere physical possession. Tenant should use the building. The word "occupy" means to cohabit with, to hold or have in possession. Tenanted premises must be in the state of being enjoyed and occupied. The word "occupy" used by the statute would show that tenanted premises be put to use. Tenant cannot be heard to contend that he is having physical possession of the premises though not in occupation. So far as this case is concerned, we are of the view landlord has discharged the burden and then the onus has shifted to the tenant and the tenant could not establish that he has not ceased to occupy the premises and even if there is cessation that was with reasonable cause."

26. In *Paulina Joseph v. Idukki District Wholesale Co-operative Consumer Stores Ltd.* (supra), the Division Bench of the High Court referred to the dictionary meaning of the word "reasonable" and observed:

> "The question whether the tenant ceases to occupy the building continuously for six months is primarily a question of fact to be determined with reference to the facts available in each case. The scope of "occupation of the building" depends on the purpose for which the building is let and the purpose for which it is used. The nature of the business and the requirement of the physical presence or otherwise of the tenant in the building for the conduct of the business is a relevant fact. No straight jacket formula can be evolved in the matter of proof of cessation of occupation within the meaning of Section 11(4)(v) of the Act. This intention of the tenant, though not conclusive as such has also relevance in determining whether there was actual cessation of occupation within the meaning of Section 11(4)(v). When it is proved by the landlord that the tenant ceased to occupy the building continuously for six months, the burden of proving that there was reasonable cause for such cessation is on the tenant. Reasonable cause is also a question of fact to be decided in the light of the facts proved in the case. No rigid formula can be evolved for proof of "reasonable cause". The facts and circumstances of the case, the particular facts with reference to the business activities of the tenant, the nature of the business, the magnitude of the business, the circumstance which led to the cessation of occupation are all relevant in considering whether there was reasonable cause. If the cessation of occupation was due to circumstances beyond the control of the tenant, certainly the Courts would be inclined to accept the case of the tenant that cessation of occupation was not without reasonable cause. Financial constraint of the tenant by itself may not be a sufficient reason to hold that there was

> reasonable cause. But that is not completely irrelevant in considering the question. Whether the tenant is an individual or an organization controlled by the Government or a Co-operative society may also be relevant in considering the question of reasonable cause. If there is a plausible explanation to the question why the business was not run in the premises continuously, it may well be a relevant fact in considering whether there was reasonable cause for cessation of occupation under Section 11(4)(v), depending on the facts and circumstances of each case. In the given set of facts and circumstances, if it can be concluded that an ordinary prudent man would act in the manner in which the tenant did, it can be safely said that the cessation of occupation was with reasonable cause."

(emphasis supplied)

27. In *Simon & Ors. v. Rappai* (2008) 2 KLJ 488, the High Court interpreted Section 11(4)(v) and held:

> "As far as the ground available under Section 11(4)(v) is concerned, it is well settled by various decisions of this Court that if the landlord has discharged the initial burden it is upto the tenant to lead evidence in the matter to show that he has been conducting business in the premises. A learned Single Judge of this Court in the decision report in Abbas v. Sankaran Namboodiri (1993 (1) KLT 76) while examining the question held that, the word 'occupation' is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees and legal possession is not sufficient. It was held that, "however, if a landlord succeeds in proving that his tenant did not occupy the building almost near the period fixed in Section 11(4)(v) of the Act it may help the court to presume that there could have been cessation of occupation for the statutory period. Such background presumption is not anathematic to the law of evidence". In para.7 it was observed that, "be that as it may, burden is

on the landlord to prove that the tenant ceased to occupy the building for six months. But it is hard to expect a landlord to prove the precise during which his tenant ceased to occupy the building. However, if the court is satisfied on the evidence and/or with the aid of presumptions that the tenant did not occupy the building for such length of time as would cover the statutory period, then the burden would shift to the tenant to show that he had reasonable cause for such non-occupation." Finally it was also observed in para.9 that, 'but, possession must combine with something more to make it occupation. Legal possession does not by itself constitute occupation'. These principles can be safely applied to the facts of this case."

28. In this case, the Rent Control Court, after detailed scrutiny of the pleadings and the evidence of the parties recorded a finding that while the landowners (respondents herein) succeeded in proving that the tenant (appellant herein) had ceased to occupy the suit premises for a period exceeding six months, the latter could not prove that it was occupying the premises or that non occupation thereof was for a reasonable cause. The Rent Control Court took cognizance of the appellant's plea that it was carrying on business activities from the suit premises with reduced staff strength but discarded the same by observing that the relevant records like the attendance register, muster roll, wage register had not been produced and no evidence was adduced to prove payment of electricity bills and sale and purchase of goods. The High Court also analysed the pleadings and evidence of the parties and concurred with the findings recorded by the Rent Control Court. As against this, the appellant did not produce any evidence to prove physical occupation of the premises or any business transaction. It also failed to produce any evidence to show that there was reasonable cause for non occupation of the suit premises.

29. The arguments of Shri Nariman that the second set of

rent control petitions should have been dismissed as barred by *res judicata* because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June, 1998. In the second set of petitions, the period of non occupation commenced from September, 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the Appellate Authority because till 2.8.1999, the premises were found kept open and alive for operation. The Appellate Authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September, 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K. Agarwal on 1.10.2001 that the company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1.10.2001; that no activity had been done in the premises with effect from 1.10.2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the Appellate Authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause.

30. The question whether the prohibition contained in Section 22(1) of the 1985 Act operates as a bar to the

maintainability of a petition filed for eviction of the tenant was considered and answered in negative in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association* (1992) 3 SCC 1. In that case, this Court referred to the provisions of the Karnataka Rent Control Act, Section 22(1) of the 1985 Act and observed:

> "11. Similarly in Civil Appeal No. 2553 of 1991 this question has been raised by the appellant-company to challenge the order of the learned Single Judge of the Karnataka High Court dated March 15, 1991 dismissing the revision petition under Section 50(1) of Karnataka Rent Control Act. For the reasons aforementioned Section 22(1) of the Act cannot be invoked to assail the said order of the High Court on the ground that on the date of passing of the order of the High Court the matter was pending before the Appellate Authority. But in this appeal, the order allowing the eviction petition was passed by the XII Additional Small Causes Court on September 30, 1989 and at that time the matter under Sections 15 and 16 was pending before the Board. It is, therefore, necessary to consider the second question about the applicability of Section 22(1) to eviction proceedings instituted by the landlord against the tenant who happens to be a sick company. In this regard, it may be mentioned that the following proceedings only are automatically suspended under Section 22(1) of the Act:
>
> (1) proceedings for winding up of the industrial company;
>
> (2) proceedings for execution, distress or the like against the properties of the sick industrial company; and
>
> (3) proceedings for the appointment of receiver.
>
> 12. Eviction proceedings initiated by a landlord against a

tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category (2). It has been urged by the learned counsel for the appellant-company that such proceedings fall in category (2) since they are proceedings against the property of the sick industrial company. *The submission is that the leasehold right of the appellant-company in the premises leased out to it is property and since the eviction proceedings would result in the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution, distress or the like against any other properties of the industrial company. The words 'or the like' have to be construed with reference to the preceding words, namely, 'for execution, distress' which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar proceedings against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick industrial company, cannot, in our opinion, be regarded as falling in this category.* We may, in this context, point out that, as indicated in the Preamble, the Act has been enacted to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined. The provision regarding suspension of legal proceedings contained in Section 22(1) seeks to advance the object of the Act by ensuring that a proceeding having an effect on the working or the finances of a sick industrial company shall not be instituted or continued during the period the matter is under

consideration before the Board or the Appellate Authority or a sanctioned scheme is under implementation without the consent of the Board or the Appellate Authority. *It could not be the intention of Parliament in enacting the said provision to aggravate the financial difficulties of a sick industrial company while the said matters were pending before the Board or the Appellate Authority by enabling a sick industrial company to continue to incur further liabilities during this period. This would be the consequence if sub-section (1) of Section 22 is construed to bring about suspension of proceedings for eviction instituted by landlord against a sick industrial company which has ceased to enjoy the protection of the relevant rent law on account of default in payment of rent. It would also mean that the landlord of such a company must continue to suffer a loss by permitting the tenant (sick industrial company) to occupy the premises even though it is not in a position to pay the rent. Such an intention cannot be imputed to Parliament. We are, therefore, of the view that Section 22(1) does not cover a proceeding instituted by a landlord of a sick industrial company for the eviction of the company premises let out to it."*

(emphasis supplied)

31. In *Gujarat Steel Tube Co. Ltd. v. Virchandbhai B. Shah* (1999) 8 SCC 11, it was argued on behalf of the appellant that suit for recovery of rent etc. is not maintainable in view of the prohibition contained in Section 22(1). While affirming the judgment of the High Court, the Court referred to the earlier judgment in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association* (supra) and held:

"Section 22 no doubt, inter alia, states that notwithstanding any other law no suit for recovery of money shall lie or be proceeded with except with the consent of the Board, but as we look at it the filing of an eviction petition on the ground of non-payment of rent cannot be regarded as filing

of a suit for recovery of money. *If a tenant does not pay the rent, then the protection which is given by the Rent Control Act against his eviction is taken away and with the non-payment of rent order of eviction may be passed. It may be possible that in view of the provisions of Section 22, the trial court may not be in a position to pass a decree for the payment of rent but when an application under Section 11(4) is filed, the trial court in effect gives an opportunity to the tenant to pay the rent failing which the consequences provided for in the sub-section would follow. An application under Section 11(4), or under any other similar provision, cannot, in our opinion, be regarded as being akin to a suit for recovery of money."*

(emphasis supplied)

The same view was reiterated in *Carona Ltd. v. Parvathy Swaminathan and Sons* (2007) 8 SCC 559.

32. We shall now examine whether pendency of the proceedings under the 1985 Act, which implies that the appellant was facing financial difficulty in conducting its business constituted reasonable cause for cessation of occupation of the premises. The appellant was declared a sick industrial company on 22.6.1998 and IDBI was appointed as the Operating Agency under Section 17(3) of the 1985 Act to examine the viability of the company. Subsequently, State Bank of India was appointed as the Operating Agency. After several hearings, the BIFR passed order dated 19.10.2001 and directed the appellant to sort out all pending issues with secured creditors, Central/State Governments, TIIC, KSIIDC and TNSEP and submit a revised comprehensive and fully tied up rehabilitation scheme to the Operating Agency. For the next about five years, no tangible step is shown to have taken by the appellant for revival of its business activities. In August and November, 2006, the appellant filed applications before the BIFR seeking its permission for issue of two crore equity shares of Rs. 10/- each fully paid up at par to the company's

promoters and/or its associates on private placement basis against full consideration to be utilized for rehabilitation. Thereupon, the BIFR passed order dated 16.3.2007. Three appeals were filed against that order. The AAIFR dismissed the appeals after taking note of order passed by the Madras High Court in Writ Petition (C) No. 24422 of 2006, order dated 25.4.2007 passed by the Orissa High Court in W.P (C) No. 344 of 2008, order dated 5.2.2008 passed by this Court in SLP(C) CC Nos. 1943-1944 of 2008 and held that in view of the various orders, the net worth of the appellant having turned positive and it can no longer be treated as sick industrial company.

Before the Rent Control Court, the appellant had neither pleaded nor any evidence was produced to show that due to financial stringency was due to the reasons beyond its control and on that account, the suit premises could not be used from September, 2001 onwards for the purpose specified in the lease deeds. Therefore, the so called financial stringency cannot be construed as reasonable cause within the meaning of Section 11(4)(v).

33. We are also of the view that order dated 3.3.2008 passed by the AAIFR has no bearing on the decision of the issues raised by the respondents in the context of Section 11(4)(v) of the 1965 Act because what was required to be considered by the Rent Control Court was whether as on the date of filing the petition the appellant had ceased to occupy the premises continuously for a period of six months without reasonable cause. The improvement in the financial health of the appellant after many years cannot impinge upon the concurrent finding recorded by the Rent Control Court and the Appellate Authority that the respondents had succeeded in making out a case for eviction under Section 11(4)(v) and that there was no reasonable cause for the appellant to have ceased to occupy the suit premises continuously for a period of six months.

34. In the result, the appeals are dismissed. The parties are, however, left to bear their own costs. The appellant is allowed three months time to deliver vacant possession of the suit premises to the respondents subject to its filing usual undertaking before this Court within four weeks. It is also made clear that during this period of three months, the appellant shall not induct any other person in the premises or transfer its possession to any other person in any capacity whatsoever.

D.G. Appeals dismissed.

LARSEN AND TOUBRO LTD. & ANR.
v.
UNION OF INDIA & ORS.
(SLP (C) No. 27217 of 2010)

MAY 05, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Government Contracts – Bid – Request For Proposal sent to bidders for supply of Fast Patrol Vessels – Tender condition that the price was to be firm and fixed for the entire duration of the contract and not subject to escalation – Petitioner No.1, lowest bidder claiming the benefit of Foreign Exchange Rate Variation (FERV) without specifying the foreign currency – Respondent No. 4, second lowest bidder indicating a firm rate of exchange as on the date of opening of the commercial bid – Subsequently, petitioner No. 1 amending its bid by withdrawing its initial offer and offering the quoted price without FERV content – However, the bid of petitioner No.1 declared as non-responsive and contract awarded to respondent No. 4 – Writ petition by petitioner No. 1 – Dismissed by High Court – Interference with – Held: Not called for – Standard of eligibility as laid down in the notice for tender could not be changed arbitrarily as that would be violative of Article 14 of the Constitution – In the absence of compliance with the terms and conditions relating to a firm and fixed price offer, petitioner No. 1 stood excluded from consideration, even though it tried to make its bid responsive by withdrawing the initial offer and substituting it with another offer – Offer made by respondent No. 4 satisfied the requirements of firm and fixed offer – Administrative law – Constitution of India, 1950 – Article 14.

Respondent No.1 sent a Request For Proposal (RFP) to petitioner No.1 and others for supply of 20 Fast Patrol Vessels for Indian Coast guard. The tender condition was

that the price was to be firm and fixed for the entire duration of the contract and would not be subject to escalation. Petitioner No.1 and others submitted their bid containing a technical proposal and a commercial proposal in two parts. Their technical bids were successful and thereafter, the commercial bids were opened. In its commercial offer, petitioner No.1 claimed the benefit of Foreign Exchange Rate Variation without specifying the foreign currency which was the basis of the foreign exchange component. The offer of petitioner No.1 was found to be the lowest but its bid was held to be non-responsive. Respondent No. 4, Public Sector Undertaking was the second lowest bidder. The price offered by respondent No. 4 contained a foreign exchange rate component which was to be considered at a particular rate as applicable on a future date at the time of opening of the bid. Thereafter, petitioner No. 1 withdrew its offer and offered the quoted price without the Foreign Exchange Rate Variation content. However, the Contract Negotiation Committee declared the bid of petitioner No. 1 as non-responsive and awarded the contract to respondent No.4. The petitioners then filed a writ petition seeking direction upon respondent Nos. 1 to 3 to consider the bid of petitioner No. 1 in response to RFP and to invite the petitioner for negotiation and thereafter, to accept the same in terms of the RFP. The High Court dismissed the same. Therefore, the petitioners filed the instant Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1.1. Where tenders are invited for grant of Government Contract, the standard of eligibility laid down in the notice for tenders could not be changed arbitrarily as that would be hit by the provisions of Article 14 of the Constitution. An executive authority has to be rigorously

held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation. Every action of the Executive Government must be informed with reason and should be free from arbitrariness, the same being the very essence of the rule of law. [Para 15] [1136-C-E]

1.2. The High Court did not commit any error in dismissing the writ petition filed by the petitioners since in the absence of compliance with the terms and conditions relating to firm and fixed price offer, the petitioners stood excluded from consideration. The offer in this regard made by respondent No.4 satisfies the requirements of a firm and fixed offer since once the commercial bids were opened, there was no further scope of the rates being altered, which was not so in the case of the petitioners, which tried to make its bid responsive by withdrawing the initial offer and substituting the same with another. Thus, there is no reason to interfere with the judgment and order of the High Court impugned in the SLP. [Paras 14 and 16] [1135-H; 1136-A-F]

*Ramana Dayaram Shetty vs. International Airport Authority of India***(1979) 3 SCC 489 – relied on.**

Case Law Reference:

(1979) 3 SCC 489	**Relied on.**	**Para 11**

CIVIL APPELLATE JURISDICTION : SLP (Civil) 27217 of 2010.

From the Judgment & Order dated 8.9.2010 of the High Court of Delhi at New Delhi in W.P. (C) No. 3231 of 2010.

Indira Jaising, ASG, S, Ganesh, Shyam Diwan, Ashok H. Desai, Raju Ramachandran, Pratap Venugopal, Surekha Raman, Dileep Poolakkot, Namrata Sood (for K.J. John & Co.)

Ritin Rai, Siddhartha Jha, Akrit Gandotra, Niraj Gupta, Anand Vaidhan Sharma, Satyakam, Anil Kaityar for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This Special Leave Petition has been filed by M/s. Larsen and Toubro Ltd. and one Lt. Col. Ajay Bhatia (Retired), challenging the judgment and order passed by the Division Bench of the Delhi High Court on 8th September, 2010, dismissing Writ Petition (Civil) No.3231 of 2010, filed by the Petitioners herein. In the Writ Petition, a prayer had, *inter alia,* been made for an appropriate writ, order or direction upon the Respondent Nos.1 to 3 to consider the bid of the Petitioner No.1 in response to Request For Proposal (RFP) No. TM (M)/0025/CG/FPV dated 17th June, 2009 and to invite the said Petitioner for negotiation, since the said bid was the lowest bid, and, thereafter, to accept the same in terms of the said RFP.

2. On 17th June, 2009, the Respondent No.1 sent a RFP to the Petitioner No.1 for supply of 20 Fast Patrol Vessels (FPV) for the Indian Coast Guard. Similar requests were also sent to other persons as well. According to the normal procedure, the RFP was to be submitted by the intending bidders in two parts. The first part was to consist of the technical proposal and the second part was to be the commercial proposal or financial bid. In response to the said RFP, the Petitioner No.1 submitted its bid on 19th October, 2009, containing a technical proposal and a commercial proposal in two parts. In its commercial offer, the Petitioner had indicated that it intended to avail of the Exchange Rate Variation benefit. The Petitioner and four others, including the Respondent No.4, proved to be successful in the technical bid and, thereafter, the commercial bids were opened on 11th January, 2010, in the presence of the Bidders and/or their representatives. Although, the offer of the Petitioner No.1 was found to be the lowest (L-

1), its bid was held to be non-responsive, because, despite the tender condition that the price was to be firm and fixed for the entire duration of the contract and would not be subject to escalation, the Petitioner No.1 had claimed the benefit of Foreign Exchange Rate Variation. On the other hand, Respondent No.4, M/s. Cochin Shipyard Ltd., a Public Sector Undertaking, was found to be the second lowest bidder (L-2).

3. Apart from the fact that the Technical Evaluation Committee, which had been constituted on 21st October, 2009, found that the price quoted by the Petitioner had a variable foreign content, it was also found that in order to determine the foreign exchange content, the Petitioner had attached a copy of the rate card of the State Bank of India along with the commercial bid, which contained various exchange rates of different foreign currencies. The Petitioner, however, did not specify as to which foreign currency was the basis of the foreign exchange component in its commercial bid. Since the Commercial offers had to be firm and fixed and since the Petitioner had claimed the benefit of the foreign exchange variation component, the Contract Negotiation Committee, which was constituted in accordance with the Defence Procurement Procedure-08 (DPP), concluded that the commercial offer of the Petitioner was non-responsive. The Petitioner thereupon withdrew its offer and offered the quoted price without the Foreign Exchange Rate Variation content. The Contract Negotiation Committee, however, declared the bid of the Petitioner as non-responsive and awarded the contract to Respondent No.4, which was declared as L-1. Challenging the said decision of the Respondents, the Petitioners filed Writ Petition No.3231 of 2010 before the Delhi High Court.

4. As has been recorded in the impugned judgment of the High Court, when the writ petition was taken up for admission on 14th May, 2010, the fact that the Petitioners had withdrawn the condition with regard to the provision of Foreign Exchange Rate Variation was considered and it was also observed that

such subsequent withdrawal could not affect the bid of the Petitioners. However, on the submission made on behalf of the Petitioners that the aforesaid condition was also included in the RFP submitted by Respondent No.4, notice was issued in the matter. Consequently, while taking up the writ petition for final disposal, the issues framed for deciding the writ petition were centered round the said question. In fact, the first issue which was framed was whether a Bidder could amend its bid by withdrawing a condition of the bid document, whereby the bid was considered to be non-responsive. The second issue, which is an off-shoot of the first issue, is whether a Bidder would be entitled to contend that a non-responsive bid be treated as responsive since the offending condition was withdrawn after the bid documents had been opened. The third issue raised was with regard to the bid submitted by Respondent No.4 and whether the same could be treated as responsive, although, the price offered by the said Respondent contained a foreign exchange rate component which was to be considered at a particular rate as applicable on a future date at the time of opening of the bid.

5. In deciding the said issues, the High Court held that since the terms and conditions of the price to be firm and fixed was one of the more important ingredients of the tender, the submission of a bid which violated the said condition rendered the bid non-responsive. The High Court observed that this was not a case of clerical mistake in the bid documents, but a conscious change in the terms and conditions of the bid as submitted by the Petitioners, which could not cure the initial disqualification when the bids were submitted. The High Court took note of the fact that the bid of Respondent No.4 contained the condition that its price would be in Indian rupees with a foreign component which would be converted in Indian rupees as on the date of opening of the bid. The High Court observed that the same did not violate the conditions of the RFP and that the said condition ensured that the price would be firm and fixed during the period of performance of the contract. Accordingly,

the High Court held that the said condition satisfied the condition regarding price being firm and fixed and could not, therefore, be treated on the same footing as the conditions offered by the Petitioner.

6. The High Court also rejected the Petitioner's contention that as per the bid documents the Discounted Cash Flow (DCF) method was required to be used to arrive at the actual and final cost which would be payable by the Respondent Nos.1 to 3, for the contract in question. Taking note of the different conditions relating to the evaluation and acceptance process and the terms of payment, the High Court took the view that once the contract had been awarded, the submission made on behalf of the Petitioner that the DCF mechanism had to be applied had little force. Furthermore, it was also observed that the adoption of the ECF method could not be said to be mandatory, as the relevant clause provides that the buyer reserved its right to apply the DCF method if it wished to do so.

7. On its aforesaid findings and strongly deprecating the practice of submitting a Foreign Currency Rate Card with the rates of various currencies, without specifying the currency in respect of which the foreign exchange rate was to be considered, the High Court was of the view that the entire exercise was *mala fide* and while dismissing the writ petition, imposed costs both in favour of the Respondent Nos.1 to 3 and the Respondent No.4.

8. Mr. S. Ganesh, learned Senior Advocate, who appeared for the Petitioners, submitted that the same ground on which the Petitioners' bid documents had been rejected, was also applicable to the bid documents submitted by the Respondent No.4, inasmuch as, the Foreign Exchange Rate Variation factor had also been projected by the said Respondent in the column relating to Foreign Exchange Conversion Rates contained in the commercial bid. Mr. Ganesh

submitted that different yardsticks had been used in the case of the Petitioners and the Respondent No.4. While accepting the commercial bid documents of the Respondent No.4 as valid, the Respondent No.1, Union of India, ought not to have rejected the commercial bid documents submitted by the Petitioners on the basis of the same objection.

9. Mr. Ganesh drew our attention to the response of the Respondent No.4 in the column relating to Foreign Exchange Conversion Rates included in the commercial bid documents. It has been indicated therein on behalf of the Respondent No.4 that the costing of the vessel had been carried out by converting the foreign currencies into Indian currency with conversion rate as on the date of costing. The said rates and the contents of foreign currency had been disclosed in the commercial offer and the exchange rate of those currencies as on the date of the opening of the bid would be applicable for the respective foreign currencies to determine the price of the vessel. There could, therefore, be price variation till the commercial bids were opened.

10. Mr. Ganesh contended that Part IV of the Request for Proposal dealt with evaluation and acceptance criteria which included evaluation of commercial proposals. Under the instructions with regard to evaluation of commercial proposals, it has been categorically stated that the shipyard/shipbuilder quoting the lowest price (L-1) as determined by the Contracts Negotiation Committee would be invited for negotiations and that the Discounted Cash Flow method would be used for evaluation of the bids.

11. Mr. Ganesh submitted that while awarding the contracts, the Government has to be completely fair and above all arbitrariness, as was laid down by this Court in *Ramana Dayaram Shetty vs. International Airport Authority of India* [(1979) 3 SCC 489]. Mr. Ganesh also submitted that, in any event, the Petitioners had withdrawn the condition regarding

Foreign Exchange Rate Variation and had substituted the same with a Fixed Rate offer. Accordingly, Petitioners' tender documents ought not to have been rejected and the High Court erred in holding otherwise.

12. The stand taken on behalf of the Petitioners was strongly opposed on behalf of the Respondent No.4, to whom the contract had been awarded. Mr. Ashok H. Desai, learned Senior Advocate, pointed out that the condition relating to the Foreign Exchange Rate Variation and the proposal of the Respondent No.4 in relation thereto indicated a firm rate of exchange as on the date of the opening of the commercial bids and there would be no escalation of such offer during the subsistence of the contract, as envisaged in the tender documents. It was urged that the rate quoted by the Respondent No.4 was firm and fixed as on the date of opening of the commercial bids and was not subject to any variation during the period of the contract. Mr. Desai submitted that the averments made on behalf of the Petitioners to the contrary, as far as the commercial bid of the Respondent No.4 was concerned, were erroneous and misconceived and were in no way similar to the offer made by the Petitioners.

13. Learned Additional Solicitor General, Ms. Indira Jaising, took much the same stand as Mr. Desai and contended that since the commercial offers had already been opened, the changed offer made on behalf of the Petitioners regarding the Foreign Exchange Rate Variation condition was concerned, could not be taken into consideration and had to be rejected on that ground. Furthermore, as submitted by Mr. Desai, the offer made by the Petitioners and that made by the Respondent No.4 on the question of firm and fixed pricing, were different and could not be said to be on the same footing.

14. Having heard learned counsel for the respective parties, we are satisfied that the High Court did not commit any error in dismissing the Writ Petition filed by the Petitioners, since in the absence of compliance with the terms and conditions

relating to firm and fixed price offer, the Petitioners stood excluded from consideration. The offer in this regard made by the Respondent No.4 satisfies the requirements of a firm and fixed offer, since once the commercial bids were opened, there was no further scope of the rates being altered, which was not so in the case of the Petitioners, which tried to make its bid responsive by withdrawing the initial offer and substituting the same with another.

15. As far as the decision in *Ramana Dayaram Shetty's* case is concerned, the same does not in any way help the Petitioners' case and, on the other hand, has very clearly laid down that where tenders are invited for grant of Government Contract, the standard of eligibility laid down in the notice for tenders could not be changed arbitrarily as that would be hit by the provisions of Article 14 of the Constitution. It was also observed by this Court that an executive authority has to be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation. It has been repeatedly stated by this Court that every action of the Executive Government must be informed with reason and should be free from arbitrariness, the same being the very essence of the rule of law. The said decision, in fact, supports the case of the Respondent No.4.

16. We, therefore, find no reason to interfere with the judgment and order of the High Court impugned in this Special Leave Petition and the same is, accordingly, dismissed.

17. There will be no order as to costs.

N.J. Special Leave Petition dismissed.

INCOME TAX OFFICER, JIND

v.

M/S. MANGAT RAM NORATA RAM NARWANA & ANR.

(Criminal Appeal No. 8 of 2005)

MAY 5, 2011

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

Income Tax Act, 1961: ss. 276C(i), 277, 278 – Discrepancies relating to entries of income, sale and purchase and bank accounts of respondent-firm – Revised return filed duly signed by the accused-partner – Assessment of income – Based on assessment, penalty imposed – Penalty paid – Complaint also lodged u/ss.276C(i), 277, 278 for prosecution of firm and partner – Magistrate held them guilty and imposed fine on the firm and the partner and awarded sentence of one year rigorous imprisonment on the partner – Acquittal of partner by appellate court – Upheld by High Court on the ground that prosecution was not able to prove that the return was signed/verified by the accused-partner – On appeal, held: At no point of time, the said partner made any objection that the return did not bear his signature or was not filed by him – By not raising any dispute at any point of time and paying the penalty, the prosecution proved his admission of filing and signing the return – Nothing was brought in evidence of the partner that signature on the return did not belong to him and the penalty was paid mistakenly – The appellate court misdirected itself in not considering the evidence in right perspective and acquitting the accused – High Court also failed to correct the apparent error – Order of conviction passed by Magistrate restored – Evidence – Admission.

Evidence: Admission – Evidentiary value of – Held: Admission is best evidence against the maker and it can be

inferred from the conduct of the party – Admission implied by conduct is strong evidence against the maker but he is at liberty to prove that such admission was mistaken or untrue.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 8 of 2005.

From the Judgment & Order dated 24.7.2003 of the High Court of Punjab & Haryana at Chandighar in Criminal Misc. No. 117-MA of 2003-Appealed Form.

Mukul Gupta, Vikas Malhotra, B.V. Balaram Das, Mohd. Mannan for the Appellant.

S.S. Khanduja, Yash Pal Dhingra for the Respondents.

The following Order of the Court was delivered

O R D E R

The Income Tax Officer, aggrieved by the acquittal of the respondents has preferred this appeal with leave of the Court.

According to the prosecution, respondent no.1 M/s. Mangat Ram Norata Ram is a partnership firm carrying on the business of sale and purchase of machinery, iron pipes and spare parts. Respondent No. 2 accused Hem Raj happened to be one of its partner. M/s. Mangat Ram Norata Ram (hereinafter referred to as "the Firm") filed its income tax return for the assessment year 1988-89 on 14th July, 1988 through its counsel, which was signed and verified by Hem Raj, its partner. The income-tax return showed the income of the firm Rs.1,02,800/-. Return was accompanied by statement of income, trading accounts, profit & loss account, partnership account and balance sheet for the assessment year 1988-89. The assessment was completed by the then Income Tax Officer under Section 143(3) of the Income Tax Act for Rs.1,47,370/-.

Further case of the prosecution is that the books of the

accounts of the firm were taken into possession by the Sales Tax Department, which were obtained by the Income Tax Department and on its perusal discrepancies relating to entries of income, sale and purchase, bank account etc. were noticed and accordingly a notice under Section 148 of the Income Tax Act (hereinafter referred to as 'the Act') was issued requiring the respondents to furnish a revised return within 30 days. The respondents did not comply with the notice and thereafter notice under Section 142(1) of the Act was issued and the assessee firm ultimately filed its income tax return declaring its income of Rs.1,47,870/-. The prosecution has alleged that this return was duly signed and furnished by accused Hem Raj, which was accompanied by revised statement of income, trading account and profit and loss account. All these documents, according to the prosecution were also signed by accused Hem Raj. On consideration of the same, the Assistant Commissioner of Income Tax made addition of Rs.1,28,000/- with trading account, Rs.1,10,000/- in bank account and Rs.19,710/- as additional income and assessed the total income to Rs.3,68,200/- and directed for initiating penalty proceedings.

Ultimately, the minimum penalty of Rs.1,24,950/- was imposed under Section 271(1)(c) of the Act and further a sum of Rs.7890/- and Rs.12,680/- under Section 271(1)(a) of the Act. The respondent firm filed appeal against the imposition of penalty which was dismissed by the Commissioner of Income Tax (Appeals). The respondents had paid the penalty inflicted on the firm.

A complaint was also lodged for prosecution of respondents under Section 276C (i), 277 and 278 of the Act. The trial court on appraisal of the evidence held both the respondents guilty and awarded a fine of Rs.1000/- each under Section 276C(1), 277 and 278 of the Act to respondent no.1, the firm, whereas, respondent no.2 was sentenced to undergo rigorous imprisonment for one year and to pay a fine of

Rs.1,000/- on each count and in default to suffer simple imprisonment for three months.

Respondents aggrieved by their conviction and sentence preferred appeal and the Appellate Court set aside the conviction and sentence on the ground that sanction for prosecution was not valid. The Appellate Court further held that the prosecution has not been able to prove the signature of respondent no.2 in the return filed, and hence, the conviction is bad on that ground also. The Income Tax Officer aggrieved by the acquittal of the respondents preferred appeal and the High Court by its impugned judgment upheld the order of the acquittal and while doing so observed that the sanction is valid but maintained the order of acquittal on the ground that the prosecution has not been able to prove that the return was signed/verified by respondent no.2. The observation of the High Court in that regard reads as follows:

> "Irrespective of the above decision as regards grant of sanction and the requirement for hearing the accused, fact remains that there was insufficient proof that the return had been signed/verified by Hem Raj. Statement of Desh Bandhu Goyal (PW 2), the officer who made the final assessment, was to the effect that the return had not been signed/verified in his presence. Furthermore, other witnesses namely Satish Kumar, UDC (PW1), J.K.Sahni (PW 3) and Satish Luthra (PW 4) had not proved Hem Raj's signatures. The prosecution case was that the return had been revised and submitted through a counsel and returns were never signed by the partners in the presence of the Income tax Officer. Therefore, the learned Additional Sessions Judge held that it had not been proved that the return had been signed/verified by Hem Raj as the counsel who had filed the return had not been examined and there was no evidence that it was Hem Raj who had signed the return even though the name Hem Raj appeared on the return. The prosecution could have examined a hand

writing expert but failed to do so. For all these reasons the learned appellate court accepted the appeal and acquittal the respondents. The appellate court had taken a plausible view. It was neither perverse nor illegal. No ground exists to interfere with the decision of the appellate court".

Mr. Mukul Gupta, learned Senior Counsel appearing on behalf of the appellant submits that the accused invited the order of the Income Tax Authority on the return so filed and aggrieved by the order of Income Tax Officer preferred appeal. According to him after the dismissal of the appeal by the Appellate Authority, the accused paid the penalty and these facts having been proved by the evidence laid by the prosecution it was for the accused to disprove that the signature on the income tax return was not his.

Mr.S.S.Khanduja, learned counsel appearing on behalf of respondent submits that in the case of prosecution of an accused the onus is always on the prosecution to prove all the ingredients to bring home the act within the mischief of penal provision and the prosecution having not proved that the signatures are of accused Hem Raj, the order of acquittal does not call for interference by this Court in the present appeal.

We have bestowed our thoughtful consideration to the submission advanced.

True it is that PW 2 Desh Bandhu Goyal, who made the final assessment did not state in his evidence that the return was signed or verified by the accused Hem Raj in his presence. Further the witnesses; namely Satish Kumar (PW1), J.K.Sahni (PW 3) and Satish Luthra (PW 4) have not proved the signatures of Hem Raj. But this, in our opinion would not be sufficient to throw out the case of the prosecution. The prosecution undoubtedly is to prove its case beyond all reasonable doubt to bring home the charge. The evidence for that purpose could be admission of the accused also. H e r e in the present case, prosecution had led evidence to prove that

revised return was filed by the firm under the name of accused Hem Raj and on that basis assessment was made by the assessing authority. There is further evidence to show that aggrieved by the order of asssessing authority, appeal was preferred before the appellate authority under the signature of the accused Hem Raj, which was dismissed and the penalty was paid. At no point of time accused Hem Raj made any objection that the return did not bear his signature and was not filed by him. It is trite that admission is best evidence against the maker and it can be inferred from the conduct of the party. Admission implied by conduct is strong evidence against the maker but he is at liberty to prove that such admission was mistaken or untrue. By proving conduct of the accused Hem Raj in not raising any dispute at any point of time and paying the penalty, the prosecution has proved his admission of filing and signing the return. Once the prosecution has proved that, it was for the accused Hem Raj to demonstrate that he did not sign the return. There is no statutory requirement that signature on the return has to be made in presence of the Income-tax authority. Nothing has been brought in evidence by the accused Hem Raj that signature did not belong to him on the return and the penalty was paid mistakenly. We are of the opinion that the appellate court misdirected itself in not considering the evidence in right perspective and acquitting the accused, so also the High Court which failed to correct the apparent error. This render their judgments unsustainable. Any other view may induce the appellant to compel the assessee to file return in the presence of the authority so that the signature is proved by direct evidence by such authority in trial. This will lead to a difficult situation not contemplated under the Act.

Accordingly, this appeal is allowed, impugned orders are set aside and the judgment of conviction passed by the Chief Judicial Magistrate is restored. However, we reduce the substantive sentence from one year to six months on each count and they are directed to run concurrently.

D.G. Appeal allowed.

K. BALAKRISHNAN NAMBIAR
v.
STATE OF KARNATAKA
(Civil Appeal No. 4994 of 2004)

MAY 05, 2011

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

Forest Conversation Act, 1980: Leasehold land, a reserved forest land – Non-renewal of lease by the State Government – Challenged – Held: The leasehold land in question was surrounded by thick forest in East Aletty Reserved Forest land which was near to the boundary of Kerala and Karnataka State – Extending the period of lease in respect of the said area was likely to cause problems for the movement of men and vehicles – Lessees had already raised Areca, Coconut and Cashew trees on the leasehold lands and those trees were fully developed and in the event of extending the lease period, it was likely that the lessee would commence fresh cultivation on the land in question – The intention of the Government was to develop naturally grown forests over the lands which could only be done if the possession was taken by the Government – By virtue of the 1980 Act, no State Government or other authority could pass an order or give a direction for de-reservation of reserved forest or any portion thereof or permit use of any forest land or any portion thereof for any non-forest purpose or grant any lease, etc. in respect of forest land to any private person or any authority, corporation, agency or organisation which was not owned, managed or controlled by the Government – Even if any forest land or any portion thereof has been used for non-forest purpose, like undertaking of mining activity for a particular length of time, prior to the enforcement of the 1980 Act, the tenure of such activity cannot be extended by way of

renewal of lease or otherwise after 25-10-1980 without obtaining prior approval of the Central Government – State Government rightly refused the claim of lessee to renew the lease.

The appellant was the lessee of the land in question. The lease in regard to a portion of the land was to expire on 31st March, 1999 and in regard to remaining portion in the year 2000. The appellant sought renewal of the lease. On 25th March 2000, the State Government rejected the claim of the appellant and directed the appellant to hand over the possession of the leasehold land back to the forest department. The reasoning of the order of the State Government was that the leasehold land was surrounded by thick forest in East Aletty Reserved Forest Land and this area was near to the boundary of Kerala and Karnataka State and in the event of extending the period of Lease in respect of this area, it was likely to create the problem for movement of men and vehicles. The lessees had already raised Areca, Coconut and Cashew trees on the leasehold lands and those trees had fully developed and in the event of extending the lease period, it was likely that the lessees would commence fresh cultivation on the land in question. Therefore, in order to protect the interest of forest, the State Government did not renew the lease deed.

The appellant filed writ petition before the High Court which was dismissed. The Division Bench of the High Court dismissed the appeal holding that the issue was concluded by Supreme Court in case of *T.N. Godavarman* wherein it was held that no forest area should be used for non-forestal activities. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. It is not correct to state that the arecanut cultivation cannot be treated as a non-forestal activity, merely because it does not involve any cutting of the trees. On the other hand, the State Government has given cogent and valid reasons for non-renewal of the lease. The order passed by the Government made it clear that the leasehold land was surrounded by thick forest in East Aletty Reserved Forest land which was near to the boundary of Kerala and Karnataka State. It noticed that extending the period of lease in respect of this area was likely to cause problems for the movement of men and vehicles. The lessees had already raised Areca, Coconut and Cashew trees on the leasehold lands and those trees were fully developed. Therefore, in the event of extending the lease period, it was likely that the lessee would commence fresh cultivation on the land in question. The intention of the Government was to develop naturally grown forests over the lands. This could only be done if the possession was taken by the Government. [Para 9] [1151-H; 1152-A-C]

2. The Forest Conversation Act, 1980 is applicable to all forests irrespective of the ownership or classification thereof and after 25-10-1980 i.e. the date of enforcement of the 1980 Act, no State Government or other authority could pass an order or give a direction for dereservation of reserved forest or any portion thereof or permit use of any forest land or any portion thereof for any non-forest purpose or grant any lease, etc. in respect of forest land to any private person or any authority, corporation, agency or organisation which was not owned, managed or controlled by the Government. Even if any forest land or any portion thereof has been used for non-forest purpose, like undertaking of mining activity for a particular length of time, prior to the enforcement of the 1980 Act, the tenure of such activity cannot be extended by way of renewal of lease or otherwise after 25-10-1980 without

obtaining prior approval of the Central Government. [Para 11] [1154-A-E]

T.N. Godavarman Thirumulkpad v. Union of India **AIR (1997) SC 1228: 1996 (9) Suppl. SCR 982;** *Nature Lovers Movement v. State of Kerala & Ors.* **(2009) 5 SCC 373: 2009 (4) SCR 687 – relied on.**

Case Law Reference:

1996 (9) Suppl. SCR 982	**relied on**	**Para 5, 7, 8, 9**
2009 (4) SCR 687	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4994 of 2004.

From the Judgment & Order dated 3.9.2003 of the High Court of Karnataka at Bangalore in Writ Appeal Nos. 3530 of 2003.

WITH

C.A. Nos. 3973 of 2011 & 4995, 4996 of 2004.

K.V. Vishwanathan, K.V. Mohan, Abhishek Kauhsik, K.R. Nambiar for the Appellants.

Anand Sanjay M. Nuli, V.N. Raghupathy, Sanjay R. Hegde, Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J.

Civil Appeal No.4994 of 2004 :

1. This appeal is directed against the final judgment and order of the High Court of Karnataka at Bangalore dated 3rd September, 2003, in Writ Appeal No. 3530 of 2003 (GM – FOR) arising out of Writ Petition No. 17766 of 2000 vide which

the order of the Learned Single Judge was affirmed and the appeal was accordingly dismissed.

2. The appellant herein is the transferee of leasehold rights of the land to an extent of 25 acres in Survey No. 336/1A1 (75 acres in total) of Aletti village of Sullia Taluk, Dakshnia Kannada district. The original order of lease grant was made in the favour of one Sri. M. Shankara Narayana Kadambalithaya in the year 1949 by the then government of Madras for a period of 50 years vide order of grant dated 24th March, 1949, issued by the District Forest Officer, Mangalore. The land was granted for the purpose of raising areca nut plantation. The lessee was permitted to grow pepper and other fruit bearing trees as subsidiary crops on the land. Thereafter, on the death of the original lessee, his legal representatives, after obtaining permission from the State Government, alienated the lease hold rights in favour of the appellant. The lease in regard to a portion of the land was to expire on 31st March, 1999 and in regard to remaining portion in the year 2000.

3. The appellant submitted an application dated 4th June, 1996 for renewal of the lease. It appears that no action was taken on the application for renewal. Consequently, apprehending eviction, immediately after the lease period, the appellant alongwith two others filed a writ petition No. 9570-9572 of 1999 in the High Court of Karnataka at Bangalore. In the aforesaid writ petition, the appellant had prayed for the issuance of writ of mandamus directing the respondents to consider the applications for renewal of the lease deed of the land in question. The High Court vide its order dated 25th March, 1999 disposed of the writ petition with a direction to the respondents therein to consider the application for the renewal of the lease in accordance with law and dispose of the same within two months of the date of receipt of the copy of the order.

4. The appellant thereafter made another representation to respondent No. 2 seeking renewal of the lease. However by order dated 25th March, 2000, the State Government cancelled

the lease deed and directed the appellant to hand over the possession of the lease hold land back to the forest department to the extent of 48 acres out of 75 acres immediately and the remaining 27 acres by 31st December, 2001. The reasons given by the State Government in its order dated 25th March, 2000 for rejecting the claim of the appellant were as under:-

> "The leasehold land is surrounded by thick forest in East Aletty Reserved Forest Land; this area is near to the boundary of Kerala and Karnataka State. In the event of extending the period of Lease in respect of this area, it is likely that there may be problem for movement of men and vehicles and in order to protect the interest of Forest, it is not felt advisable to lease the extent of 48 acres of Forest land, as the lessees have already raised Areca, Coconut and Cashew trees on the leasehold lands and those trees have fully developed and in the event of extending the Lease period, it is likely that the lessees would commence fresh cultivation on the land in question. It is proposed to take possession of the land in respect of which Lease period is completed and thereafter after doing forestery work on this land and on the land naturally grown trees are allowed to be protected fully and the Reserved Forest could be taken possession and could be maintained as a Reserved forest land only. As the renewal of the Lease or the extension of Lease period would involve obtaining prior sanction of the Central Government and therefore there is no room for granting the forest land for the purpose of forest activities within the Reserved Forest Area.
>
> As the period of Lease transferred in favour of Shri K Balakrishnan Nambiar, out of the total extent of 75 acres, Lease period comes to an end in respect of an extent of 48 acres on 31.3.1999, it is felt desirable that there is no justification to extend the Lease period in respect of the Leasehold land and that the Department should take back the possession of the land from the Lessee and in respect

of the remaining extent of 27 acres the Lease period expires on 31.12.2001 and thereafter without extending that lease also after the lease period is over, the possession of that land also should be taken back to the department.

After examining these proceedings the Government has passed the following order:-

ORDER OF GOVERNMENT; FG 17 FLL 97, Bangalore,

Dated : 25.3.2000.

Having regard to the background and reasons explained above, it is hereby ordered that out of the extent of 75 acres of Leasehold land transferred in favour of Sri Balakrishnan Nambiar in the land in S.No.336/1A6 of Aletty Reserved forest land; an extent of 48 acres of Leased land is ordered to be forthwith taken possession of by the Forest Department. It is also hereby ordered that the remaining extent of 27 acres in respect of which lease period comes to an end on 31.12.2001 and thereafter the Lease period should not be extended and the possession of that land also should be taken over by the Forest Department.

By order and in the name
of the Governor of Karnataka,
Sd/-xx K Krishnamurthy,
Under Secretary to Government,
Forest & Environment Department."

5. Aggrieved by the aforesaid order, the appellant again moved the High Court of Karnataka at Bangalore in writ petition No. 17766 of 2000. The learned Single Judge dismissed the Writ Petition by order dated 9th April, 2003. The Writ Appeal No. 3530 of 2003 filed by the appellant as against the judgment of the learned Single Judge was also dismissed by order dated 3rd September, 2003. The Division Bench of the High Court

held that the issue is concluded by this Court in the case of *T.N. Godavarman Thirumulkpad Vs. Union of India*[1] wherein it has been held that no forest area shall be used for nonforestal activities. The Division Bench judgment is under challenge before us in the present appeal.

6. We have heard the learned counsel for parties at length.

7. Mr. K.V. Vishwanathan, learned senior counsel appearing for the appellant submits that the High Court has dismissed the matter on erroneous interpretation of the judgment of this Court in *T.N. Godavarman's* case (supra). He then submits that aforesaid judgment of this Court was with regard to 'nonforestal' activities in the 'reserved forest' area. He further submits that plantation of arecanut trees, cashew trees, coconut trees and black pepper vines do not amount to nonforestal activities. He further relies on the reports of the Assistant Conservator of Forest with regard to the adjoining lands, which were similarly leased, to indicate that the lands have lost all the character of forest land and in fact the status of the lands according to the said report had ceased to be 'reserved forest'. Therefore, judgment in the *Godavarman's* case (supra) would not be applicable in the instant matter. He thereafter submits that the appellant has not violated the conditions of grant and his activities on the land do not include breaking up or clearing of any forest land or portion thereto. He then submits that the appellant has incurred huge investments to raise valuable arecanut trees for a number of years. Therefore, it would cause grave injustice to him if the lease period is not renewed. He also submits that appellant has no other source of income. The learned counsel further draws our attention to the letter dated 19th February, 1994 where the Chief Conservator of Forest, Bangalore, has recommended to the State Government for confirming the lease grant on permanent basis.

8. On the other hand, Mr. Anand Sanjay M. Nuli, learned counsel for the State, submits that the lease land is a part of

1. AIR (1997) SC 1228

the statutorily declared reserved forest, having been declared as such by Order No. 318 dated 9th February, 1907. This was published in Notification of Board of Revenue (Land Revenue) Forest No. 32 dated 22nd February, 1907, which had declared the land under lease as reserved forest with effect from 1st May 1907 under the Madras Forest Act, 1882. Since then, it has continued to be the reserved forest land. The grant of lease in favour of the predecessors of the appellant did not have the effect of dereservation. At the expiry of the lease, the land was expected to be surrendered to the State as forest land. He further submits that after the enactment of the Forest Conservation Act, 1980, no forest land can be dereserved without prior approval of the Central Government. Under no circumstances, forest land can be permitted to be used for nonforestal activities. Learned counsel submitted that the High Court was bound to dismiss the writ petition as the matter was squarely covered by the judgment of this Court in *T.N. Godavarman's* case (supra). In order to ensure the effective implementation of the Forest Conservation Act, 1980, the State Government has taken a policy decision not to continue the lease of any forest land. The policy of the State, according to the learned counsel, is in conformity with National Forest Policy, 1988, which has been formulated to maintain the environmental stability and to preserve the ecological balance. The learned counsel submits that the State Government has rejected the claim of the appellant, after taking due notice of the legal position as well as any hardship that may be caused to him.

9. We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment of this Court in *Godavarman's* case (supra), it is not necessary to dilate upon the matter at length, since all the issues raised by Mr. Vishwanathan have been elaborately considered and decided in the aforesaid judgment. We are unable to accept the submission of Mr. Vishwanathan that arecanut cultivation cannot be treated as a nonforestal activity, merely because it does not involve any cutting of the trees. On the other hand, the Government has given cogent and valid

reasons for non-renewal of the lease. The order passed by the Government makes it clear that the leasehold land is surrounded by thick forest in East Aletty Reserved Forest land; this area is near to the boundary of Kerala and Karnataka State. It notices that extending the period of lease in respect of this area is likely to cause problems for the movement of men and vehicles. It is also noticed that lessees have already raised Areca, Coconut and Cashew trees on the leasehold lands and those trees are fully developed. Therefore, in the event of extending the lease period, it is likely that the lessee would commence fresh cultivation on the land in question. The intention of the Government is to develop naturally grown forests over the lands. This can only be done if the possession is taken by the Government. Addressing the similar issues, this Court in *Godavarman's* case (supra) has observed as follows:-

> "The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works v. State of Gujarat,

Rural Litigation and Entitlement Kendra v. State of U.P. and recently in the order dated 29-11-1996 (Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority). The earlier decision of this Court in State of Bihar v. Banshi Ram Modi has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this Court to dispel the doubt, if any, in the perception of any State Government or authority. This has become necessary also because of the stand taken on behalf of the State of Rajasthan, even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this Court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will forthwith correct its stance and take the necessary remedial measures without any further delay."

10. After making these observations, a specific direction has been issued, to all the State Governments, to ensure that all ongoing non-forest activity within any forest, without the prior approval of the Central Government, must cease forthwith. It was emphasised that every State Government must ensure total cessation of all nonforestal activities forthwith. Mr. Vishwanathan had also submitted that since the lease has been granted prior to the operation of the 1980 Act and the land has been declared as dereserved at the time of the grant of the lease, the lease can not be automatically cancelled upon promulgation of the 1980 Act. In our opinion, the aforesaid submission of the learned counsel is also no longer *res integra* as it has been answered in the case of *Nature Lovers Movement Vs. State of Kerala & Ors*[2].

11. Upon consideration of the earlier cases pertaining to the conservation of forests in India, this Court culled out certain principles. We may, however, notice only the observations

2. (2009) 5 SCC 373.

made in Paragraphs 47 and 48, which are as under:-

"47. The ratio of the above noted judgments is that the 1980 Act is applicable to all forests irrespective of the ownership or classification thereof and after 25-10-1980 i.e. the date of enforcement of the 1980 Act, no State Government or other authority can pass an order or give a direction for dereservation of reserved forest or any portion thereof or permit use of any forest land or any portion thereof for any non-forest purpose or grant any lease, etc. in respect of forest land to any private person or any authority, corporation, agency or organisation which is not owned, managed or controlled by the Government.

48. Another principle which emerges from these judgments is that even if any forest land or any portion thereof has been used for non-forest purpose, like undertaking of mining activity for a particular length of time, prior to the enforcement of the 1980 Act, the tenure of such activity cannot be extended by way of renewal of lease or otherwise after 25-10-1980 without obtaining prior approval of the Central Government."

12. In view of the aforesaid observations, we are of the considered opinion that there is no merit in the appeal. The appeal is accordingly dismissed with no order as to costs.

Civil Appeal No. 4995 of 2004,

Civil Appeal No. 4996 of 2004 and

Civil Appeal No. 3973 of 2011

(Arising out of SLP (C) No. 26371 of 2008)

13. Leave granted in Civil Appeal No 3973 of 2011 (Arising out of SLP (C) No.26371 of 2008).

14. In view of the judgment passed in Civil Appeal No. 4994 of 2004, these appeals are also dismissed with no order as to costs.

D.G. Appeals dismissed.

HAFEEZA BIBI & ORS.
v.
SHAIKH FARID (DEAD) BY LRS. & ORS.
(Civil Appeal No. 1714 of 2005)

MAY 5, 2011

[R.M. LODHA AND SURINDER SINGH NIJJAR, JJ.]

MOHAMMADAN LAW:

Hiba (gift) – Essential requisites of – Held: Are: (1) declaration of the gift by the donor, (2) acceptance of the gift by the donee and (3) delivery of possession –The rules of Mohammadan Law do not make writing essential to the validity of a gift and an oral gift fulfilling all the three essentials make the gift complete and irrevocable – However, the donor may record the transaction of gift in writing – In the instant case, as all the three essential requisites are satisfied by the gift deed – The gift in favour of defendant 2 became complete and irrevocable –Judgment of High Court set aside and that of trial court, holding the gift deed genuine and binding between the parties, restored –Transfer of Property Act – ss. 129 and 123.

Transfer of Property Act, 1882:

ss. 123 and 129 – Deed of gift executed by a Mohammadan – HELD: Is not the instrument effecting, creating or making the gift – Such writing is not a document of title but is a piece of evidence – Section 129 preserves the rule of Mohammadan Law and excludes the applicability of s. 123 to a gift of an immovable property by a Mohammadan – In the instant case, the gift deed is a form of declaration by the donor and not an instrument of gift as contemplated u/s 17 of the Registration Act – Registration Act, 1908 – s.17.

In a suit for partition between the parties governed by Sunni Law, defendant no. 2 set up the defence that his father executed a hiba (gift deed) on 5.2.1968 and gifted his properties to him, and put him in possession of the hiba properties. The trial court held the hiba as true, valid and binding between the parties, and dismissed the suit. In the appeal, before the High Court it was contended for the plaintiffs that the gift deed dated 5-2-1968 being in writing was compulsorily required to be registered and stamped and in the absence thereof the gift deed could not be accepted and relied upon. The High Court allowed the appeal and remanded the matter to the trial court for passing a preliminary decree.

Allowing the appeal filed by heirs of defendant no.2, the Court

HELD: 1.1. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are: (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession. The rules of Mohammadan Law do not make writing essential to the validity of a gift; and an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. [para 27] [1175-H; 1176-A-B]

1.2. Merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the

transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to be in conformity with the rule of gifts in Mohammadan Law. [para 29] [1176-H; 1177-A-C]

1.3. A deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence; such writing is not a document of title but is a piece of evidence. [para 32] [1178-A-B]

Mahboob Sahab v. *Syed Ismail and others* **1995 (2) SCR 975 = (1995) 3 SCC 693 – relied on.**

Nasib Ali v. *Wajed Ali* **AIR 1927 Cal 197;** *Md. Hesabuddin and others* v. *Md. Hesaruddin and others* **AIR 1984 Gauhati 41;** *Jubeda Khatoon* v. *Moksed Ali* **AIR 1973 Gauhati 105; and** *Makku Rawther's Children: Assan Ravther and others* v. *Manahapara Charayil* **AIR 1972 Kerala 27– approved.**

Inspector General of Registration and Stamps, Govt. of Hyderabad v. *Smt. Tayyaba Begum* **AIR 1962 Andhra Pradesh 199;** *Sankesula Chinna Budde Saheb* v. *Raja Subbamma* **1954 2 MLJ 113;** *Amirkhan* v. *Ghouse Khan* **(1985) 2 MLJ 136;** *Ghulam Ahmad Sofi* v. *Mohd. Sidiq Dareel and others* **AIR 1974 Jammu & Kashmir 59; and *Chota Uddandu Sahib* v. *Masthan Bi (died) and others* AIR 1975 Andhra Pradesh 271 – disapproved.**

Mohammad Abdul Ghani (since deceased) & Anr.v. *Fakhr Jahan Begam & Ors.* **1922 (49) IA 195– referred to**

Mohammadan Law by Syed Ameer Ali; Mahomedan Law by Mulla, ***19th Edition 5(pp.696-697);*** *Asaf A. A. Fyzee in*

Outlines of Muhammadan Law, Fifth Edition (edited and revised by Tahir Mahmood) ***at page 182; and*** *Mulla, Principles of Mahomedan Law* ***(19th Edition), Page 120 –*** **referred to.**

2.1. Section 17(1)(a) of the Registration Act, 1908 leaves no manner of doubt that an instrument of gift of immoveable property requires registration irrespective of the value of the property. Section 123 of the Transfer of Property Act, 1882 lays down the manner in which gift of immoveable property may be effected and prescribes that transfer of immovable property by gift must be effected by a registered instrument. However, an exception is carved out in s. 129 of the T.P. Act with regard to the gifts by a Mohammadan. [para 14,15 and 18] [1164-B-E; 1166-A]

2.2. Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of s. 123 of T.P. Act to a gift of an immovable property by a Mohammadan. It is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered u/s. 17 of the Registration Act. Each case would depend on its own facts. [para 31] [1177-F-G]

2.3. In the inastant case, the gift was made by the father of defendant no. 2 by a written deed dated 5.2.1968 in his favour in respect of the properties 'A' schedule and 'B' schedule appended thereto. The gift – as is recited in the deed – was based on love and affection for defendant no. 2 as after the death of donor's wife, he has been looking after and helping him. Therefore, it cannot be said that because a declaration is reduced to writing, it must have been registered. The acceptance of the gift by defendant no 2 is also evidenced as he signed the deed. He was residing in the 'B' schedule property consisting of a house and a kitchen room appurtenant thereto and,

thus, was in physical possession of residential house with the donor. The trial court on consideration of the entire evidence on record has recorded a categorical finding that the donor, executed the gift deed dated 5-2-1968 in favour of donee, the donee accepted the gift and the donor handed over the properties covered by the gift deed to the donee, and thus all the three essentials of a valid gift under the Mohammadan Law were satisfied. The view of the trial court is in accord with the legal position. The gift deed dated 5.2.1968 is a form of declaration by the donor and not an instrument of gift as contemplated u/s 17 of the Registration Act. As all the three essential requisites are satisfied by the gift deed dated 5.2.1968, the gift in favour of defendant 2 became complete and irrevocable. [para 34] [1178-G-H; 1179-A]

2.4. The High Court in the impugned judgment relied upon the Full Bench decision in the case of *Tayyaba Begum* which is not a correct view and does not lay down the correct law. The judgment and order passed by the High Court is set aside. The judgment and decree passed by the Principal Subordinate Judge is restored. [para 35-36] [1179-B-C]

Case Law Reference:

1922 (49) IA 195	**referred to**	**para 12**
1995 (2) SCR 975	**relied on**	**para 13**
AIR 1927 Cal 197	**approved**	**para 19**
1954 2 MLJ 113	**disapproved**	**para 20**
AIR 1962 Andhra Pradesh 199	**disapproved**	**para 21**
1972 Kerala 27	**approved**	**para 22**
AIR 1974 Jammu & Kashmir 59	**disapproved**	**para 23**

AIR 1975 Andhra Pradesh 271	**disapproved**	**para 24**
(1985) 2 MLJ 136	**disapproved**	**para 27**
AIR 1984 Gauhati 41	**approved**	**para 28**
AIR 1973 Gauhati 105	**approved**	**para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1714 of 2005.

From the Judgment & Order dated 13.9.2004 of the High Court of Judicature, Andhra Pradesh at Hyderabad in First Appeal No. 1685 of 1988.

A.K. Srivastav, G.R.K. Paramahamsa, Lokesh Kumar (for M.K.Garg) for the Appellants.

V. Mohana for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This appeal, by special leave, arises from the judgment of the High Court of Andhra Pradesh dated September 13, 2004 whereby the Single Judge of that Court set aside the judgment and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakhapatnam and remitted the matter back to the trial court for the purpose of passing a preliminary decree after determining the shares to which each party would be entitled.

2. Shaik Dawood had three sons; Shaik Farid, Mehboob Subhani and Mohammed Yakub. He also had five daughters; Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum, Rabia Bibi and Alima Bibi. All the five daughters were married. His wife predeceased him. Shaik Dawood retired as Reserve Head Constable. He was also a Unani Medical Practitioner.

3. Shaik Farid, Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum and Mohd. Iqbal (son of Alima Bibi) – hereinafter referred to as 'plaintiffs' – filed a suit for partition

against Mehboob Subhani, Mohammed Yakub and Rabia Bibi (hereinafter referred to as 'defendant 1', 'defendant 2' and 'defendant 3' respectively). The son and daughters of Syed Ali, who was brother of Shaik Dawood, were impleaded as other defendants (hereinafter referred to as 'defendants 4 to 7').

4. The parties are governed by Sunni Law. The plaintiffs averred in the plaint that Shaik Dawood died intestate on December 19, 1968 and the plaintiffs and defendants 1 to 3 became entitled to 'A' schedule properties and half share in 'B' schedule properties. The plaintiffs stated that the defendants 4 to 7 are entitled to other half share in 'B' schedule properties.

5. Mohammed Yakub — defendant 2 — contested the suit for partition. He set up the defence that Shaik Dawood executed hiba (gift deed) on February 5, 1968 and gifted his properties to him. Shaik Dawood put him in possession of the hiba properties on that day itself. The hiba became complete and the plaintiffs were fully aware of that fact. The defendant 2 in his written statement also referred to a previous suit for partition filed by some of the parties which was dismissed in default.

6. Some of the original parties have died during the pendency of the suit. Their legal representatives have been brought on record.

7. The trial court framed four issues. The issue relevant for the purpose of the present appeal is issue no.2 which is to the effect whether hiba dated February 5, 1968 is true, valid and binding on the plaintiffs. The trial court, after recording the evidence and on hearing the parties, answered issue no. 2 in the affirmative and, held that plaintiffs were not entitled to the shares claimed in the plaint. Consequently, vide judgment and decree dated April 27, 1988, the trial court dismissed the plaintiffs' suit.

8. The plaintiffs challenged the judgment and decree of the

trial court before the High Court. Inter alia, one of the arguments raised before the High Court on behalf of the appellants was that the gift dated February 5, 1968 being in writing was compulsorily required to be registered and stamped and in absence thereof, the gift deed could not be accepted or relied upon for any purpose and such unregistered gift deed would not confer any title upon the defendant 2. The High Court was persuaded by the argument and held that the unregistered gift deed would not pass any title to the defendant 2 as pleaded by him. The High Court, as indicated above, allowed the appeal; set aside the judgment and decree of the trial court and sent the matter back to that court for the purposes of passing a preliminary decree.

9. The present appellants are legal heirs of the deceased defendant 2.

10. As to whether or not the High Court is right in its view that the unregistered gift deed dated February 5, 1968 is not a valid gift and conveyed no title to the defendant 2 is the question for determination in this appeal.

11. There is divergence of opinion amongst High Courts on the question presented before us.

12. The Privy Council in the case of *Mohammad Abdul Ghani* (since deceased) & Anr.v. *Fakhr Jahan Begam & Ors*[1]. referred to 'Mohammadan Law'; by Syed Ameer Ali and approved the statement made therein that three conditions are necessary for a valid gift by a Muslim: (a) manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

13. In *Mahboob Sahab* v. *Syed Ismail and others*[2], this

1. 1992(49) IA 195.
2. (1995) 3 SCC 693.

Court referred to the Principles of Mahomedan Law by Mulla, 19th Edition and in paragraph 5 (pp. 696-697) noticed the legal position, in relation to a gift by Muslim incorporated therein, thus:

> **"5.** Under Section 147 of the *Principles of Mahomedan Law* by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of moveable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be, (*i*) a declaration of gift by the donor, (*ii*) acceptance of the gift, express or implied, by or on behalf of the donee, and (*iii*) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only the gift is complete. Section 152 envisages that where the donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential

> conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift……."

14. Section 123 of the Transfer of Property Act, 1882 (for short, 'T.P. Act') lays down the manner in which gift of immoveable property may be effected. It reads thus :

> "S.123. Transfer how effected. — For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

15. However, an exception is carved out in Section 129 of the T.P. Act with regard to the gifts by a Mohammadan. It reads as follows:

> "S.129. Saving of donations *mortis causa* and Muhammadan Law. — Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law."

16. At this stage, we may also refer to Section 17 of the Registration Act, 1908 which makes registration of certain documents compulsory. Section 17 of the Registration Act, to the extent it is necessary, reads as follows :

> "S.17. *Documents of which registration is compulsory.*— (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on

which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) . . . . . ;

(c) . . . . . ;

(d) . . . . . ;

(e) . . . . . ."

17. Section 49 of the Registration Act deals with the effect of non-registration of documents required to be registered. It reads thus:

"S.49. *Effect of non- registration of documents required to be registered.*- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(a) affect any immovable property comprised therein or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

18. Section 17(1)(a) of the Registration Act leaves no manner of doubt that an instrument of gift of immoveable property requires registration irrespective of the value of the property. The question is about its applicability to a written gift executed by a Mohammadan in the light of Section 129 of the T.P. Act and the rule of Mohammadan Law relating to gifts.

19. In the case of *Nasib Ali* v. *Wajed Ali*[3], the contention was raised before the Division Bench of the Calcutta High Court that the deed of gift, not being registered under the Registration Act, is not admissible in evidence. The Calcutta High Court held that a deed of gift by a Mohammadan is not an instrument effecting, creating or making the gift but a mere piece of evidence. This is what the High Court said :

"……The position under the Mahomedan Law is this : that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent; to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.

3. The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the Judicial Committee *Kamarunnissa Bibi v. Hussaini Bibi* [1880] 3 All. 266, where a gift was said to have been made in lieu of dower, their Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or whether there was any

3. AIR 1927 Cal 197.

dower due. The case of *Karam Ilahi v. Sharfuddin* [1916] 38 All. 212 is similar in principle to the present case. There also a deed relating to the gift was executed. The learned Judge held that if the gift was valid under the Mahomedan Law it was none the less valid because there was a deed of gift which, owing to some defect, was invalid under Section 123, Transfer of Property Act, and could not be used in evidence.

4. The next, question that calls for consideration is whether a document like the present one executed by a Mahomedan donor after he made a gift to show that he had made it in favour of the donee is compulsorily registrable under the Registration Act. Under Section 17 of the Registration Act an instrument of gift must be registered. By the expression 'instrument of gift of immovable property' I understand an instrument or deed which creates, makes or completes the gift, thereby transferring the ownership of the property from the executant to the person in whose favour it is executed. In order to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration Act.

5. The present document does not affect immovable property. It does not transfer the immovable property from the donor to the donee. It only affords evidence of the fact that the donor has observed the formalities under the Mahomedan Law in making the gift to the donee. I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Mahomedan. But for purposes of the present case it is not necessary to go so far because I hold that this document is only a piece of evidence, and conceding that it should, have been

registered, the effect of its non-registration is to make it inadmissible in evidence under Section 49 of the Registration Act……."

20. In *Sankesula Chinna Budde Saheb* v. *Raja Subbamma*[4], the Andhra Pradesh High Court, after noticing the three essentials of a gift under the Mohammadan Law, held that if a gift was reduced to writing, it required registration under Section 17(1)(a) of the Registration Act. It went on to hold that even if by virtue of Section 129 of the T.P. Act, a deed of gift executed by Mohammadan was not required to comply with the provisions of Section 123 of the T.P. Act, still it had to be registered under Section 17(1)(a) of the Registration Act when the gift related to immoveable property.

21. A Full Bench of the Andhra Pradesh High Court in the case of *Inspector General of Registration and Stamps, Govt. of Hyderabad* v. *Smt. Tayyaba Begum*[5], was called upon to decide on a reference made by the Board of Revenue under Section 55 of the Hyderabad Stamp Act whether the document under consideration therein was a gift deed or it merely evidenced a past transaction. The High Court applied the test – whether the parties regarded the instrument to be a receptacle and appropriate evidence of the transaction; was it intended to constitute the gift or was it to serve as a record of a past event – and held as under :

"12. We have to examine the document in question in the light of these rules. No doubt, there was recitals therein which relate to past transaction. But that is not decisive of the matter. What is the purpose which it was designed to serve? That the executant did not treat it as a memorandum of a completed hiba is evident from some of the sentences. In the deed, such as "I deemed it necessary to execute a deed also making a declaration

4. 1952 2 MLJ 113.

5. AIR 1962 Andhra Pradesh 1999.

in favour of my son…in accordance with the Muslim law", and the last portion of the document. The anxiety of the donor to free the title of the donee to the property from all doubts and to save him from future litigation is clearly exhibited in the last sentence.

> "I pray that no one may have any kind of doubt regarding the ownership of Syed Ehasan Hussain and that if per chance any doubt at all should arise, this deed of Ekrarnama may prove sufficient."

This sentence is expressive of her intention to silence all doubts regarding the ownership of the property with the aid of this document. She did not want anyone to challenge the title of the donee to the house in question. This object could be attained only if it is regarded as a conveyance, a document which effected the transfer by its own force. If, on the other hand, if it is a mere record of a past transaction, that would not have the desired effect. There is one circumstance which gives some indication as to the intention of the executant of the document. The document is attested by two witnesses as required by Section 123 of the Transfer of Property Act. No doubt, this is not conclusive of the matter. But it is indicative of the desire of the executant that it should serve as evidence of the gift and not as a memorandum of a past transaction."

22. In *Makku Rawther's Children: Assan Ravther and others* v. *Manahapara Charayil*[6], V.R. Krishna Iyer, J. (as His Lordship then was) did not agree with the test applied by the Full Bench of Andhra Pradesh High Court and the reasoning given in *Tayyaba Begum5* . He held in paragraphs 8 and 9 of the report thus :

> "8. I regret my inability to agree with the reasoning in these decisions. In the context of Section 17, a document is the same as an instrument and to draw nice distinctions

6. AIR 1972 Kerala 27.

between the two only serves to baffle, not to ill mine. Mulla says: "The words 'document' and 'instrument' are used interchangeable in the Act". An instrument of gift is one whereby a gift is made. Where in law a gift cannot be effected by a registered deed as such, it cannot be an instrument of gift. The legal position is well-settled. A Muslim gift may be valid even without a registered deed and may be invalid even with a registered deed. Registration being irrelevant to its legal force, a deed setting out Muslim gift cannot be regarded as constitutive of the gift and is not compulsorily registerable."

9. Against this argument counsel invoked the authority of the Andhra Pradesh Full Bench. One may respect the ruling but still reiect the reasoning. The Calcutta Bench in AIR 1927 Cal 197 has discussed the issue from the angle I have presented. The logic of the law matters more than the judicial numbers behind a view. The Calcutta Bench argued:

> "The essentials of a gift under the Mahomedan law are ..... A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift; and if a gift is made by a written instrument without delivery of possession, it is invalid in law ..... That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence ..... Under Section 17 of the Registration Act an instrument of gift must be registered. By the expression 'instrument of gift of immovable property' I understand an instrument or deed which creates, makes or completes the gift thereby transferring the ownership of the property ..... The present document does not affect immovable property. It does not transfer an

immovable property from the donor to the donee which only affords evidence of the fact that the donor has observed the formalities under the Mahomedan law in making the gift ..... I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Mahomedan."

These observations of Suhrawardy, J. have my respectful concurrence. So confining myself to this contention for the nonce, I am inclined to hold that Ext. B1 is admissible notwithstanding Ss. 17 and 49 of the Indian Registration Act. This conclusion, however, is little premature if I may anticipate my opinion on the operation of Section 129 of the Transfer of Property Act expressed later in this judgment. Indeed, in the light of my interpretation of Section 129, Ext. B1 needs to be registered. For the present I indicate my conclusion, if the law of gifts for Muslims were not to be governed by Section 129."

23. The Full Bench of Jammu and Kashmir High Court in *Ghulam Ahmad Sofi* v. *Mohd. Sidiq Dareel and others*[7] had an occasion to consider the question whether in view of the provisions of Sections 123 and 129 of the T.P. Act, the rule of gifts in Mohammadan Law stands superseded; and whether it is necessary that there should be a registered instrument as required by Sections 123 and 138 of the T.P. Act in the case of gifts made under that Law. The Full Bench noticed the statutory provisions and also decisions of different High Courts including the decision of Calcutta High Court in the case of *Nasib Ali*[3]. The Full Bench held as follows :

"14. The ratio of the above cited authorities is therefore in favour of the proposition that an oral gift made under the

7. AIR 1974 Jammu & Kashmir 59.

Muslim law would not be affected by Section 123 of the Transfer of Property Act and the gift if it has otherwise all the attributes of a valid gift under the Muslim Law would not become invalid because there is no instrument in writing and registered. Therefore the answer to the question formulated would be in the negative i.e. that Sections 123 and 129 of the Transfer of Property Act do not supersede the Muslim law on matters relating to making of oral gifts, that it is not essential that there should be a registered instrument as required by Sections 123 and 138 of the Transfer of Property Act in such cases. But if there is executed an instrument and its execution is contemporaneous with the making of the gift then in that case the instrument must be registered as provided under Section 17 of the Registration Act. If, however, the making of the gift is an antecedent act and a deed is executed afterwards as evidencing the said transaction that does not require registration as it is an instrument made after the gift is made and does not therefore create, make or complete the gift thereby transferring the ownership of the property from the executant to the person in whose favour it is executed."

24. The Single Judge of the Andhra Pradesh High Court in the case of *Chota Uddandu Sahib* v. *Masthan Bi (died) and others*[8], was concerned with the question about the gift by Mohammadan. The Single Judge referred to some of the decisions noticed above and few other decisions and held in paragraph 10 of the report thus :

"10. Under Section 129 of the Transfer of Property Act, nothing in Chapter VII relates to gifts of movable property made in contemplation of death or shall be deemed to affect any rule of Mohammadan Law. According to the Mohammedan Law, there can be a valid gift, if three essentials of the gift are satisfied. (1) a declaration of the

8. AIR 1975 Andhra Pradesh 271.

gift by the donor, (2) the acceptance of the gift express or implied by or on behalf of the donee and (3) delivery of possession of the subject of gift by the donor to the donee. If these conditions are complied with the gift is complete. According to Muslim law it is not necessary that there should be a deed of gift in order to make it a valid gift, but of course, if there is a deed it should be registered. But if the deed is merely a memoranda of an already effected gift, then it stands on a separate footing. In view of this specific provision of Muslim Law, which is saved by Section 129, it cannot be held that the gifts amongst muslims also should satisfy the provisions of Chapter VII. . . . . Hence if all the formalities, as prescribed by Muslim Law, regarding the making of gifts are satisfied, the gift is valid notwithstanding the fact that it is oral and without any instrument. If there is a contemporaneous document it should be registered. But if the gift is antecedent and the deed is subsequent merely evidencing the past transaction, it does not require registration, because it does not by itself make or complete the gift. . . . . ."

25. In the case of *Amirkhan* v. *Ghouse Khan*[9], one of the questions that arose for consideration before the Madras High Court was : whether the gift of the immoveable property by Mohammadan, if reduced to writing, required registration. The Single Judge of the Madras High Court concluded that though a Mohammadan could create a valid gift orally, if he should reduce the same in writing, the gift will not be valid unless it is duly registered.

26. In the case of *Md. Hesabuddin and others* v. *Md. Hesaruddin and others*[10], the question with regard to gift of immoveable property written on ordinary unstamped paper arose before the Gauhati High Court. That was a case where

9. (1985) 2 MLJ 136.

10. AIR 1984 Gauhati 41.

a Mohammadan mother made a gift of land in favour of her son by a gift deed written on ordinary unstamped paper. The Single Judge of the High Court relying upon an earlier decision of that Court in *Jubeda Khatoon* v. *Moksed Ali*[11] held as under:

"….. But it cannot be taken as sine qua non in all cases that wherever there is a writing about a Mahomedan gift of immovable property, there must be registration thereof. The facts and circumstances of each case have to be taken into consideration before finding whether the writing requires registration or not. The essential requirements, as said before, to make a Mahomedan gift valid are declaration by the donor, acceptance by the donee and delivery of possession to the donee. It was held in *Jubeda Khatoon v. Moksed Ali,* AIR 1973 Gau 105 (at p. 106)-

"Under the Mahomedan Law three things are necessary for creation of a gift. They are (i) declaration of gift by the donor, (ii) acceptance of the gift express or implied by or on behalf of the donee and (iii) delivery of possession of the subject of the gift by the donor to the donee. The deed of gift is immaterial for creation of gift under the Mahomedan Law. A gift under the Mahomedan Law is not valid if the above mentioned essentials are not fulfilled, even if there be a deed of gift or even a registered deed of gift. In other words even if there be a declaration of acceptance of the gift, there will be no valid gift under the Mahomedan Law if there be no delivery of possession, even though there may be registered deed of gift." In that case there was a deed of gift which was not produced during trial. Still it was found in that case that had the defendants produced the deed of gift, at best it would have proved a declaration of the gift by the donor and acceptance thereof by the donee. It was further held that despite this the defendants would have to lead independent oral evidence to prove delivery of possession

11. AIR 1973 Gauhati 105

in order to prove a valid gift. Therefore it was found in that case that deed of gift under the Mahomedan Law does not create a disposition of property. Relying on this it cannot be said that whenever there is a writing with regard to a gift executed by the donor, it must be proved as a basic instrument of gift before deciding the gift to be valid. In the instant case a mere writing in the plain paper as aforesaid containing the declaration of gift cannot tantamount to a formal instrument of gift. Ext. A (2) has in the circumstances of the present case to be taken as a form of declaration of the donor. In every case the intention of the donor, the background of the alleged gift and the relation of the donor and the donee as well as the purpose or motive of the gift all have to be taken into consideration. In the present case, it is recited in the said writings that the 3rd defendant has been maintaining and looking after the donor and that the other children of the donor were neglecting her. The gift was from a mother to a son and it was based on love and affection for the son in whose favour the gift was made. Therefore, it cannot be held that because a declaration is contained in the paper Ext. A (2) the latter must have been registered in order to render the gift valid. Admittedly, the 3rd defendant has been possessing the land and got his name mutated in the revenue records with respect to the land. It is therefore implied that there was acceptance on behalf of the donee and also that the possession of the property was delivered to the donee by the donor. It should be remembered that unless there was possession on behalf of the 3rd defendant, no mutation would have taken place with regard to the property. It may be repeated that Ext. A (2) has to be taken in the present case as a mere declaration of the donor in presence of the witnesses who are said to have attested the writing."

27. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor;

(2) acceptance of the gift by the donee and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Asaf A. A. Fyzee in Outlines of Muhammadan Law, Fifth Edition (edited and revised by Tahir Mahmood) at page 182 states in this regard that writing may be of two kinds : (i) it may merely recite the fact of a prior gift; such a writing need not be registered. On the other hand, (ii) it may itself be the instrument of gift; such a writing in certain circumstances requires registration. He further says that if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of a gift, it must be registered. Conversely, the author says that registration, however, by itself without the other necessary conditions, is not sufficient.

28. Mulla, Principles of Mahomedan Law (19th Edition), Page 120, states the legal position in the following words :

"Under the Mahomedan law the three essential requisites to make a gift valid : (1) declaration of the gift by the donor: (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case."

29. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made

orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law.

30. In considering what is the Mohammadan Law on the subject of gifts inter vivos, the Privy Council in *Mohammad Abdul Ghani1* stated that when the old and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of possession of land, and that could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed.

31. Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of T.P. Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mahomedan Law (19th Edition), page 120. In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts.

32. We are unable to concur with the view of the Full Bench

of Andhra Pradesh High Court in the case of *Tayyaba Begum5*. We approve the view of the Calcutta High Court in *Nasib Ali3* that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence.

33. We also approve the view of the Gauhati High Court in the case of *Md. Hesabuddin*[10] . The judgments to the contrary by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law.

34. Now, as regards the facts of the present case, the gift was made by Shaik Dawood by a written deed dated February 5, 1968 in favour of his son Mohammed Yakub in respect of the properties 'A' schedule and 'B' schedule appended thereto. The gift – as is recited in the deed – was based on love and affection for Mohammed Yakub as after the death of donor's wife, he has been looking after and helping him. Can it be said that because a declaration is reduced to writing, it must have been registered? We think not. The acceptance of the gift by Mohammed Yakub is also evidenced as he signed the deed. Mohammed Yakub was residing in the 'B' schedule property consisting of a house and a kitchen room appurtenant thereto and, thus, was in physical possession of residential house with the donor. The trial court on consideration of the entire evidence on record has recorded a categorical finding that Shaik Dawood (donor), executed the gift deed dated February 5, 1968 in favour of donee (Mohammed Yakub), the donee accepted the gift and the donor handed over the properties covered by the gift deed to the donee. The trial court further held that all the three essentials of a valid gift under the Mohammadan Law were satisfied. The view of the trial court is in accord with the legal position stated by us above. The gift deed dated February 5, 1968 is a form of declaration by the donor and not an instrument of gift as contemplated under Section 17 of the Registration Act. As all the three essential requisites are

satisfied by the gift deed dated February 5, 1968, the gift in favour of defendant 2 became complete and irrevocable.

35. The High Court in the impugned judgment relied upon the Full Bench decision in the case of *Tayyaba Begum*[5] but we have already held that the view of the Full Bench in *Tayyaba Begum*[5] is not a correct view and does not lay down the correct law.

36. Consequently, the appeal is allowed and the judgment and order dated September 13, 2004 passed by the High Court of Andhra Pradesh is set aside. The judgment and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakhapatnam is restored. The parties shall bear their own costs.

R.P. Appeal allowed.

STATE OF MAHARASHTRA
v.
RAVIKANT SHANKARAPPA PATIL & ORS.
(Criminal Appeal Nos. 262-263 of 2005)

MAY 5, 2011

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

PENAL CODE 1860:

ss.376,386 read with ss.148,, 452/149, 366/149, 342/149, 323/149, 506 (2)/149 IPC and S. 25(1) (a) of the Arms Act – Allegation against main accused that he threatened the prosecutrix and her family members and married the prosecutrix and raped her – Other accused prosecuted for various other offences —Conviction by trial court—Acquittal by High Court holding that the father and the brother of prosecutrix acted as vakils of the prosecutrix and gave consent for the marriage and in consideration Mehar was given and there was also a valid Nikahnama – Held: The judgment of the High Court cannot be faulted with and the findings given by it are perfectly justified – Judgment of High Court acquitting the accused persons is confirmed –Appeal against acquittal.

Constitution of India, 1950:

Article 136 – Appeal against acquittal – Held: Burden is on the prosecution to prove and justify its case that findings of High Court in acquitting the accused were perverse and were not justifiable and that the High Court miserably failed to do justice and inferences drawn by it are not possible or could not have been drawn in law – In the instant case, the prosecution has failed to discharge the burden – Penal Code, 1860 – ss. 376 and 386 read with ss. 148, 452/149, 377/149, 242/149, 323/149, 506 (2)/149 IPC – Arms Act, 1951 – s.25(1) (a) – Appeal.

Respondent No.1 was prosecuted for committing offences punishable u/s. 376 and 386 IPC and s. 25(1)(a) of the Arms Act. He was also prosecuted with the other accused-respondents for committing offences punishable u/ss. 148, 452/149, 366/149, 342/149, 323/149, 506 (2)/149 IPC. The case of the prosecution was that the prosecutrix was a student of 3rd year Computer Engineering. Her father was a professor and after returning to India, he started Hotel business, and her brother was studying in a different city; that accused-respondent No.1 (A-1), who was an M.P., came in close contact with the family members of the prosecutrix and helped them initially in construction of their house; that he wanted to marry with the prosecutrix, but her father opposed it: that on 5.5.1999, A-1, under threat, took the prosecutrix and her whole family to Mumbai for getting married with the prosecutrix, and for this purpose, he converted himself into Islam; that Nikah was performed on 6.5.1999 at Mumbai in presence of Kazi (PW-3) with the help of accused-respondents No. 2 to 5; that after Nikah, A-1 took the prosecutrix to various places and under threat raped her from 9.5.1999 to 17.5.1999. The prosecutrix lodged an FIR on 5.6.1999. The trial court convicted the accused persons of the offences charged. But on appeal, the High Court set aside the conviction and acquitted all the accused.

In the instant appeal filed by the State, it was contended for the accused- respondents that the High Court considered the evidence of the prosecutrix, her mother (PW-8) and the Kazi (PW-3) and there was nothing on record to suggest that A-1 at any point of time coerced or threatened the prosecutrix or her family members who were educated and well to do parents; that the High Court went painstakingly through the whole list of events from November, 1998 up to 5.6.1999, the day

when the FIR was lodged, and took a reasonable and plausible view of the evidence of the prosecutrix, her mother and the Kazi, and the silence on the part of the material witnesses and failure to explain as to why they did not report the matter to the police of all these events, created a doubt on the prosecution story, particularly, when the father and the brother of the prosecutrix were not examined as prosecution witnesses and they rather acted as vakils and gave consent for the marriage, and in consideration Mehar was given and the valid Nikahnama was on record.

Dismissing the appeals, the court

HELD: The impugned judgment cannot be faulted with. The findings given by the High Court are perfectly justifiable. The High Court has not erred in coming to the conclusion that the whole prosecution story was a myth. This is an appeal against the acquittal. The burden was on the prosecution to prove and justify its case that the findings of the High Court were perverse and were not justifiable and that the High Court has miserably failed to do justice and the findings and inferences drawn by it are not possible view or could not have been drawn in law. The prosecution has failed to discharge the burden. The well-considered judgment of the High Court acquitting the accused persons is confirmed. [para 13-15] [1187-F-H; 1188-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 262-263 of 2005.

From the Judgment and Order dated 10.9.2004 of the High Court of Bombay in Criminal Appeal No. 658 and 644 of 2000.

Uday B. Dube, Sanjay V. Kharde and Asha Gopalan Nair for the Appellant.

Sushil Karnajkar and Venkateswara Rao Anumolu for the Respondents.

The Judgment of the Court was delivered by

V.S.SIRPURKAR, J. 1. Challenge in these appeals is to the judgment dated 10.9.2004 passed by the High Court of Bombay in Criminal Appeal Nos. 658 and 644 of 2000 whereby the conviction and sentence awarded by the trial court were set-aside and appeals of the appellants were allowed and they were acquitted of the charges levelled against them. Respondent Nos. 1 to 5 were convicted by the trial court for the offences punishable under Sections 148, 452 r/w 149, 366 r/w 149, 342 r/w 149, 323 r/w 149 and 506 (2) r/w 149, IPC. Respondent No. 1/accused No. 1 Ravikant Shankarappa Patil was also convicted for the offences punishable under Section 386 r/w Section 511, 376 IPC and 25(1)(a) of the Arms Act.

2. Briefly stated, the prosecution case is that prosecutrix Fatima Sabin Nazir Ahmad Shaikh was studying in III year Computer engineering at Walchand Institute of Technology at Solapur and had brilliant education record. Her father was a professor. He left India for Libya in 1981 but returned to India in 1991 and started his hotel business. Her brother was also getting education at Pune. Accused No. 1 contested election from Solapur constituency and was elected Member of Parliament. Due to political activities, accused No. 1 came in close contact with the family members of the prosecutrix and also helped her family initially for the construction of their house.

3. It is further alleged that accused No. 1 developed fatal attraction for the prosecutrix. After hearing the proposal from accused No.1 for marriage with the prosecutirx, her father got annoyed with accused No.1 and asked him not to come to his house. It is alleged that with his muscle and money power, accused No. 1 started threatening the family members of the prosecutrix. On 5.5.2009, accused No. 1, under threat, took the prosecutrix and her whole family to Bombay for getting married

with prosecutrix and for that purpose he also converted himself to Islam. Thereafter, Nikaah was performed on 6.5.1999 at Bombay in the presence of Kazi. In this nikaah, accused no. 1 was helped by other accused persons who were his henchmen. Even after the nikaah, accused No. 1 is alleged to have moved along with prosecutrix at various places including Khandala, Mysore and Hyderabad where according to the prosecutrix, under threat,she was raped by accused No. 1 from 9.5.1999 to 17.5.1999. In short, the case of the prosecution appears to be that it was only with the muscle and money power that the accused No. 1 forced the prosecutrix for nikaah and ravished her. The prosecutrix lodged an FIR against the accused persons on 5.6.1999.

4. In support of its case, the prosecution, in all, examined 12 witnesses including prosecutrix PW 2- Fatima Sabin Nazir Ahmad Shaikh, Kazi PW-3 Hajij Yusuf Shaikh and her mother PW8- Rashida Begum Nazir Ahmed Shaikh.

5. We have heard learned counsel appearing for the parties and gone through the record.

6. We were taken through the evidence of PW1, PW3 and PW8 by Mr. U.B.Dube, learned counsel appearing for the State of Maharashtra who painstakingly developed the whole argument to the effect that the family of the prosecutrix was a middle class family. With the help of muscle and money power, accused No. 1 used to threaten the prosecutrix and her family members. The whole family remained under the threat of the accused No. 1 and the nikaah was performed forcibly though the prosecutrix had not consented for it. Learned counsel, therefore, argued that it is established law that when the prosecutrix herself alleges the rape and other ill treatments by accused No. 1, her evidence was sufficient enough to convict the accused persons and rightly believed to be true by the trial court and, therefore, the High Court should not have upset the conviction awarded by the trial court.

7. Mr. Dube submitted that in committing the crime, accused No. 1 was helped by all the other accused persons who were his henchmen. He also stated that accused No. 1 was an influential political leader having been once elected as a Member of Parliament and once as a Member of Legislative Assembly of Karnataka. He, therefore, pointed out that accused No. 1 along with his henchmen overawed the family of the prosecutrix and also obtained forceful consent from the prosecutrix for their nikaah. He, further argues that there was no valid nikaah and that the act of the accused No. 1 in ravishing the prosecutirx would amount to rape under Section 376 IPC. He also argued that the prosecutrix was forcibly taken away from the custody of her parents. The conviction and sentence ordered by the Sessions court for the various offences including criminal intimidation and causing injuries were well justified.

8. Mr. Sushil Karanjkar, learned counsel for the respondent pointed out that the High Court has very painstakingly gone through the whole list of events from November, 1998 right up to 5.6.1999, the day when the first information report was lodged by the prosecutrix. Mr. Karanjkar, pointed out that even though it was alleged that because of his desire to marry with the prosecutrix as he was not happy with his wife, accused No. 1 overawed the family with the revolver, but the incident was never reported to the police. Mr. Karanjkar further pointed out that even though in the Ramzaan Eid festival in January, 1999, when the prosecutrix and her family members had shifted to new house at Jule, Solapur, accused No. 1 came there and threatened them to pay Rs. 12,00,000/-, this matter was also not reported to the police. Learned counsel further argues that in the last week of April, 1999 when accused No. 1 again came to the residence of the prosecutrix and started threatening and insisted for payment of Rs. 8,00,000/- and also insisted the prosecutrix to marry him, no report to that effect was lodged. Likewise, the learned counsel pointed out the that the event of 5.5.1999 was not reported to the police when the prosecutrix

and her family was made to travel to Bombay in a car belonging to accused No. 1 for the purpose of nikaah. Learned counsel points out that for the purpose of nikaah, accused No. 1 converted himself to Islaam and there was a kazi who got the nikaah performed between accused No. 1 and the prosecutrix. Thereafter, learned counsel relied on all the documents including the affidavit filed by the accused No. 1 to the effect that he had converted himself into Islaam as also the oral evidence of the Kazi - PW3. Therefore, there was no question of any undue influence or coercion having been exercised by or at the instance of accused No. 1.

9. Mr. Karanjkar also points out that for the purpose of this nikaah, the rest of family members including the father and mother of the prosecutrix travelled by train and accompanied accused No. 1 and the prosecutrix to the house of Shakil Noorani in Bombay where nikaah was performed. Learned counsel further points out that there was no question of this marriage having been performed under the undue influence, coercion, threat or fraud. Learned counsel points out that after the marriage, accused No. 1 and the prosecutrix went to a resort in Khandala and thereafter, they also went to Hyderabad, Mysore etc. including the Vrindavan gardens where accused No. 1 is alleged to have taken the photographs of the prosecutrix.

10. Mr. Karanjkar further points out that the High Court has threadbare appreciated the evidence of PW2, her mother PW8, Kazi- PW 3 and other prosecution witnesses. There is nothing on record to suggest that accused No. 1, at any point of time, coerced or threatened the prosecutrix and her family members. Mr. Karanjkar wonders that the educated family and well to do parents do not find time to report the serious matter concerning their daughter to the police. He further supports the finding of the High Court to the effect that though accused No. 1 had ravished the prosecutrix in her own house in a bed room when the other family members were also present, but none of them

came forward to the rescue of the prosecutrix despite her cries for help and lodged any report. Learned counsel points out a very substantial discrepancy in the prosecution case that the father and brother of the prosecutrix,who were professor and student, have not been examined as prosecution witnesses. Learned counsel further points out that the High Court has taken a reasonable and plausible view of the evidence of PWs 1, 3 and 8 and silence on the part of the material witnesses and failure to explain as to why they did not report the matter to the police of all these events creates a doubt on the prosecution story.

11. Mr. Dube, learned counsel appearing for the State was not in a position to justify the evidence of Kazi PW 3, particularly, that he did not see happiness on the face of the bride when he performed the nikaah.

12. Mr. Karanjkar argued that the High Court has rightly concluded that from the solitary statement of PW3 that he did not see happiness on the face of bride, no inference can be drawn that it was a forced nikaah. It is also stated that the father and the brother of the prosecutrix acted as vakils of the prosecutrix and also gave consent for the marriage and in consideration, Mehar of Rs. 25,0000/- was given. There is also a valid nikaahnama on record.

13. We have gone through the impugned judgment very carefully. We find that the impugned judgment cannot be faulted with. The findings given by the High Court are perfectly justifiable. The High Court has not erred in coming to the conclusion that the whole prosecution story was a myth. Undoubtedly, the whole matter is unfortunate. However, this is an appeal against the acquittal. The burden was on the prosecution to prove and justify its contention that the findings of the High Court were perverse and were not justifiable and in this case, the High Court has miserably failed to do justice and the findings and inferences drawn by it are not possible

view or could not not have been drawn in law. The prosecution has failed to convince us.

14. Once the appeal fails against the main accused, there remains nothing against the other accused. Mr. Dube, did not seriously challenge their acquittal. The evidence also does not suggest any criminal activity on their part. The appeal against their acquittal has to necessarily fail.

15. This being the position, we are not inclined to interfere with the well-considered judgment of the High Court. The impugned judgment of the High Court, acquitting the accused persons, is confirmed. The appeals are, accordingly, dismissed.

R.P. Appeals dismissed.

MURUGAN @ SETTU
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 455 of 2004)

MAY 06, 2011

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

Penal Code, 1860 – ss. 366, 376 and s. 363 r/w s. 109 – Punishment for kidnapping and rape – A1 allegedly kidnapped PW 4, compelled her to marry him and raped her – A2 and A3 were allegedly involved in compelling PW 4 to get married to A1 – Concurrent findings by the courts below that PW 4 was minor on the date of the incident – Trial court convicted A1 u/ss. 366 and 376 and sentenced him to rigorous imprisonment for 3 and 7 years; and A2 and A3 u/s. 366/109 and sentenced them to 3 years rigorous imprisonment each – High Court upheld conviction and sentence of A1, however, modified that of A2 and A3 to s. 363/109 and sentenced them to two years imprisonment each – Plea of appellants (A1, A2 and A3) before Supreme Court that PW 4 was major at the relevant time and that she married A1 voluntarily and not under compulsion – On appeal, held: School certificate issued by the Headmaster on basis of the entry made in the school register corroborates the contents of the birth certificate issued by Municipality that prosecutrix was minor on the date of the incident – Thus, no other issue required to be considered – Order of conviction and sentence passed by the High Court does not call for interference – Evidence Act, 1872 – s. 35

According to the prosecution, appellant (A1) kidnapped PW-4, compelled her to marry him and raped her. A2 and A3 were allegedly involved in compelling PW-4 to get married with the appellant. The trial court holding

that PW-4 was minor on the date of the incident, convicted the appellant under Sections 366 and 376 IPC and awarded the sentence of rigorous imprisonment for 3 and 7 years; and A2 and A3 under Sections 366/109 IPC and were sentenced for 3 years rigorous imprisonment each. The High Court upheld the order of conviction and sentence of A 1. The conviction of A2 and A3 under Sections 366/109 IPC was modified to one under Sections 363/109 IPC and imposed punishment of two years each. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1. Documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. [Para 11] [1199-D-E]

Umesh Chandra v. State of Rajasthan **AIR 1982 SC 1057;** *State of Bihar and Ors. v. Sri Radha Krishna Singh and Ors.* **AIR 1983 SC 684 – relied on.**

Mohd. Ikram Hussain v. State of U.P. and Ors. **AIR 1964 SC 1625;** *Madan Mohan Singh and Ors. v. Rajni Kant and Anr.* **AIR 2010 SC 2933;** *Brij Mohan Singh v. Priya Brat Narain Sinha and Ors.* **AIR 1965 SC 282;** *Birad Mal Singhvi v. Anand Purohit* **AIR 1988 SC 1796;** *Updesh Kumar and Ors. v. Prithvi Singh and Ors.* **AIR 2001 SC 703;** *State of Punjab v. Mohinder Singh* **AIR 2005 SC 1868;** *Vishnu @ Undrya v. State of Maharashtra* **AIR 2006 SC 508;** *Satpal Singh v. State of Haryana* **(2010) 8 SCC 714 – referred to.**

2.1. PW-1, father of the prosecutrix (PW-4) in his examination-in-chief did not say anything about the age of the prosecutrix. Thus, the defence did not cross-examine him on this issue. However, no suggestion were put to him by the defence that the prosecutrix was major and had developed a liking/love affair with A.1 and had

voluntarily gone with him. PW-15, mother of the prosecutrix had deposed that the date of birth of the prosecutrix was 30.3.1984. At the relevant time, the prosecutirix was studying in 8th standard and was 14 years of age. Suggestion put to her that she was deposing about the age of her younger daughter and not of the prosecutrix was denied. She also denied that she was deposing falsely. PW-11, Head Mistress of the School proved the certificate and stated that in the school register the date of birth of the prosecutrix had been recorded as 30.3.1984. [Paras 5 and 7] [1196-D-E; 1197-F-H; 1198-A-B]

2.2. It is evident from a letter written by the prosecutrix to the police officer that she had developed a love affair with A 1, but there is nothing on record on the basis of which she had written that her hospital age was 17 years. No reliance can be placed on such a letter in view of the certificates issued by the Municipality and the School. It is a matter of common knowledge that the birth certificate issued by the Municipality generally does not contain the name of the child, for the reason, that it is recorded on the basis of the information furnished either by the hospital or parents just after the birth of the child and by that time the child is not named. [Para 9] [1198-F-G]

2.3. In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30.3.1984; registration was made on 5.4.1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Head Master on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the

Municipality. Both these entries in the school register as well, as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of PW.15, the mother of the prosecutrix. She had been cross examined at length but nothing could be elicited to doubt her testimony. Her deposition remained un-shaken and is fully reliable. [Para 13] [1200-B-E]

2.4 There is no reason to hold that the prosecutrix was major on the date of incident and in view thereof, no other issue is required to be considered. There is no reason to interfere with the quantum of punishment in either of these appeals. [Para 14] [1200-F]

Case Law Reference:

AIR 1964 SC 1625	**Referred to.**	**Para 10**
AIR 1982 SC 1057	**Relied on.**	**Para 11**
AIR 1983 SC 684	**Relied on.**	**Para 11**
AIR 2010 SC 2933	**Referred to.**	**Para 12**
AIR 1965 SC 282	**Referred to.**	**Para 12**
AIR 1988 SC 1796	**Referred to.**	**Para 12**
AIR 2001 SC 703	**Referred to.**	**Para 12**
AIR 2005 SC 1868	**Referred to.**	**Para 12**
AIR 2006 SC 508	**Referred to.**	**Para 12**
(2010) 8 SCC 714	**Referred to.**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 455 of 2004.

From the Judgment & Order dated 14.7.2003 of the High Court of Judicature at Madras in Criminal Appeal No. 981 of 2002.

WITH

Crl. A.Nos. 456 & 457 of 2004.

G. Sivabalamurugan, Anis Mohd, L.K. Pandey, Rakesh K. Sharma, S. Thananjayan for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. All the three appeals have been preferred against the common judgment and order dated 14.7.2003 passed by the High Court of Judicature at Madras in Criminal Appeal Nos. 981 and 986 of 2002, by which the High Court had disposed of the said appeals preferred by the appellants against the judgment and order of the trial court dated 24.6.2002, in Sessions Case No. 30 of 2000, by which appellant Murugan @ Settu (A.1) had been convicted under Sections 366 and 376 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and awarded the sentence of rigorous imprisonment for 3 and 7 years on those counts respectively. Other appellants stood convicted under Sections 366 r/w 109 IPC and were sentenced for 3 years rigorous imprisonment.

2. **FACTS :**

(A) The prosecution case reveals that on 11.2.1998 at 9.00 A.M., Murugan @ Settu (A.1) with an intention to marry the minor girl Shankari (PW.4), aged 14 years studying in 8th standard, kidnapped her from S.S.K.V. School, Kancheepuram, by stating that her mother, Parimala (PW.15) was seriously ill and had been admitted to hospital. Shankari (PW.4) took permission to leave the school from her teacher, Rajeshwari (PW.5) and also informed about the said fact to her classmate P. Megala (PW.6).

(B) Shankari (PW.4) was taken by A.1 in an auto bearing No. TN 21 B 6582 to Kamatchi Amman Temple, where Shiva (A.2) also came and both of them took Shankari (PW.4) to Orikai road stating that they were going to the hospital.

(C) On being questioned by Shankari (PW.4), she was threatened by A.1 and A.2 that if she made noise they would spoil her life. She was taken to the house of Smt. Logammal (PW.7), the grand-mother of A.2 at Kaliampoondi, at about 1.00 P.M. They stayed there at night. On 12.2.1998, M.P. Ekambaram (PW.1), father of Shankari (PW.4) lodged an FIR in Crime No. 209 of 1998 that his daughter had gone to attend the school on 11.2.1998 and did not return. Thus, she was missing.

(D) On the same day, i.e. 12.2.1998, Ramalingam @ Ramu (A.3) came from Kancheepuram. All the accused compelled Shankari (PW.4) to get married with A.1 and, accordingly, A.1 tied 'Thali' in Shankari's neck. A.1 and A.3 took Shankari (PW.4) to Bangalore leaving A.2 at Vellore. They went to New Lingapuram, Bangalore, to the house of Rajeshwari (PW.9), sister of A.3 and stayed there upto 24.2.1998. During this period, A.1 raped the prosecutrix Shankari (PW.4) many times. They reached Chennai and stayed in the house of Vijayalakshmi (PW.12).

(E) As there had been an FIR in respect to the fact that Shankari (PW.4) had been missing, Pugazhendhi (PW.19), Inspector of Police, Kanchi Taluk Police Station after receiving the information that A.1 and prosecutrix Shankari (PW.4) would appear before the court at Kancheepuram reached there, and made a written application before the Judicial Magistrate, Kancheepuram for sending A.1 and Shankari (PW.4) for medical examination. The application was accepted.

(F) Dr. Parasakthi (PW.18) examined Shankari (PW.4) and issued a medical certificate, Ex.P-10 to the effect that she had been sexually assaulted. Dr. K. Gururaj (PW.20) examined A.1 on 26.3.1998 and issued certificate Exs.P-14 and P-15 to the effect that he was not impotent. He also examined Shankari (PW.4) and issued certificates including Ex.P-16 giving his opinion that she was about 18 years of age.

(G) After completing the investigation, charge sheet was

submitted. Subsequently, the trial court framed the charges against A.1 under Sections 366 and 376 IPC and so far as A.2 and A.3 were concerned, they were charged under Sections 366 r/w 109 IPC and Sections 376 r/w 109 IPC. As all the three appellants denied the charges and claimed trial, they were proceeded with trial.

(H) In support of its case, the prosecution examined 21 witnesses and 12 documents were exhibited and marked. Five properties were also marked. In defence, the appellants examined a photographer as DW.1. Three documents i.e. D1 to D3 were also exhibited and marked. After concluding the trial, the Sessions Court convicted all the appellants and imposed punishment as aforesaid.

(I) Being aggrieved, all the three appellants preferred Criminal Appeals before the High Court which have been disposed of by the common judgment and order impugned herein with certain modifications in the conviction and sentence so far as A.2 and A.3 are concerned. It set aside their conviction under Sections 366 r/w 109 IPC and convicted them under Sections 363 r/w 109 IPC and imposed punishment of two years. Hence, these appeals.

3. Shri G. Sivabalamurugan, learned counsel appearing for the appellants, has challenged the concurrent findings recorded by the courts below mainly on the grounds that the courts failed to appreciate that Shankari (PW.4) had gone voluntarily with A.1 as she was in love with him and wanted to marry him and not under compulsion of any one else. A.2 and A.3 had played no role in their affair or marriage. All independent witnesses i.e. Smt. Logammal (PW.7); Rajeshwari (PW.9) and Vijayalakshmi (PW.12) turned hostile. Shankari (PW.4) was major as opined by Dr. K. Gururaj (PW.20) who issued certificate to the effect that she was about 18 years of age. The courts erred in placing reliance upon the birth certificate of Shankari (PW.4) either given by the Municipality or by the School on the basis of the School Register. In the birth certificate issued by the Municipality, the name of the prosecutrix was not mentioned. Neither M.P.

Ekambaram (PW.1), father nor Parimala (PW.15), mother of the prosecutrix, was able to state the correct age and they were not sure about the date of birth and age of Shankari (PW.4). In such a fact-situation, conviction of the appellants is liable to be set aside.

4. On the other hand, Shri S. Thananjayan, learned counsel appearing for the State has vehemently opposed the appeals contending that there are concurrent findings of fact recorded by the courts below, particularly on the most material issue i.e. regarding the age of the prosecutrix Shankari (PW.4), to the effect that she was minor. The school register and birth certificate issued by the Municipality are admissible pieces of evidence under the Indian Evidence Act, 1872 and have rightly been relied upon. In case the finding on the issue of age of the prosecutrix is not disturbed, the question of entertaining any other issue does not arise. The appeals are devoid of any merit and are liable to be dismissed.

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

We are in full agreement with the learned counsel appearing for the State that in case the finding recorded by the courts below on minority of the prosecutrix remains undisturbed, no other issue is required to be examined.

6. **Age as per the documents** :

I. Relevant part of the FIR lodged by M.P. Ekambaram (PW.1) father of the prosecutrix reads as under:

> "My daughter's name is Shankari, aged about 14 years and studying in 8th Std. at S.S.K.V. School. She went on 11.2.1998 at 9 A.M. and did not return home. I came to know that she is missing."

II. Relevant part of the certificate of birth issued by the Department of Public Health, under Section 17 of the Registration of Birth and Deaths Act, 1969, issued by the

Commissioner, Kancheepuram Municipality reads as under:

Name	-……
Date of Birth	- 30.3.1984
Date of Registration	-5.4.1984
Sex	- Female
Registration No.	- 140
Name of father	- M.P. Ekambaram
Name of Mother	- Parimala

III. The date of birth certificate issued by the Head Master, S.S.K.V. Higher Secondary School, Kancheepuram reads as under:

> "Certified that E. Shankari D/o M.P. Ekambaram was a student of this school in Eighth Std. during 1997-98 and her date of birth as per our school record (Admn.No.13714 (n.c.) is 30.3.1984 (Thirtieth March Nineteen Eighty Four)."

IV. Dr. K. Gururaj (PW.20) examined prosecutrix Shankari (PW.4) and on the basis of Radiological Test Report (Ex.P.16) opined that she was aged about 18 years.

7.**Evidence of the witnesses in respect of age :**

I. M.P. Ekambaram (PW.1) in his examination-in-chief does not say anything about the age of the prosecutrix. Thus, the defence did not cross-examine him on this issue. However, no suggestion had been put to him by the defence that she was major and had developed a liking/love affair with A.1 and had voluntarily gone with him.

II. Parimala (PW.15), mother of the prosecutrix had deposed that the date of birth of the prosecutrix was 30.3.1984. At the relevant time, prosecutirix was studying in 8th standard and was 14 years of age. Suggestion put to her that she was

deposing about the age of her younger daughter and not of Shankari (PW.4) was denied. She also denied that she was deposing falsely.

III. Mrs. Gayathri (PW.11), Head Mistress, SSKV School, proved the certificate and stated that in the school register the date of birth of Shankari (PW.4) had been recorded as 30.3.1984.

8. The defence has placed reliance on Ex. D-1, a letter written by the prosecutrix to the police officer which reads:

> "I am in love with Murugan for the past 1 ½ years. My school age is 15 years. My hospital age is 17 years. My father and mother would go by caste. I talked with him without knowledge of my father and mother. When my parents came to know about our affair they tortured me for 4 months. My lover told me that he was going to die by consuming 'poison'. I insisted that if I live, I can live with him otherwise I will die. He did not take me out. I only took him out. I am requesting the police and my relatives to put us together, otherwise if they try to separate us, my parents and police would be responsible.
>
> Sd/- Shankari"

9. It is evident from the aforesaid documents that prosecutrix Shankari (PW.4) had developed a love affair with A.1, but there is nothing on record on the basis of which she had written that her hospital age was 17 years. No reliance can be placed on such a letter in view of the certificates issued by the Municipality and the School. It is a matter of common knowledge that the birth certificate issued by the Municipality generally does not contain the name of the child, for the reason, that it is recorded on the basis of the information furnished either by the hospital or parents just after the birth of the child and by that time the child is not named.

10. In *Mohd. Ikram Hussain v. State of U.P. & Ors.,* AIR 1964 SC 1625, this Court had an occasion to examine a similar

issue and held as under:

> "In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on June 20, 1960 she was under 17 years of age. There was also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Indian Evidence Act and the entries in the school registers were made *ante litem motam*. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the Doctor who examined Kaniz Fatima,.....The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."

11. Documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. (Vide: *Umesh Chandra v. State of Rajasthan,* AIR 1982 SC 1057; and *State of Bihar & Ors. v. Sri Radha Krishna Singh & Ors.,* AIR 1983 SC 684).

12. This Court in *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.,* AIR 2010 SC 2933, considered a large number of judgments including : *Brij Mohan Singh v. Priya Brat Narain Sinha & Ors.* AIR 1965 SC 282; *Birad Mal Singhvi v. Anand Purohit* AIR 1988 SC 1796; *Updesh Kumar & Ors. v. Prithvi Singh & Ors.,* AIR 2001 SC 703; *State of Punjab v. Mohinder Singh,* AIR 2005 SC 1868; *Vishnu @ Undrya v. State of Maharashtra,* AIR 2006 SC 508; *Satpal Singh v. State of Haryana* (2010) 8 SCC 714, and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document. Authenticity of entries may also depend on whose information

such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases.

13. In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30.3.1984; registration was made on 5.4.1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Head Master on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well, as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW.15), the mother of the prosecutrix. She had been cross examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW.4), which she flatly denied. Her deposition remained un-shaken and is fully reliable.

14. In view of the above, we do not see any reason to hold that prosecutrix, Shankari (PW.4) was major on the date of incident and in view thereof, no other issue is required to be considered. We also see no reason to interfere with the quantum of punishment in either of these appeals. Thus, appeals fail and are accordingly dismissed.

15. The appellants are on bail. Their bail bonds are cancelled. appellants must surrender within 30 days from today to serve the remaining part of the sentences, failing which the Chief Judicial Magistrate, Kancheepuram, Tamil Nadu, shall apprehend the appellants and send them to jail. Copy of the judgment and order be sent to the court concerned for information and compliance.

N.J. Appeals dismissed.