BHAJAN SINGH @ HARBHAJAN SINGH & ORS.
v.
STATE OF HARYANA
(Criminal Appeal No. 562 of 2007)

JULY 4, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

ss. 302/149 and 307/149 – Double murder and attempt to murder – Six accused armed with deadly weapons went to the house of complainant and attacked his family members resulting in death of two of his sons and serious injuries to his grandson – Conviction by trial court of three accused u/ss 302/34 and 307/34 and acquittal of the other three – High Court convicting all the six u/ss 302/149 and 307/149 – HELD: High Court has rightly held that the judgment of trial court in acquitting three of the accused was perverse, as it was a clear case of common object which all the six accused shared and by application of s.149 all the six were liable for inflicting injuries on the two victims which resulted in their death and serious injuries to the other – Judgment of High Court affirmed – Appeal against acquittal – Scope of interference by appellate court –Reiterated.

Code of Criminal Procedure, 1973:

ss. 154 and 157 – Recording of FIR and sending of special report to Magistrate – Delay – Effect of – HELD: Every delay is not fatal, unless prejudice to the accused is shown – In the instant case, two sons of the complainant were done to death by accused and his grand son seriously injured and was shifted to hospital – After making all the required arrangements, the complainant made his way to police station which was 6 km from the village – In the circumstances, there

was no delay in lodging the FIR nor in sending the special report to Magistrate.

s.157 – Sending of report of commission of offence to jurisdictional Magistrate – Delay – HELD: The expression 'forthwith' in the section does not mean that prosecution is required to explain delay of every hour in sending copy of FIR to Magistrate – In the given case, if number of dead and injured is high, delay in dispatching the report is natural – Purpose of s.157 – Explained.

Evidence:

Testimony of eye-witness and injured witness vis-à-vis medical evidence – Legal position – Explained – HELD: In the instant case, two persons died on the spot and other received grievous injuries – In such a fact situation the witness is not supposed to give exact account of the incident, and minor discrepancies on trivial matters, which do not affect the core of prosecution case, may not prompt the court to reject the evidence in its entirety – Penal Code, 1860 – ss. 302/149 and 307/149.

Witness:

Testimonies of injured witness and related witness – Evidentiary value of – Explained.

The six accused-appellants were prosecuted for committing offences punishable u/ss 302/149 and 307/149 IPC. The prosecution case as narrated by the complainant (PW-9) was that at 5.00 P.M. on 6.11.2002, the accused armed with swords, spear, 'gandasa' and 'mogra' and accompanied by two ladies, came to his house and exhorted that they would teach them a lesson for tethering their cattle in the street, and attacked his family members resulting in the death of two of his sons ('GS' and 'NS') at the spot and grievous injuries to his

grand-son (PW-10) who was taken to the hospital and had to be operated upon the following day. The accused were arrested and upon their disclosure statements, weapons of crime, namely, two swords, one spear, one 'gandasa' and one 'mogra', were recovered. The two ladies were discharged and the six accused-appellants were put to trial. Accused 'JS' in his statement u/s 313 CrPC stated that he was called from his house, which was nearby, by PW-10 and when he came out, 'GS', 'NS' and PW-10 pounced upon him and in order to save himself, he took out his 'kirpan' and welded it at random in self-defence and the three opponents suffered injuries. The trial court convicted three accused u/ss 302/34 and 307/34 IPC and acquitted the remaining three giving them the benefit of doubt. The convicts filed appeals against their conviction; whereas the State appealed against acquittal of three accused. The High Court convicted all the six accused u/ss 302/149 and 307/149 IPC and sentenced them to imprisonment for life and to pay a fine of Rs.10,000/- each.

In the instant appeals filed by all the six accused, it was contended for the appellants that there was three hours delay in lodging the FIR and again there was three hours delay in sending the special report u/s 157 CrPC to the Magistrate; that the injuries attributed to the deceased and PW-10, did not tally with the medical evidence; that no independent witness was examined; and that the High Court committed an error in setting aside the acquittal of three accused.

Dismissing the appeals, the Court

HELD: 1.1. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In case, there is some delay in filing the FIR, the complainant must give

explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint may prove to be fatal. [para 9] [18-F-G]

1.2. In the instant case, the occurrence took place at about 5 p.m. on 6.11.2002. PW.9 was going to Police Station, when PW.18, the Sub Inspector, met him along with other police officials on the way. Statement of PW.9 was recorded there by PW-18. The evidence on the file proves that the special report was received by the Ilaqa Magistrate at 10.45 p.m. on 6.11.2002. The occurrence had taken place in the village, which was about 6 Km. from the Police Station. Two sons of PW.9 had died in the occurrence. His grandson, P.W.10, was seriously injured and was shifted to the hospital. So, after making all these arrangements, PW.9 had made his way to the Police Station to lodge the report. In the circumstances, there is no delay in lodging the FIR. [para 10] [19-D-F]

Sahib Singh v. State of Haryana, weapon of crime **1997 (3) Suppl. SCR 95 = AIR 1997 SC 3247;** *G. Sagar Suri & Anr. v. State of U.P. & Ors.,* **2000 (1) SCR 417 = AIR 2000 SC 754;** *Gorige Pentaiah v. State of A.P. & Ors.,* **2008 (12) SCR 623 = (2008) 12 SCC 531; and** *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors*. **2010 (10) SCR 16 = AIR 2010 SC 3624 – referred to.**

1.3. The expression 'forthwith' mentioned in s. 157 CrPC does not mean that the prosecution is required to explain delay of every hour in sending copy of the FIR to the Magistrate. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been anti-timed or anti-dated or investigation is not fair and forthright. Every such delay

is not fatal unless prejudice to the accused is shown.I n a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances. Thus, a delay in dispatch of the copy of the FIR by itself is not a circumstance which can throw out the prosecution case in its entirety, particularly, when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence. However, an un-explained inordinate delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. In the instant case, the High Court has rightly held that there was no delay either in lodging the FIR or in sending the copy of the FIR to the Magistrate. It may be pertinent to point out that defence did not put any question on these issues while cross-examining the Investigating Officer, providing him an opportunity to explain the delay, if any. [para 15-16] [21-G-H; 22-A-D]

Shiv Ram & Anr. v. State of U.P., **1997 (4) Suppl. SCR 531 = AIR 1998 SC 49;** *Munshi Prasad & Ors. v. State of Bihar,* **2001 (4) Suppl. SCR 25 =AIR 2001 SC 3031;** *Pala Singh & Anr. v. State of Punjab,* **1973 (1) SCR 964 =AIR 1972 SC 2679; and** *State of Karnataka v. Moin Patel & Ors*, **1996 (2) SCR 919 =AIR, 1996 SC 3041;** *Rajeevan & Anr. v. State of Kerala,* **(2003) 3 SCC 355;** *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra*, **2007 (11) SCR 197 = (2007) 13 SCC 501,** *State of Rajasthan v. Teja Singh & Ors.,* **AIR 2001 SC 990; and** *Jagdish Murav v. State of U.P. & Ors.,* **2006 (5) Suppl. SCR 219 = (2006) 12 SCC 626;** *Sarwan Singh & Ors. v. State of Punjab* **AIR 1976 SC 2304:** *State of U.P. v. Gokaran & Ors*. **AIR 1985 SC 131;** *Gurdev Singh & Anr. v. State of Punjab* **2003 (2) Suppl. SCR 80 = (2003) 7 SCC 258;** *State of Punjab v. Karnail Singh* **2003 (2) Suppl. SCR 593 = (2003) 11 SCC 271;** *State of J & K v.*

Mohan Singh & Ors., **AIR 2006 SC 1410;** *N.H. Muhammed Afras v. State of Kerala*, **(2008) 15 SCC 315;** *Sarvesh Narain Shukla v. Daroga Singh & Ors.,* **2007 (11) SCR 300 = AIR 2008 SC 320; and** *Arun Kumar Sharma v. State of Bihar* **2009 (14) SCR 1023 = (2010) 1 SCC 108 – referred to.**

2.1. As regards the plea of contradiction in medical evidence and ocular evidence, the position of law can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. [para 17 and 23] [22-E-F; 26-B]

2.2. PW.11 along with another doctor conducted the post-mortem examination on the two bodies and found incised wounds and stab wounds on the vital parts of the bodies. The witness further opined that the cause of death was due to shock and haemorrhage as a result of injuries which were ante-mortem in nature and sufficient to cause death in the normal course of nature. On the same day at about 10.30 AM, PW.10 was examined and one incised wound on his left shoulder 6 x 3 cm x muscle deep; one sword injury in stomach, and one injury on his neck were noted. He was operated upon with repair of liver tear. [para 7] [16-G-H; 17-A-H; 18-A-D]

2.3. The testimonies of PW.9 and PW.10 are fully reliable. There is no contradiction between their statements which rather corroborate each other. Their depositions fully corroborate the medical reports. PW.10 is an injured witness in the same occurrence and his testimony cannot be ignored. The High Court has dealt with the injuries found on the person of PW.10. The

evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. "Convincing evidence is required to discredit an injured witness". Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [para 18 and 21] [23-C-F; 25-D-G]

Abdul Sayeed v. State of Madhya Pradesh, **2010 (13) SCR 311 = (2010) 10 SCC 259;** *Kailas & Ors. v. State of Maharashtra,* **(2011) 1 SCC 793;** *Durbal v. State of Uttar Pradesh,* **(2011) 2 SCC 676; and** *State of U.P. v. Naresh & Ors*., **(2011) 4 SCC 324; and** *State of U.P. v. Hari Chand* **2009 (7) SCR 149 (2009) 13 SCC 542 – relied on**

2.4. In an alike case, where two persons died on the spot and other received grievous injuries, the eye witnesses also make an attempt to save themselves and rescue the persons under attack. In such a fact-situation, the witness is not supposed to be a perfectionist to give the exact account of the incident. Some sort of contradiction, improvement, embellishment is bound to occur in his statement. [para 24] [26-D]

2.5. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirety. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. In the instant case, there is no major contradiction either in the evidence of the witnesses or any conflict in medical or ocular evidence which may tilt the balance in favour of the appellants. [para 30-31] [29-B-F]

Vijay @ Chinee v. State of M.P., **(2010) 8 SCC 191; and** *Brahm Swaroop & Anr. v. State of U.P.,* **2010 (15) SCR 1 = AIR 2011 SC 280 – referred to.**

3.1. So far as the plea that no independent witness has been examined by the prosecution is concerned, in a case like this where without having any substantial cause two persons had been killed and one had been seriously injured, no neighbour, even if he had witnessed the incident, would like to come forward and depose against the assailants. More so, the defence did not ask the Investigating Officer (PW 18) to explain for not examining any independent witness. The appellants are, therefore, not entitled to take any benefit out of it. [para 25] [26-F-H]

3.2. Evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. [para 26] [27-A-B]

M.C. Ali & Anr. v. State of Kerala, **AIR 2010 SC 1639; and** *Himanshu @ Chintu v. State (NCT of Delhi),* **(2011) 2 SCC 36 – referred to.**

4.1. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may

also be a subject matter of scrutiny by the appellate court. Where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, the appellate court may interfere with an order of acquittal. [para 28] [27-C-H; 28-A]

Sanwat Singh & Ors. v. State of Rajasthan **1961 SCR 120 = AIR 1961 SC 715;** *Suman Sood alias Kamaljeet Kaur v. State of Rajasthan* **2007 (6) SCR 499 = (2007) 5 SCC 634;** *Brahm Swaroop & Anr. v. State of U.P.,* **2010 (15) SCR 1 = AIR 2011 SC 280;** *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* **(2011) 3 SCC 317; *and*** *Rukia Begum & Ors. v. State of Karnataka,* **(2011) 4 SCC 779 – referred to.**

4.2. In the instant case, the High Court has rightly reached the conclusion that the judgment of the trial court was perverse, as it was a clear cut case of common object, which the three accused convicted by the trial court shared with the three accused acquitted by it; and by application of s.149 IPC all the six were liable for inflicting injuries on two victims which resulted in their death and brutal injuries to PW-10. [para 29] [28-E-H; 29-A]

5. The theory of self-defence put forward by accused 'JS' that he caused the injuries to the complainant party to save himself, is most improbable and not worthy of acceptance and the High Court has rightly rejected the same. [para 32] [29-G-H]

Case Law Reference:

1997 (3) Suppl. SCR 95	**referred to**	**para 9**
2000 (1) SCR 417	**referred to**	**para 9**

2008 (12) SCR 623	**referred to**	**para 9**
2010 (10) SCR 16	**referred to**	**para 9**
1997 (4) Suppl. SCR 531	**referred to**	**para 11**
2001 (4) Suppl. SCR 25	**referred to**	**para 12**
1973 (1) SCR 964	**referred to**	**para 12**
1996 (2) SCR 919	**referred to**	**para 12**
2003 (3) SCC 355	**referred to**	**para 13**
2007 (11) SCR 197	**referred to**	**para 14**
2001 AIR 990	**referred to**	**para 14**
2006 (5) Suppl. SCR 219	**referred to**	**para 14**
1976 AIR 2304	**referred to**	**para 14**
1985 AIR 131	**referred to**	**para 14**
2003 (2) Suppl. SCR 80	**referred to**	**para 14**
2003 (2) Suppl. SCR 593	**referred to**	**para 14**
2006 AIR 1410	**referred to**	**para 14**
2007 (11) SCR 300	**referred to**	**para 14**
2009 (14) SCR 1023	**referred to**	**para 21**
2011 (1) SCC 793	**referred to**	**para 21**
2011 (2) SCC 676	**referred to**	**para 21**
2011 (4) SCC 324	**referred to**	**para 21**
2009 (7) SCR 149	**referred to**	**para 22**
AIR 2010 SC 1639	**referred to**	**para 26**
(2011) 2 SCC 36	**referred to**	**para 26**

1961 SCR 120	**referred to**	**para 28**
2007 (6) SCR 499	**referred to**	**para 28**
2010 (15) SCR 1	**referred to**	**para 28**
2011 (3) SCC 317	**referred to**	**para 28**
2011 (4) SCC 779	**referred to**	**para 28**
(2010) 8 SCC 191	**referred to**	**para 30**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 562 of 2007..

From the Judgment & Order dated 15.12.2006 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 360-DBA of 2005.

WITH

Crl. A. Nos. 982 & 983 of 2008.

Amit Kumart, Ritesh Ratnam, Jawahar Lal for the Appellants.

Rajeev Gaur Naseem, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

Dr. B.S. CHAUHAN, J. 1. All the aforesaid three appeals have been filed against the common judgment and order dated 15.12.2006 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 17-DB of 2005; and 360-DBA of 2005. The High Court partly affirmed the judgment and order dated 25/26.11.2004 of the Sessions Court in Sessions Trial No. 97 of 2003 convicting three appellants, namely, Joga Singh, Mukhtiar Singh and Nishabar Singh under Sections 302 and 307 read with Section 149 of the Indian Penal Code, 1860, (hereinafter called 'IPC'), and sentenced them to undergo

rigorous imprisonment for life and to pay a fine of Rs.10,000/-. Further, the High Court convicted accused/appellants, namely, Bhajan Singh, Puran Singh and Gurdeep Singh who had been acquitted of all the charges by the trial court and awarded the sentences similar to the other accused.

2. Facts and circumstances giving rise to these appeals are as under:

A. Prosecution version as mentioned in the complaint of Trilok Singh (PW.9) is that, at 5.00 PM on 6.11.2002, he was present in his house alongwith his sons, namely, Gian Singh (deceased), Nishan Singh (deceased), his wife Swaran Kaur, daughter Harbhajan Kaur, grandson Harbhajan Singh and maternal grandson Ajaib Singh (injured) (PW.10). Bhajan Singh armed with Neja (Spear), Gurdeep Singh armed with Mogra (Pestle), Puran Singh armed with Gandasa, Joga Singh armed with sword, Nishabar Singh armed with Gandasa and Mukhtiar Singh armed with sword, accompanied by two ladies, namely, Chinder Kaur and Manjit Kaur, entered his house and raised Lalkara that they would teach them a lesson for tethering their cattle in the street. All the accused attacked Gian Singh (deceased) and Nishan Singh (deceased). Gurdeep Singh opened the attack by giving Mogra blow on the head of Gian Singh and Mukhtiar Singh inflicted a sword blow on the waist of Gian Singh, as a result of which he fell down. Joga Singh inflicted a sword blow on Nishan Singh's chest, Bhajan Singh inflicted Neja blow on his waist, Puran Singh inflicted Gandasa blow on his right elbow, Nishabar Singh inflicted Gandasa blow on his waist and, as a result, Nishan Singh fell down on the ground. Joga Singh inflicted a sword blow on the stomach of Ajaib Singh (PW.10), Mukhtiar Singh inflicted sword blow on the neck of Ajaib Singh, and as a result, he fell down. All the assailants then fled away from the spot with their respective weapons. Gian Singh and Nishan Singh died on the spot due to injuries. Ajaib Singh (PW.10), injured, was taken to the hospital.

B. On the basis of the complaint, an FIR was lodged and registered (Ex.PB-1). SI Prakash Chand (PW.18) accompanied by Surinder Kumar, Photographer and other police officials reached the place of occurrence at about 8.15 P.M. Photographs of the dead bodies etc., were taken, inquest reports were prepared on the dead bodies of Gian Singh and Nishan Singh and blood stained earth was picked up from the place of occurrence. It was sealed in separate parcels. Dead bodies were sent for post-mortem examination and site plan etc. were prepared. Post-mortem was conducted on 7.11.2002 by Dr. Rajesh Gandhi (PW.11), who opined that the cause of death of both the persons was shock and haemorrhage as a result of injuries. Ajaib Singh (PW.10), injured, was also examined on 6.11.2002 with diagnosis of multiple stab injuries in chest and abdomen. He was operated upon on 7.11.2002 and was discharged from the hospital on 20.11.2002.

C. Bhajan Singh @ Harbhajan Singh was arrested on 10.11.2002, and on his disclosure statement, Neja (Spear) was recovered from his residential house. On the disclosure statement of Puran Singh - appellant, the Gandasa was recovered from underneath his box at his residential house, and on the same day, on the disclosure statement of Joga Singh – appellant, that he had kept concealed sword underneath his bed in his residential house, the sword was recovered. On 11.11.2002, Gurdeep Singh made a disclosure statement, on the basis of which, Mogra alleged to have been used in the crime was recovered from his residential house. On the same day, Mukhtiar Singh also got the concealed sword recovered from the house of Bhajan Singh. On completion of the investigation, challan was put up in the court. Charges were framed against all the six appellants for the offences punishable under Sections 148, 302 and 307 read with Section 149 IPC. The two ladies, namely, Chinder Kaur and Manjit Kaur were discharged. As all of the accused pleaded not guilty to the charges and claimed trial, they were put on trial.

D. During the course of trial, the prosecution examined as many as 19 witnesses including injured Ajaib Singh (PW.10), and Trilok Singh (PW.9), the complainant. All the appellants were examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). Joga Singh, appellant, pleaded that at the time of the incident, he was present in his house which was adjoining to the house of the complainant. Ajaib Singh (PW.10) came to his house and called him saying that he was being called by someone at the 'Phirni' of the village. When he came out, Gian Singh and Nishan Singh (both deceased) and Ajaib Singh (PW.10) pounced upon him and tried to drag him towards their house forcibly. Apprehending and suspecting that they would take him inside their house and kill him, he pushed Gian Singh, as a result of which, his head was struck against the wall. The other persons, namely, Nishan Singh (deceased) and Ajaib Singh (PW.10) in order to save him and to wriggle out of this situation, took out kirpan and wielded the same at random in self defence. It was in this background that Gian Singh, Nishan Singh and Ajaib Singh suffered injuries. The other accused simply denied the allegations and complained of their false implicity in the case. However, none of the appellant/accused adduced any evidence in defence.

E. On conclusion of the trial, the trial court held that appellants Bhajan Singh @ Harbhajan Singh, Puran Singh and Gurdeep Singh were entitled to benefit of doubt and acquitted them of all the charges. However, the other remaining three appellants, namely, Joga Singh, Mukhtiar Singh and Nishabar Singh were convicted under Section 302 read with Section 34, and Section 307 read with Section 34 IPC, and were sentenced to undergo imprisonment for life and fine of Rs.10,000/-, each under Section 302 read with Section 34 IPC, and seven years imprisonment and fine of Rs.5,000/- under Section 307 read with Section 34 IPC; in default of payment of fine, they would further undergo rigorous imprisonment for six months. However, they were acquitted of charges under Section 148 I.P.C.

3. Being aggrieved, the three appellants convicted by the trial court filed Criminal Appeal No. 17-DB of 2005, while against the order of acquittal of the other three appellants, the State of Haryana filed Criminal Appeal No. 360-DBA of 2005. The High Court heard both the appeals together and disposed of the same by a common judgment and order dated 15.12.2006, maintaining the conviction of appellants in Criminal Appeal No. 17-DB of 2005. It also reversed the judgment and order of the trial court which acquitted the other three appellants, and convicted them for the same offence. The High Court awarded them same sentence as one awarded to the persons convicted by the trial court. Hence, these appeals.

4. Shri Amit Kumar, learned counsel appearing for the appellants has submitted that no independent eye-witness has been examined. The High Court has placed a very heavy reliance on the evidence of Trilok Singh, complainant (PW.9) and his grandson Ajaib Singh (PW.10). In spite of the fact that a large number of persons had witnessed the incident, none of them has been examined. It is evident from the depositions of Trilok Singh (PW.9) and Ajaib Singh (PW.10) and judgments of the courts below that the place of occurrence has been tempered with by the prosecution and thus, the prosecution failed in its duty to disclose the correct facts. Injuries attributed to the deceased persons as well as Ajaib Singh (PW.10) by the witnesses do not tally with the medical evidence. There had been inordinate delay of 3 hours in lodging the FIR, though the Police Station was in close vicinity of the place of occurrence. Information of offence was sent to the Illaqa Magistrate as required under Section 157 Cr.P.C. after inordinate delay of 3 hours. Weapons used in the commission of the crime had not been shown to the medical experts for their opinion to ascertain whether the injuries on the persons of the deceased and Ajaib Singh (PW.10), injured, could be caused by those weapons. The High Court committed an error in interfering with the order of acquittal so far as the three appellants are concerned. Thus, the appeals deserve to be allowed.

5. On the contrary, Shri Rajeev Gaur "Naseem", learned counsel appearing for the State of Haryana has opposed the appeals with vehemence contending that it was pre-planned attack by the appellants as Gurdeep Singh and Bhajan Singh @ Harbhajan Singh had come to the house of the complainant on that day at 7.00 A.M. and told him not to tether the cattles in the street, otherwise the complainant's family would face the dire consequences. It was in pursuance of the common object of teaching the lesson to the family, the attack was made on the same day at 5.00 P.M. The appellants committed gruesome murder of two innocent persons and caused grievous injuries to Ajaib Singh (PW.10). The weapons had been recovered on the disclosure statements of the appellants, and were sent to Forensic Science Laboratory for report and the report was positive. Law does not prohibit to place reliance upon the evidence of closely related persons, rather the requirement is that evidence of such persons must be scrutinised with caution and care. However, evidence of an injured witness has to be relied upon, unless the injuries are found to be superfluous or self-inflicted just to create evidence against the other party. There is no material discrepancy in the medical and ocular evidence. In case the common object stands proved, such trivial discrepancies become immaterial and insignificant. The High Court was right in reversing the order of acquittal of three appellants as the High Court came to the conclusion that the findings of fact so recorded by the trial court were perverse. Thus, the appeals lack merit and are liable to be dismissed.

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

7. **Injuries:**

I. Dr. Rajesh Gandhi (PW.11) along with Dr. R.N. Boora conducted the post-mortem examination on the body of Gian Singh and found following injuries:-

(1) A stab wound was present on the back at level of

T5 vertebra, 2 cm. lateral to mid line on right side. Horizontally placed. Wound was 3 x 2 cm. On opening rupture of right lung was present. Fluid blood approximately 250 ml. was present in cavity. On further extending the dissection an incised wound was present on the posterior surface of liver which was 2 x 1 cm. Fluid blood approximate 700 ml. was present in abdominal cavity.

(2) On opening skull a haematoma of size 5 x 2 cm. was present on right parietal side.

The witness further opined that the cause of death was due to shock and haemorrhage as a result of injuries described above which were ante-mortem in nature and sufficient to cause death in normal course of nature.

II. On the same day at about 10.30 AM, Dr. Rajesh Gandhi (PW.11) and other Doctors conducted autopsy on the dead-body of Nishan Singh and found following injuries on his person:-

(1) Incised wound was present in front of neck 2 cm. lateral to mid line on left side, obliquely placed and on opening there was hole in trachea and oesophagus. The size of wound was 6 x 3 cm. External carotid artery was also punctured.

(2) Incised wound was present on anterior lateral aspect of right elbow. Size was 6 x 3 cm. x muscle deep.

(3) Stab wound was present on the back on the right side 4 cm. below scapula, 6 cm. medial to mid axillary line obliquely placed and size was 3 x 2 cm. and deep upto lung. On opening the lung was sharply cut.

(4) Stab wound was present in the mid epigastric

region 6 cm. inferior to xiphisternum. Spindle shaped obliquely placed size was 4 x 2 cm. Omentum was lying outside. On opening there was incised wound on the interior surface of liver whose size 2 x 2 cm. There was collection of 800 ml. of fluid blood in abdominal cavity.

III. Ajaib Singh (PW.10) was examined and following injuries were found on his person:

(1) Incised wound on left shoulder 6 x 3 cms x muscle deep.

(2) Sword injury in stomach.

(3) Injury on the neck.

He was operated upon exploratory laprotomy with restion ananstomosis with repair of liver tear with bilateral intercostals tube drainage with peritoneal lavage.

8. Shri Amit Kumar, learned counsel appearing for the appellants has submitted that there has been delay in lodging the FIR and sending the copy of the FIR to the court. Therefore, the prosecution failed to give a fair picture with regard to genesis of the crime.

9. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In case, there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint may prove to be fatal. In such case of delay, it also cannot be presumed that the allegations were an after thought or had given a coloured version of events. The court has to carefully examine the facts before it, for the reason, that the complainant party may initiate criminal proceedings just to harass the other side with

mala fide intentions or with ulterior motive of wreaking vengeance. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law. (Vide: *Sahib Singh v. State of Haryana,* AIR 1997 SC 3247; *G. Sagar Suri & Anr. v. State of U.P. & Ors.,* AIR 2000 SC 754; *Gorige Pentaiah v. State of A.P. & Ors.,* (2008) 12 SCC 531; and *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors.,* AIR 2010 SC 3624)

10. In the instant case, the occurrence took place at about 5 p.m. on 6.11.2002. Trilok Singh (PW.9) was going to Police Station, Safidon, when Prakash Chand (PW.18), Sub Inspector met him along with other police officials in old bus stand, Safidon. Statement of Trilok Singh (PW.9) was recorded there by Prakash Chand, Sub Inspector. The evidence on the file proves that the special report was received by the Ilaqa Magistrate at 10.45 p.m. on 6.11.2002. The occurrence had taken place in village Chhapar, which is about 6 Kms. from Police Station Safidon. Two sons of Trilok Singh (PW.9), namely, Gian Singh and Nishan Singh had died in this occurrence. Ajaib Singh (P.W.10) was seriously injured. He was shifted to the hospital. So, after making all these arrangements, Trilok Singh (PW.9) had made his way to the Police Station to lodge report with the police. In view of the above, we reach an inescapable conclusion that there is no delay in lodging the FIR with the police in this case.

DELAY IN SENDING THE COPY OF FIR TO COURT

11. In *Shiv Ram & Anr. v. State of U.P.,* AIR 1998 SC 49, this Court considered the provisions of the Section 157, Cr.P.C., which require that the police officials would send a copy of the FIR to the Illaqa Magistrate forthwith. The court held that if there is a delay in forwarding the copy of the FIR to the

Illaqa Magistrate, that circumstance alone would not demolish the other credible evidence on record. It would only show how in such a serious crime, the Investigating Agency was not careful and prompt as it ought to be.

12. In *Munshi Prasad & Ors. v. State of Bihar,* AIR 2001 SC 3031, this Court considered this issue again and observed:

> "While it is true that Section 157 of the Code makes it obligatory on the officer in charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice — if the court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case."

While deciding the said case, this Court placed relied upon its earlier judgments in *Pala Singh & Anr. v. State of Punjab,* AIR 1972 SC 2679; and *State of Karnataka v. Moin Patel & Ors,* AIR, 1996 SC 3041.

13. In *Rajeevan & Anr. v. State of Kerala,* (2003) 3 SCC 355, this Court examined a case where there had been *inordinate delay* in sending the copy of the FIR to the Illaqa Magistrate and held that un-explained inordinate delay may adversely affect the prosecution case. However, it would depend upon the facts of each case.

14. A similar view was reiterated in *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra,* (2007) 13 SCC 501, wherein there had been a delay of four days in sending the copy of the FIR to the Illaqa Magistrate and no satisfactory explanation could be furnished for such inordinate delay. While deciding the said case, reliance had been placed on earlier

judgments in *State of Rajasthan v. Teja Singh & Ors.*, AIR 2001 SC 990; and *Jagdish Murav v. State of U.P. & Ors.,* (2006) 12 SCC 626.

[See also *Sarwan Singh & Ors. v. State of Punjab AIR 1976 SC 2304: State of U.P. v. Gokaran & Ors.* AIR 1985 SC 131**;** *Gurdev Singh & Anr. v. State of Punjab* (2003) 7 SCC 258; *State of Punjab v. Karnail Singh* (2003) 11 SCC 271; *State of J & K v. Mohan Singh & Ors.,* AIR 2006 SC 1410; *N.H. Muhammed Afras v. State of Kerala,* (2008) 15 SCC 315; *Sarvesh Narain Shukla v. Daroga Singh & Ors.,* AIR 2008 SC 320; and *Arun Kumar Sharma v. State of Bihar* (2010) 1 SCC 108].

15. Thus, from the above it is evident that the Cr.P.C provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not anti-timed or anti-dated. The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159 Cr.P.C., if so required. Section 159 Cr.P.C. empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself or through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been anti-timed or anti-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression 'forthwith' mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances. However, un-explained inordinate

delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence.

16. In view of the above, we are in agreement with the High Court that there was no delay either in lodging the FIR or in sending the copy of the FIR to the Magistrate. It may be pertinent to point out that defence did not put any question on these issues while cross-examining the Investigating Officer, providing him an opportunity to explain the delay, if any. Thus, we do not find any force in the submissions made by the learned counsel for the appellants in this regard.

17. It has further been submitted on behalf of the appellants that there is contradiction in medical evidence and ocular evidence. The trial Court has examined this issue and in para 22 of the impugned judgment, observed as under:

".....that accused Joga Singh and accused Mukhtiar Singh had attacked their victims with swords whereas accused Nishabar Singh had used 'Gandasa' for the purpose resulting in the deaths of Gian Singh and Nishan Singh and brutal attempt on the life of P.W. Ajaib Singh. The trial court had further observed that the skull injury attributed to accused Gurdeep Singh does not receive corroboration from the medical evidence on record because such forceful blow was bound to leave

some external mark of injury at the site of the impact but no such mark was seen there by the doctor."

The trial court reached the conclusion that it seems that accused Puran Singh was also implicated in this case along with his father Bhajan Singh alias Harbhajan Singh because he is a brother of prime accused Joga Singh. Thus, the involvement of accused Puran Singh in the incident is also doubtful.

18. This has to be examined in the light of the evidence of two eye witnesses, namely, Trilok Singh (PW.9) and Ajaib Singh (PW.10). There is no contradiction between their statements which rather corroborate each other. Ajaib Singh (PW.10) corroborates the version of Trilok Singh (PW.9). He also deposed that Gurdeep Singh was armed with 'Mogra'. Joga Singh and Mukhtiar Singh were armed with swords. Puran Singh and Nishabar Singh were armed with 'Gandasas'. Bhajan Singh @ Harbhajan Singh was armed with 'Neja'. Gurdeep Singh inflicted a 'Mogra' blow on the head of Gian Singh while Mukhtiar Singh inflicted a 'sword' blow on the waist of Gian Singh. He fell down on the ground. Then Joga Singh inflicted a sword blow on Nishan Singh's chest . Bhajan Singh @ Harbhajan Singh inflicted a 'Neja' blow on his waist. Puran Singh inflicted a 'Gandasa' blow on his right elbow. Nishabar Singh inflicted a 'Gandasa' blow on his waist and as a result, Nishan Singh fell down on the ground. Ajaib Singh (PW.10) further deposed that when he tried to rescue Gian Singh and Nishan Singh, Joga Singh inflicted a sword injury in his stomach. Mukhtiar Singh inflicted a sword injury on the back of his neck. Nishabar Singh inflicted a 'Gandasa' injury on his left shoulder.

19. Depositions of Trilok Singh (PW.9) and Ajaib Singh (PW.10) fully corroborate the medical reports. The High Court correctly appreciated this issue as under:

"So, according to their testimonies two injuries were caused to Gian Singh (deceased), four injuries were caused to Nishan Singh (deceased) and three injuries were caused to Ajaib Singh (PW.10). In medical evidence also, two injuries were found on the body of Gian Singh (deceased) and four injuries were found on P.W.10 Ajaib Singh as per copy of medico legal report Exhibit P.AA. There is some conflict about the seat of the injuries as stated by P.W.9 Trilok Singh and P.W. 10 Ajaib Singh."

The testimonies of Trilok Singh (PW.9) and Ajaib Singh (PW.10) are fully reliable. Ajaib Singh (PW.10) is an injured witness in the same occurrence and his testimony cannot be ignored.

20. The High Court has dealt with the injuries found on the person of Ajaib Singh (PW.10) and held as under:

"Regarding injuries to PW.10, Ajaib Singh, it can be said that these were dangerous to life. He was operated upon for small gut perforation and liver laceration. He remained admitted in PGI MS Rohtak, from 6.11.2002 to 20.11.2002. PW.17 Dr. Paryesh Gupta and PW.19 Dr. Satish Bansal proved the nature of the injuries of PW. Ajaib Singh. The appellants and their acquitted co-accused had the intention or knowledge to cause his death. Determinative question is intention and knowledge, as the case may be, and not nature of the injury. Bodily injury may not be sufficient to cause death. An accused may be convicted under Section 307 of the Code if he had intention to cause death.

After scrutinizing the testimonies of P.W.11 Dr. Rajesh Gandhi, PW.17 Dr. Paryesh Gupta and PW.19 Dr. Satish Bansal, we are of the considered opinion that the trial court over depended on their opinion evidence. The trial court should not have rejected the direct evidence of P.Ws Trilok Singh and Ajaib Singh on the strength of the

uncanny opinion expressed by the doctors. This makes us to interfere in the impugned judgment for setting aside the acquittal of Bhajan Singh @ Harbhajan Singh, Puran Singh and Gurdeep Singh. They are vicariously liable with appellants Nishabar Singh, Mukhtiar Singh and Joga Singh on the principle of vicarious liability enunciated under Section 149 of the Code. Conviction of appellants Nishabar Singh, Mukhtiar Singh and Joga Singh on the basis of direct evidence and medical evidence is well founded and we do not find any infirmity in the impugned judgment in this regard."

21. The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide: *Abdul Sayeed v. State of Madhya Pradesh,* (2010) 10 SCC 259; *Kailas & Ors. v. State of Maharashtra,* (2011) 1 SCC 793; *Durbal v. State of Uttar Pradesh,* (2011) 2 SCC 676; and *State of U.P. v. Naresh & Ors.,* (2011) 4 SCC 324).

22. In *State of U.P. v. Hari Chand,* (2009) 13 SCC 542, this Court re-iterated the aforementioned position of law:

"In any event unless the oral evidence is totally

irreconcilable with the medical evidence, it has primacy."

23. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. [Vide: *Abdul Sayeed* (Supra)].

24. In a case like at hand, where two persons died on the spot and other received grievous injuries, the eye witnesses also make an attempt to save themselves and rescue the persons under attack. In such a fact-situation, the witness is not supposed to be perfectionist to give the exact account of the incident. Some sort of contradiction, improvement, embellishment is bound to occur in his statement.

Thus, in view of the above, we have no hesitation to hold that submission of the learned counsel for the appellants in this regard is preposterous.

25. It has further been submitted that a large number of persons had gathered at the place of occurrence but no independent witness has been examined by the prosecution for the reasons best known to it. In a case like this where without having any substantial cause two persons had been killed and one had been seriously injured, no neighbour, even if he had witnessed the incident, would like to come forward and depose against the assailants. More so, the defence did not ask SI Prakash Chand (PW.18), the Investigating Officer as to why he could not have furnished the explanation for not examining the independent witness. In view thereof, we are of the considered opinion that the appellants are not entitled to take any benefit of doubt.

26. Evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. (Vide: *M.C. Ali & Anr. v. State of Kerala,* AIR 2010 SC 1639; and *Himanshu @ Chintu v. State (NCT of Delhi),* (2011) 2 SCC 36).

27. It has further been submitted that the High Court had no justification to reverse the judgment of acquittal so far as the three appellants are concerned.

28. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the Appellate Court may be more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Interference with the order of acquittal is permissible only in "exceptional circumstances" for "compelling reasons". The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court.

The expressions like 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc., are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution

evidence points to the guilt of the accused and the judgment is on the face of it perverse, the appellate Court may interfere with an order of acquittal.

The appellate court should also bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

(See: *Sanwat Singh & Ors. v. State of Rajasthan* AIR 1961 SC 715; *Suman Sood alias Kamaljeet Kaur v. State of Rajasthan* (2007) 5 SCC 634; *Brahm Swaroop & Anr. v. State of U.P.,* AIR 2011 SC 280; *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* (2011) 3 SCC 317; and *Rukia Begum & Ors. v. State of Karnataka,* (2011) 4 SCC 779).

29. The High Court has reached the conclusion that the judgment of the trial Court was perverse as the trial Court held that it was a clear cut case of common object. The High Court has decided the issue as under:

> "There was common object which appellants Nishabar Singh, Mukhtiar Singh and Joga Singh shared with their acquitted co-accused Bhajan Singh alias Harbhajan Singh, Puran Singh and Gurdeep Singh. They entered the courtyard of the house of P.W. Trilok Singh by raising 'Lalkara' that they would teach a lesson for tethering cattle in the street. By application of Section 149 of the Code, they all the six were liable for inflicting injuries to Gian Singh and Nishan Singh, which resulted in their deaths and brutal injuries to P.W. Ajaib Singh. The trial court was not justified in acquitting Bhajan Singh alias Harbhajan Singh, Puran Singh and Gurdeep Singh on hypothetical medical evidence, by ignoring the reliable direct evidence of P.Ws. Trilok Singh and Ajaib Singh."

In view of the above, we do not find any reason to accept the submissions so made on behalf of the appellants.

30. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety. "*Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."* Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. [Vide: *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191; and *Brahm Swaroop* (Supra)].

31. In the instant case, we could not find any major contradiction either in the evidence of the witnesses or any conflict in medical or ocular evidence which may tilt the balance in favour of the appellants. There had been minor improvement, embellishment etc., which remain insignificant and have to be ignored.

32. The theory of self-defence put forward by Joga Singh, appellant, that he caused the injuries to the complainant party to save himself, is most improbable and not worthy of acceptance. The High Court has rightly rejected the same, observing that Joga Singh, appellant, could not even suspect

that the complainant party was nurturing a sinister design against him when he was called from his house initially.

33. In view of above, we do not find any force in either of these appeals. The same are dismissed. The judgment of the High Court dated 15.12.2006 is affirmed in its totality. The appellants in Criminal Appeal No. 562 of 2007, namely, Bhajan Singh, Puran Singh and Gurdeep Singh have been enlarged on bail by this Court vide orders dated 2.8.2007 and 22.7.2009. Their bail bonds are cancelled, they are directed to surrender within a period of two weeks from today, failing which, the Chief Judicial Magistrate, Jind, (Haryana) shall ensure to take them into custody and send them to jail to serve their remaining part of the sentence. A copy of this judgment and order be sent to the learned Chief Judicial Magistrate, Jind, (Haryana) for information and compliance.

R.P. Appeals dismissed.

BINABAI BHATE

v.

STATE OF MADHYA PRADESH AND ORS.

(Civil Appeal No. 4920 of 2011)

JULY 04, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 – ss. 17, 18, 19 and 23(A) – Publication of draft development plan which included some portion of appellant's land – Appellant filed objections – Resolution passed by the Committee in favour of the appellant – However, State Government included certain lands belonging to the appellant in the modified development plan – Review petition filed by the appellant u/s. 23(A) before the State Government rejected – Writ petition as also writ appeal dismissed – On appeal, held: Resolutions passed by the Committee cannot be said to be absolute, final and binding – State Government possesses the final authority in the matter of giving approval to the development plan – On facts, development plan was approved by the State Government without any modification and therefore, there was no question of inviting any further suggestions or giving any hearing to the appellant – There was no violation of the principles of natural justice – State Government issued a final plan and also invited objections from the persons who are likely to be affected by inclusion of their land to which the appellant did not submit any objection, therefore, the question of giving a hearing to the appellant at that stage did not arise – High Court was justified in holding that there could be no review to the order passed since no power of review is provided for under the provisions of the Act – Also, ss. 23 and 23A providing for review and modifications of the development plan or adjoining plan not applicable in the instant case since State Government has not made any

modification in the development plan – Thus, order passed by the High Court does not suffer from any infirmity.

Some portion of appellant's land was included in the draft development plan published under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973, for the purpose of holding a Mela. The appellant submitted objections. The Committee decided that the appellant's land was not required and passed a resolution in favour of the appellant. However, by a Notification, the appellant came to know that the State Government had included certain lands belonging to the appellant in the modified development plan. The appellant filed a review petition under Section 23(A) of the Act before the State Government and the same was rejected stating that there is no provision for review of the order in the Act. The appellant then filed a writ petition and the same was dismissed. Thereafter, writ appeal was also dismissed by the High Court. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 Sections 17, 18 and 19 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 give a broad scheme laying down the procedure as to how a development plan is to be approved by the State Government as also the procedure as to when it becomes final and operational. The said scheme of the provisions clearly states that a recommendation of the Committee is only recommendatory and advisory in nature and such recommendations of the Committee are required to be considered by the State Government, but the absolute and final power is rested on the State Government to approve or reject the draft development plan or to approve the same with some modifications as it may deem appropriate. The resolutions passed by the Committee cannot be said to be absolute, final and

binding and the State Government possesses the final authority in the matter of giving approval to the development plan. [Paras 18 and 19] [39-C-G]

1.2 In the instant case, the development plan as prepared under Section 14 was approved by the State Government without any modification and therefore there was no question of inviting any further suggestions as no modification was suggested to the said development plan. There was no question of giving any hearing to the appellant and therefore, the issue raised with regard to alleged violation of the principles of natural justice is without any merit. In any case, the State Government approved the draft plan without any modification and therefore provisions of sub-sections (2) and (3) of Section 19 are not applicable to the facts and circumstances of the instant case. Despite the said legal provision, the State Government in the instant case issued a final plan and also invited objections from the persons who are likely to be affected by inclusion of their land. Even thereafter the appellant did not submit any objection and therefore, the question of giving a hearing to the appellant at that stage did not arise. So the contentions of the appellant are not found to be worthy of acceptance. [Paras 17 and 19] [38-H; 39-A-B; E-G]

1.3 A power of review against an order passed is a creature of the statute and since no such power of review is provided for under the provisions of the Act, the High Court was justified in holding that there could be no review to the order passed. So far the review and modifications of the development plan or adjoining plan as provided in Sections 23 and 23A of the Act, are concerned, the said provisions are not applicable in the instant case for the State Government has not made any modification in the development plan. Besides, the said power is exclusively vested with the State Government

and in an appropriate case, the State Government is empowered to exercise such power as and when deem proper. This is not a case where the State Government thought it fit to invoke such power. Therefore, there is no error in the judgment passed by the High Court. The impugned order does not suffer from any infirmity. [Paras 20 and 21] [39-H; 40-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4920 of 2011.

From the Judgment & Order dated 29.8.2008 of the High Court of Judicature of Madhya Pradesh, Jabalpur in W.A. No. 1063 of 2006.

Pramod Swarup, Sushma Verma, Pooja Sharma, Praveen Swarup for the Appellant.

Vikas Upadhyay (for B.S. Banthia) for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 29.08.2008 passed by the High Court of Madhya Pradesh at Jabalpur, in Writ Appeal No. 1063 of 2003, whereby the High Court dismissed the said appeal filed by the appellant herein and upheld the order dated 16.04.2003 passed by the Single Bench of the High Court of Madhya Pradesh at Jabalpur.

3. The appellant is Bhuswami of certain lands situated at Tehsil Khandwa, District East Nimar, Madhya Pradesh. A draft development plan was published under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereafter referred to as "The Act"). The apellant came to know that the draft development plan included some portion of her land with the intention of making it available for Navchandi Mela. However,

the land was ancestral and he appellant intended to transfer it by a will duly registered and already executed.

4. The Appellant submitted objections on 24.03.2000 and a committee was constituted consisting of Member of Parliament, Member of Legislative Assembly, Mayor, President Zila Panchayat, Sarpanch Gram Panchayat and Collector. The committee considered the objections and decided that the land was not required and the objections of the appellant and others were accepted stating that the land in question was not required. Accordingly, a resolution dated 26.05.2000 was passed by the committee in favour of the Appellant.

5. In spite of the resolution passed by the committee, by a notification dated 28.02.2001 published in Madhya Pradesh Raj Patra, the Appellant came to know that the State Government had included certain lands belonging to the appellant in the modified development plan. The Appellant filed review Petition under section 23(A) of the Act before the State Government which was rejected by order dated 24.07.2002 stating that there is no provision for review of the order in the Act.

6. The Appellant thereafter, filed Writ Petition in the High Court which was dismissed by the Learned Single Judge by order dated 16.04.2003. Since the Letter Patent jurisdiction was abolished, the appellant filed Special Leave Petition in the Supreme Court. During the pendency of the Special Leave Petition the provision of Letter Patent jurisdiction was revived. The Special Leave Petition was allowed to be withdrawn for filing Letters Patent Appeal in the High Court.

7. The Appellant filed Writ Appeal before the High Court of Judicature, Jabalpur which was dismissed by order dated 29.08.08. The present appeal, as stated hereinbefore, is directed against the aforesaid order passed by the High Court.

8. The learned counsel appearing for the appellant

submitted that after passing of the Resolution by the Committee constituted accepting the objections/suggestions of the appellant, the said resolution of the Committee should have been accepted by the Government as the same was binding, but instead the State Government without providing any opportunity of hearing to the appellant rejected the said recommendation of the committee and proceeded to acquire the land without giving any opportunity of hearing and thus the said action of the State Government is in violation of the principles of natural justice.

9. It was also submitted that the entire acquisition process was in colourable exercise of power and not for any public purpose and that it was done for extraneous consideration. It was also submitted by the learned counsel appearing for the appellant that the appellant had all along been assured that the land belonging to her will not be used for or utilised by the State Government for the purpose of holding a Mela and therefore, the acquisition of the said land came as a complete surprise to the appellant.

10. It was also submitted that as per the report of the Committee constituted of Member of Parliament, Members of Legislative Assembly, Mayor, President of Zila Panchayat, Sarpanch Gram Panchayat and Collector, the land, in question was not required and the objections of the appellant having been accepted there was no requirement of the land in question and therefore the action taken is a colourable exercise of power. It was also submitted that the High Court committed a serious error in interpreting the provisions of Section 23 of the Act and in holding that there was no provision given under the Act for review of orders.

11. On the other hand, the learned counsel appearing for the respondent submitted that the resolution passed by the aforesaid committee was not final and was only of recommendatory nature and that it was open for the State

Government to take its own decision considering the facts of each case. It was also submitted that there was no violation of the principles of natural justice and that the appellant was provided sufficient opportunity of hearing.

12. It was also stated that the appellant would be paid compensation as and when the land is acquired by the Municipal Corporation of Khandwa, and therefore, at the present moment, the possession of the land is with the appellant. It was also submitted that the decision is bona fide and was taken in accordance with law.

13. Before the High Court also similar submissions were made by the appellant. In its order dated 16.4.2003 the High Court rejected the said submissions holding that they are without any merit. The High Court held that as per the scheme of Sections 17 and 18 of the Act, the recommendation of the Committee is not final, binding and conclusive and therefore it was open for the State to take its own final decision in accordance with law. It was also held by the High Court that a review of the order of the nature which was filed by the appellant before the High Court was not maintainable in terms of the provisions of Section 23A of the Act.

14. In the order passed in the writ appeal dated 29.08.2008, the High Court while upholding its order dated 16.04.2003 observed that the State Government did not accept the recommendations made by the Committee, therefore it was not necessary for the State to issue a modified plan. For the final plan, the State Government did issue the plan, as per section 19(2) and had invited objections from the persons who are likely to be affected by inclusion of their land. The Court also observed that if the appellant was of the opinion that certain documents had been kept back by the State Government, then he could have always asked the learned Single Judge to issue directions to the State Government for the production of said documents. For failure to call for such documents, it cannot be held that the State Government accepted the recommendations

made by the Committee, did not include the land in the final plan and all of a sudden issued the final plan against the interest of the appellant.

15. In the light of the submissions made by the counsel appearing parties, we have minutely perused the records as also the orders passed by the High Court. On a careful reading of the provisions of Section 17A, Section 18 and Section 19 of the Act, we become aware regarding the procedure and the scheme provided for publication of a draft development plan and also for approval and preparation of the final development plan.

16. Sub-section (2) of Section 17A of the Act makes it crystal clear that the Committee has the power to consider the draft development plan prepared by the Director under Section 14. It also has the power to suggest modifications and alterations in the aforesaid draft development plan prepared. The Committee has also been empowered to hear objections after publication of the draft development plan under Section 18 and suggest modifications or alterations, if any, to the Director. It is, therefore, clearly established that the aforesaid decision and resolution of the Committee is only suggestion and recommendation which is required to be taken notice of by the State Government. Once, the development plan is submitted on completion of the procedure and process prescribed under Sections 17 and 18 of the Act, the State Government is empowered under Section 19 of the Act either to approve the development plan or to approve the same with some modifications as it may consider necessary. A further power is also vested on the State Government to return the same to the Director to modify the same or to prepare a fresh plan in accordance with such directions as the State Government may deem appropriate.

17. In the present case, the development plan as prepared under Section 14 was approved by the State Government without any modification and therefore there was no question

of inviting any further suggestions as no modification was suggested to the said development plan. In view of the said position also, there was no question of giving any hearing to the appellant in the present case, and therefore the issue raised with regard to alleged violation of the principles of natural justice is without any merit.

18. The aforesaid provisions namely Section 17, 18 and 19 of the Act give a broad scheme laying down the procedure as to how a development plan is to be approved by the State Government as also the procedure as to when it becomes final and operational. The aforesaid scheme of the provisions clearly states that a recommendation of the Committee is only recommendatory and advisory in nature and such recommendations of the Committee are required to be considered by the State Government, but the absolute and final power is rested on the State Government to approve or reject the draft development plan or to approve the same with some modifications as it may deem appropriate.

19. The resolutions passed by the Committee cannot be said to be absolute, final and binding and the State Government possesses the final authority in the matter of giving approval to the development plan. In any case, in the present case, the State Government approved the draft plan without any modification and therefore provisions of sub-sections (2) and (3) of Section 19 are not applicable to the facts and circumstances of the present case. Despite the said legal provision, the State Government in the present case has issued a final plan and also invited objections from the persons who are likely to be affected by inclusion of their land. Even thereafter the appellant did not submit any objection and therefore the question of giving a hearing to the appellant at that stage did not arise. So from whatever angle the contentions of the appellant are examined, the same are not found to be worthy of acceptance.

20. So far the power of review is concerned, the High Court

does not have the power of review as such power of review has to be specifically provided for in the Act. A power of review against an order passed is a creature of the statute and since no such power of review is provided for under the provisions of the Act, the High Court was justified in holding that there could be no review to the order passed. So far the review and modifications of the development plan or adjoining plan as provided in Section 23 and 23A of the Act are concerned, the said provisions are not applicable in the present case for the State Government has not made any modification in the development plan, and therefore, the contentions appearing for the appellant are held to be without any merit. Besides, the said power is exclusively vested with the State Government and in an appropriate case, the State Government is empowered to exercise such power as and when deem proper. This is not a case where the State Government thought it fit to invoke such power.

21. We, therefore, find no error in the judgment passed by the High Court. The impugned order does not suffer from any infirmity. The present appeal is, therefore, dismissed as without any merit. However, there shall be no order as to costs.

N.J. Appeal dismissed.

SUNIL RAI @ PAUA & ORS.
v.
UNION TERRITORY, CHANDIGARH
(Criminal Appeal Nos.1254-1255 of 2011)

JULY 4, 2011

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

Penal Code, 1860:

s.302/34 – Murder – Circumstantial evidence – Extra-judicial confession – Conviction of three accused by trial court – Affirmed by High Court – HELD: The first circumstance of deceased seen being chased by accused not established – The witness who claims that the main accused made confession to him, tried to save one of the accused and implicate another person in his place and thus, his evidence cannot be relied upon – The recovery of blood stained jacket of the main accused is of no consequence as his blood sample was not taken to ascertain his blood group – Theft of money and clothes of main accused cannot be said to make out sufficient motive for him to kill the deceased – Besides, there was nothing on record as against the remaining two accused – On the materials on record, there may be some suspicion against the accused, but, the suspicion, howsoever strong, cannot take place of proof – Conviction of accused persons is based on completely insufficient evidence and, as such, is set aside – Evidence – Circumstantial evidence – Extra-judicial confession – Recovery of blood stained articles – Proving of – Criminal Law – Motive.

The appellants were prosecuted for commission of an offence punishable u/s 302 IPC. The prosecution case was that on 29.3.2001 at about 8:30 p.m., PW-14, PW-9 and one 'JS' were present near the GPO, Sector 17, Chandigarh; accused-appellant no.2 (A-2) was also

present there. At that time accused-appellant no. 1 (A- l) and accused-appellant no.3 (A-3) came there. A-1 was agitated as his money and clothes were stolen. He accused A-2 of committing the theft and an altercation took place between them. A-2 told A-1 that he had not stolen his money or the other articles and it might have been the work of 'DR' (the deceased). It was at this stage that 'DR' also arrived at the scene. A-1 caught hold of 'DR' by his neck and asked him to return his money and clothes otherwise he would kill him. A scuffle took place between the two but 'DR' got himself freed and ran away from there. The three accused went after him yelling and shouting that they would not spare him. The following day, at about 8:30 A.M. 'DR' was found lying injured near the local bus stand on the rear side of Neelam Cinema, situate at Sector 17 market. There were injuries on his head and face. He was sent to hospital where he died. The three accused were put on trial for the murder of 'DR'. The trial court relied on the circumstances: (i) the deceased was last seen being chased by the appellants yelling at him and shouting that they would not spare him (ii) extra judicial confession of A-1 before PW-10, (iii) recovery of the blood-stained jacket (Ext. P8) of A-1 from under the seat of the rickshaw on the basis of the disclosure statement (Ex. PU) made by him; and (iv) motive for the accused to commit the offence. It convicted all the three accused u/s 302/ 34 IPC and sentenced them to rigorous imprisonment for life and a fine of Rs.5,000/- each. The appeals filed by the accused were dismissed by a division bench of the High Court. Aggrieved, the accused filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. From the ante mortem injuries on the body of the deceased as coming to light from the medical evidence and the objects found at the spot where the

body was found lying, it is quite clear that his death was homicidal. But, there is no ocular evidence of the commission of the offence and the prosecution case is based entirely on circumstantial evidence. [para 7-8] [49-C-D]

1.2. On the issue of last seen, the prosecution examined PW-9, PW-14 and PW-15. Though 'JS' had also been cited earlier as one of the witnesses on this point, he was not examined before the court. The first statement of PW-9 suggests that the deceased and the accused had gone in the direction completely opposite to where his body was found 12 hours later. His second statement is that the deceased and the accused had gone in opposite directions. His third statement, in answer to the court question, is of course that the deceased and the accused had gone in the direction of Neelam Cinema. It is also to be noted that in his first two statements he only mentions the names of A-1 and A-2, but does not name 'A-3' whom he mentions only in his third statement in reply to the question by the court. The vacillations in the deposition of PW-9 cannot be brushed aside as "minor discrepancy", as has been done by the High Court, especially when it is to form the basis for life sentences to three persons.[para 10, 13 and 15] [50-C; 51-D-E; 52-A]

1.3. PW-14 was declared hostile and was cross-examined by the prosecution. He was examined on 14-1-2003, 8.4.2003 and 18.9.2003. Each time he gave contrary statements. Thus, he is not a trustworthy witness and no reliance can be placed on his testimony. [para 16-19] [52-B-H; 57-B-C]

1.4. PW-15 did not at all support the prosecution case on the point of last seen and he did not even identify the accused present in court. He was declared hostile by the prosecution. However, significantly, in his cross-

examination by the defence, he stated that he had appeared as a prosecution witness in two NDPS cases (which were investigated by the same police officer who initially investigated the instant case). He further stated that the spot where the injured was running did not have any light point and that he did not see any person hitting the injured. [para 20] [53-D-F]

1.5. On a careful consideration of the evidences of PWs 9, 14 and 15, the accused can not be said to be connected with the commission of the offence on the basis of the quarrel that is said to have taken place in the evening of 29.3.2001 between A-1 and the deceased. On the basis of the depositions of PWs 9 and 14 what can be said to have been established is only that while they were all present near the GPO, Sector 17, a quarrel and a scuffle had taken place between A-1 and the deceased whom he accused of stealing his money and clothes. But the further story that when the deceased freed himself from the grip of A-1 and ran away towards Neelam Cinema he was pursued by all the accused shouting that they would not spare him is completely unacceptable on the basis of their evidences. The failure to establish that part of the story leaves a wide gap in the prosecution case and weakens it considerably. [para 22] [53-H; 54-A-C]

2. As regards the extra-judicial confession said to have been made by A-1 before P W 10, A-1, in his statement u/s 313 Cr P C, of course, denied having made any confessional statement. From the evidence of PW-10 it is evident that in the examination-in-chief he was trying to implicate 'JS' (who was not an accused in the case) and was trying to save A-3. He was declared hostile and was cross-examined by the prosecution. In his cross-examination by the defence, he admitted that A-1 was not known to him personally. Admittedly, the alleged confessional statement was oral and it was not recorded

in writing. An extra judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration. PW- 10 appearing particularly anxious to implicate 'JS' in place of A-3, his testimony loses any credibility.[para 23-27] [54-D-H; 55-A-E]

S. Arul Raja v. *State of Tamil Nadu* 2010 (9) SCR 356 = **(2010) 8 SCC 233 - relied on**

3.1. So far as the recovery of the bloodstained jacket of A-1 from under the seat of a rickshaw is concerned, no effort was made to take the blood sample of A-1 and it is not known what is his blood group. Moreover, the jacket was recovered from a rickshaw standing out in the open where it was accessible to anyone. In the circumstances, the recovery of the bloodstained jacket, on its own is a circumstance too fragile to bear the burden of the appellants' conviction for murder. [para 29-30] [56-B-D]

3.2. Likewise, the fact that A-1 had got his money and clothes stolen and he believed that the deceased had committed the theft, normally, cannot be said to make out sufficient motive for him to kill the deceased. In any event, motive alone can hardly be a ground for conviction. [para 31] [56-F-G]

3.3. On the materials on record, there may be some suspicion against the accused but, the suspicion, howsoever strong, cannot take the place of proof. Therefore, the conviction of the appellants is based on completely insufficient evidence and is wholly unsustainable. The quality of the prosecution evidence is too poor to satisfactorily establish any of the first three circumstances for holding the appellants guilty of the offence of murder. As none of the three circumstances

were sufficiently proved, there is no question of taking them as links forming an unbroken chain that would lead to the only possible inference regarding the appellant's guilt. [para 32-33] [56-G-H; 57-A-C]

3.4. So far as A-2 and A-3 are concerned, it is a case of no evidence inasmuch as apart from the first, the remaining three circumstances are not relatable to them at all. The second circumstance in the case was the extra judicial confession made by A-1, which could not be fastened upon A-2 and A-3 for holding them guilty of murder. Recovery of the bloodstained jacket of A-1, the third circumstance obviously does not relate to A-2 and A-3 in any manner. Equally, the theft of the money and clothes of A-1, would be no motive for the other two accused to assault the deceased much less to kill him. [para 33, 37 and 38] [57-C; 59-B-D]

Ammini v. *State of Kerala* **1997 (5) Suppl. SCR 181 = (1998) 2 SCC 301 and the other in** *Prakash Dhawal Khairnar* v. *State of Maharashtra* **2001 (5) Suppl. SCR 612 = (2002) 2 SCC 35 – relied on.**

4. Thus, the conviction of the appellants cannot be sustained. The judgments and orders of the High Court and the trial court are completely unsustainable and, as such, are set aside. The appellants are acquitted of the charges. [para 39] [59-D-E]

Case Law Reference:

2010 (9) SCR 356	**relied on**	**para 27**
1997 (5) Suppl. SCR 181	**relied on**	**para 34**
2001 (5) Suppl. SCR 612	**relied on**	**para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1254-1255 of 2011.

From the Judgment & Order dated 5.3.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 523-DB and 580-DB of 2006.

Shirin Khajuria for the Appellants.

Manpreet Singh Doabia (for Sudarshan Singh Rawat) for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. The three appellants are serving life sentences for committing murder of one Dile Ram. They were never on bail and have, thus, completed over ten years of incarceration. We, therefore, intended to grant leave in the case and release the appellants on bail. But, the counsel for the respondent stated that once released on bail it will be almost impossible to get hold of the appellants. We, accordingly, proceeded to hear the case on merits at the stage of special leave itself and at the conclusion of hearing we are dismayed to find that the appellants were convicted and sentenced on completely insufficient evidence.

3. The appellants are migrant workers who came to Chandigarh from different parts of the country in search of livelihood and were trying to eke out a living by working as rickshaw pullers. Appellant no.1, Sunil Rai alias Paua (accused no.1) had his money and clothes stolen by someone breaking open the lock of the box under the passenger seat of the rickshaw and the quarrel that took place, as a result of it, is said to be at the root of the alleged offence.

4. According to the prosecution case, on March 29, 2001 at about 8:30 p.m. Arun Kumar (PW-14), Shailendra Kumar Pandey (PW-9) and one Jaspreet Singh alias Chikna were present near the GPO, Sector 17, Chandigarh. Appellant no.2, Sher Bahadur alias Sheru (accused no.2) was also present

there. At that time Sunil Rai and appellant no.3, Ram Lal (accused no.3) came there. Sunil Rai was agitated as his money and clothes were stolen. He accused Sher Bahadur of committing the theft and an altercation took place between them. Sher Bahadur told Sunil Rai that he had not stolen his money or the other articles and it might have been the work of Dile Ram. He also told Sunil Rai that he would make Dile Ram return his money and clothes. It was at this stage that Dile Ram also arrived at the scene coming from the side of Jagat Cinema. Sunil Rai caught hold of Dile Ram by his neck and asked him to return his money and clothes otherwise he would kill him. A scuffle took place between Sunil Rai and Dile Ram but the latter got himself freed and ran away from there. The three accused went after him yelling and shouting that they would not spare him. 12 hours later, at about 8:30 in the morning of March 30, 2001, an unidentified person was found lying in a badly injured condition at a spot near the local bus stand on the rear side of Neelam Cinema, situate at the sector 17 market. There were injuries on his head and face. At the spot where he lay there was a pouch of liquor (Ex. P32), a piece of brick (Ex. P1), a piece of stone (Ex. P2) and another piece of hard concrete. The blood flowing from the injuries had stained the earth at the spot, a sample of which was collected and produced in court as Ex. P3.

5. The injured was sent to hospital where he died. He was later identified as Dile Ram who, according to the prosecution, was last seen the previous evening, fleeing away with the appellants in pursuit yelling and shouting threats at him.

6. The three accused were put on trial for the murder of Dile Ram before the Sessions Judge, Chandigarh, who by judgment dated June 12, 2006 passed in Sessions Case no.02 of July 30, 2001 convicted all of them under section 302 read with section 34 of the Penal Code and by orders dated June 13 & 15, 2006, sentenced them to rigorous imprisonment for life and a fine of Rs.5,000/- each with the direction that in default

of payment of fine they would undergo rigorous imprisonment for 1 year. The appellants went to the High Court in two separate appeals, one by Sunil Rai (Criminal Appeal no.580-DB of 2006) and the other by the other two appellants (Criminal Appeal no.523-DB of 2006). Both the appeals were heard together and were dismissed by a division bench of the High Court by judgment and order dated March 5, 2008. The matter is now before this Court in appeal by grant of special leave.

7. From the ante mortem injuries on the body of Dile Ram as coming to light from the medical evidence and the objective findings at the spot where the body was found lying, it is quite clear that his death was homicidal. But, the question remains regarding the culpability of the three appellants.

8. It may be stated at the outset that there is no ocular evidence of the commission of the offence and the prosecution case is based entirely on circumstantial evidence. There are four circumstances relied upon by the prosecution and accepted by the trial court and the High Court to hold the appellants guilty of the offence. These are as under:

I. The deceased was last seen being chased by the appellants yelling at him and shouting that they would not spare him (paragraphs 20 and 21 of the High Court judgment).

II. Sunil Rai made an extra judicial confession before PW-10, Chander Shekhar, President of the Rickshaw Pullers' Union telling him that he along with Sher Bahadur and Ram Lal hit Dile Ram with brickbats and stones at about 9:00pm in the night between March 29 and 30, 2001, causing injuries to him that led to his death (paragraphs 22, 23 and 24 of the High Court judgment).

III. The recovery of the blood-stained jacket (Ex. P8) of Sunil Rai, appellant no.1 from under the seat of the rickshaw on the basis of the disclosure statement (Ex. PU) made by him and that was seized under seizure memo (Ex. PV) (paragraph 27 of the High Court judgment).

IV. There was motive for the accused to beat and even kill Dile Ram (paragraph 25 of the High Court judgment).

9. Let us now examine the evidences in support of each of the four circumstances enumerated above.

10. On the issue of last seen, the prosecution examined Shailendra Kumar Pandey as PW-9, Arun Kumar as PW-14 and Harish Kumar Bansal as PW-15. Though Jaspreet Singh had also been cited earlier as one of the witnesses on this point, he was not examined before the Court.

11. PW-9, in course of his examination-in-chief stated that as he (Dile Ram) was able to free himself from the hold of Sunil Rai:

"Dile Ram ran towards **Jagat Theatre**. Pauya and Sheru and Ram Lal ran after Dile Ram."

In cross examination he stated as follows:

"Dile Ram went towards **Neelam Theatre** whereas Sheru and Pauya went towards **Jagat theatre**."

In reply to a question by the court, he said:

"Chikna and Arun ran towards Jagat theatre. Pauya, Sheru and Ram Lal ran after the deceased towards **Neelam theatre.**"

(emphasis added)

12. It needs to be recalled here that the spot where Dile Ram was found next morning lying in an injured condition, was near the local bus stand, on the rear side of Neelam Cinema. It has also come on record that the place where the quarrel took place between the accused and the Dile Ram and from where

Dile Ram ran away, allegedly being chased by them, is at a large square and Neelam theatre and Jagat theatre are at its two opposite ends, at a distance of about 1km from each other. Sub-Inspector, Ramesh Chand Sharma, PW-17 in his deposition said:

> "… It is correct that if one comes from Jagat Theatre and goes to Neelam Theatre he has to pass police post of Neelam Chowki. Subway of Neelam is at a distance of 50 yards from the police post. Some one always remains at police post of Neelam. After 8/9p.m. only 1/2 persons remain in the police post. It is wrong to say that 12 persons remain deputed at the police post…."

13. Thus, the first statement of PW-9 suggests that the deceased and the accused had gone in the direction completely opposite to where his body was found 12 hours later. His second statement is that the deceased and the accused had gone in opposite directions. His third statement, in answer to the court question, is of course that the deceased and the accused had gone in the direction of Neelam Cinema. It is also to be noted that in his first two statements he only mentions the names of accused nos.1 and 2, that is, Sunil Rai and Sher Bahadur but does not name Ram Lal whom he mentions only in his third statement in reply to the question by the court.

14. The High Court has tried to explain the vacillating statements of PW-9 by observing as follows:

> "It appears that Shailender Kumar Pandey, PW9, inadvertently made a statement that Dile Ram (deceased) ran towards Jagat Cinema, instead of Neelam Cinema and the accused chased him. Such a minor discrepancy, cannot be given any weight, since a period of more than one year, and four months, from the date of altercation, referred to above, had lapsed when Shailender Kumar Pandey PW9 appeared in the court as a witness."

15. To our mind the vacillations in the deposition of PW-9 cannot be brushed aside as "minor discrepancy" especially when it is to form the basis for life sentences to three persons.

16. With all the inconsistencies, on the issue of last seen PW-9 happens to be the best prosecution witness and the position becomes far worse when we come to the other two witnesses. PW-14 was first examined on January 14, 2003. In course of his examination-in-chief, he stated as follows:

> "… all of a sudden Diley Ram freed himself from the clutches of Pauya and ran towards **Neelam Cinema** located in sector 17. All the three accused i.e. Pauya alias Sunil Rai, Sheru and Ram Lal also chased Diley Ram and as they were chasing they said they will kill him…."

17. His cross examination did not take place on that date but it was done later on April 8, 2003. In cross examination he stated as follows:

> "… The deceased was under the influence of liquor on the day of occurrence and some others had also taken liquor. It is correct that Dilay Ram was insisting for more liquor whereas the others were saying that they will not consume liquor. Dilay Ram was demanding money for buying more liquor. Then they all left that place. *Dilay Ram left towards Neelam theatre and the accused present in the court went towards Jagat theatre…."*
>
> (emphasis added)

18. After his cross examination, the prosecution declared him 'hostile' and filed a petition seeking permission to cross examine him. The court allowed the petition by order dated July 11, 2003 and granted permission to the prosecution to cross examine PW-14, whereupon his cross examination by the prosecution took place on September 18, 2003. In this round he again went back to his earlier statement and stated as follows:

"… Dilay Ram ran towards Neelam Theatre and all the accused present in the court today ran after him…

… I say that deceased ran towards Neelam theatre and the accused followed him. It is correct that earlier I had mentioned in my statement regarding Jagat Theatre."

19. The only explanation for these contrary statements appears to be that each time during the gap between his depositions in court he came under the influence of the one or the other side and made the statements to please the respective sides. To us, he is not a trustworthy witness and we are unable to place any reliance on his testimony.

20. PW-15 did not at all support the prosecution case on the point of last seen and he did not even identify the accused present in court. He was declared hostile by the prosecution. There is one thing, however, quite significant about PW-15. In cross examination by the defence, it was suggested that he was a tout and a stock witness for the police. In reply to the suggestion, he stated as under:

"… It is wrong to say that I am a police tout. It is correct that I have been shown as a witness in case FIR.52 dt.12.8.2K under NDPS Act. It is correct that I also appeared as a prosecution witness registered under NDPS Act under FIR No.228 dt.15.5.2000. It is correct that both these cases were investigated by S.I. Ramesh Chand. It is correct that the spot where the injured was running does not have any light point. I have not seen any person hitting the injured."

21. Ramesh Chand Sharma, S.I. was the investigating officer of the case before the investigation was taken over by DSP Arjun Singh Jaggi, PW-20. Ramesh Chand Sharma was examined in the case as PW-17.

22. On a careful consideration of the evidences of PWs 9, 14 and 15, we are unable to see how the accused can be

said to be connected with the commission of the offence on the basis of the quarrel that is said to have taken place in the evening of March 29, 2001 between Sunil Rai and Dile Ram. On the basis of the depositions of PWs 9 and 14 what can be said to have been established is only that while they were all present near the GPO, Sector 17, a quarrel and a scuffle had taken place between Sunil Rai and Dile Ram whom he accused of stealing his money and clothes. But the further story that when Dile Ram freed himself from the grip of Sunil Rai and ran away from there to-wards Neelam Cinema he was pursued by all the accused who were shouting that they would not spare him is completely unacceptable on the basis of their evidences. The failure to establish that part of the story leaves a wide gap in the prosecution case and weakens it considerably.

23. Coming now, to the extra judicial confession said to have been made by Sunil Rai before Chander Shekhar, President, Rickshaw Pullers' Union, Sunil Rai, in his statement under section 313 of the Code of Criminal Procedure, of course, denied having made any confessional statement. Chander Shekhar was examined as PW-10. In the examination-in-chief he stated that on April 1, Sunil Kumar went to him at about 3 in the afternoon and disclosed that he along with some others had committed a blunder by killing Dile Singh in course of a fight. He added that Sunil disclosed to him that *Jaspreet Singh* and Sher Bahadur had also joined him in assaulting the deceased.

24. It is, thus, evident that in course of his examination-in-chief, he was trying to implicate Jaspreet Singh (who was not an accused in the case) and was trying to save Ram Lal who, according to the prosecution, was accused no.3.

25. At that stage he was declared hostile and on being cross examined by the prosecution, he said that Sunil had told him that he along with Sher Bahadur and Ram Lal had caused injuries to Dile Ram by hitting him with brickbats and stones.

26. In further cross examination by the defence, he admitted that Sunil was not known to him personally but all rickshaw pullers were known to him as he was the President of one of the three Unions of Rickshaw Pullers of Chandigarh. In cross examination by the defence, he once again replaced Ram Lal by Jaspreet Singh and stated that Sunil Rai had disclosed to him that he along with Sher Bahadur and Jaspreet Singh had thrown stones at the deceased causing injuries to him leading to his death. Evidently, PW-10 does not have much regard for truthfulness.

27. Admittedly, the alleged confessional statement was oral and it was not recorded in writing. Admittedly, Sunil Rai had no personal acquaintance, much less any intimacy with PW-10. An extra judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration (See *S. Arul Raja* v. *State of Tamil Nadu*, (2010) 8 SCC 233 paragraphs 48-56). In this case with PW- 10 appearing particularly anxious to implicate Jaspreet Singh in place of Ram Lal, it further loses any credibility. Further, in the confessional statement allegedly made before PW-10 there is an inherent improbability. The "disclosure" made by Sunil Rai before PW-10 did not indicate the place where the assault on Dile Ram took place but it gave the time of the assault as 9.00pm. In the evidence of PW-17 it has come that Neelam Police Chowki is at a distance of 50 yards from the Neelam sub-way. The police post is naturally manned twenty four hours even though, according to PW-17, after 8-9 pm only one or two persons remain on the post. The occurrence took place on March 29. At the end of March, 9.00pm is not a very late hour when an occurrence of this kind taking place near the local bus stand and the parking place for rickshaws, behind a cinema theatre and at a distance of no more than 50 yards should normally go completely unnoticed by any one, including the policemen at the police post.

28. For the aforesaid reasons we find it impossible to rely upon the evidence of PW-10 and, thus, goes the extra judicial oral confession by Sunil Rai.

29. This leaves us with the remaining two circumstances, that is to say, the recovery of the bloodstained jacket of Sunil Rai from under the seat of a rickshaw and motive. According to the report of the Central Forensic Science Laboratory (Ext. PA) the pair of pants, shirt, vest, and under-pants taken off from the body of Dile Ram were stained with human blood of 'B' group; the blood group of the sample of blood taken from the deceased was also 'B'. And the stains on the jacket recovered from under the seat of the rickshaw were also of the same group of human blood. The report further indicated that though there were stains of human blood on the piece of brick and the sample of earth collected from the spot where the body of Dile Ram was found it was not possible to ascertain the blood group. The piece of concrete and the stone piece had no blood stains.

30. No effort was made to take the blood sample of Sunil Rai and it is not known what is his blood group. Moreover, the jacket was recovered from a rickshaw standing out in the open where it was accessible to anyone. In the aforesaid circumstances, the recovery of the bloodstained jacket, on its own is a circumstance too fragile to bear the burden of the appellants' conviction for murder.

31. Likewise, the fact that Sunil Rai had got his money and clothes stolen and he believed that Dile Ram had committed the theft, normally, cannot be said to make out sufficient motive for him to kill Dile Ram. In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof. We, therefore, find and hold that the conviction of the appellants is

based on completely insufficient evidence and is wholly unsustainable.

33. It is seen above that the quality of the prosecution evidence is too poor to satisfactorily establish any of the first three circumstances for holding the appellants guilty of the offence of murder. As none of the three circumstances were sufficiently proved, there is no question of taking them as links forming an unbroken chain that would lead to the only possible inference regarding the appellant's guilt. But before parting with the records of the case, we must sadly observe that so far as appellant nos.2 and 3 are concerned, it's a case of no evidence inasmuch as apart from the first the remaining three circumstances are not relatable to them at all.

34. The second circumstance in the case as noted above was the extra judicial confession made by Sunil Rai, appellant no.1. It is seen above that PW-10, before whom the confession was allegedly made, tried his best to shield Ram Lal and to implicate in his place Jaspreet Singh. Nonetheless, the High Court deemed fit to use the extra judicial confessional statement made orally by Sunil Rai as substantive evidence not only against him but against appellant nos.2 and 3 as well. In our view, the High Court was completely wrong in using the alleged confessional statement made by Sunil Rai against appellant nos.2 and 3. For taking into consideration the confessional statement of Sunil Rai against the other two appellants the High Court has relied upon two decisions of this Court. One in *Ammini* v. *State of Kerala* (1998) 2 SCC 301 and the other in *Prakash Dhawal Khairnar* v. *State of Maharashtra*, (2002) 2 SCC 35. In our view, both the decisions have no application to the facts of this case. In both cases the confessions were neither oral nor extra judicial. In both cases confessional statements were made before a Magistrate and were reduced to writing. In *Prakash Dhawal Khairnar*, the Judicial Magistrate, first class, before whom the maker of the confession was produced not only gave him the due warning

but also allowed him 24 hours time to think over the matter. It was only after he was produced the following day that the Magistrate recorded his statement under section 164 of the Code of Criminal Procedure. In *Prakash Dhawal Khairnar*, the confessional statement was not retracted either.

35. In *Ammini*, the facts were entirely different from the present. The accused had entered into a conspiracy in pursuance of which several unsuccessful attempts were earlier made before the victims were eventually killed. In the trial for the crime the accused were charged separately under section 120-B, apart from section 302 read with section 34 of the Penal Code. One of the charges being under section 120-B, the confessional statement by one accused was used against the others on the basis of section 10 of the Indian Evidence Act. In the present case there was no allegation of any conspiracy and there was no charge under section 120-B of the Penal Code.

36. In *Prakash Dhawal Khairnar* too, one of the charges against the two accused being father and son was under section 120-B of the Penal Code. But the son, the maker of the confession was acquitted of the charge under section 120-B of the Penal Code. In that circumstance, the question arose whether the confessional statement of the son could be used against the other co-accused, his father for maintaining his conviction under section 302 of the Penal Code. This Court pointed out that the conviction of the father under section 302 of the Penal Code was based on a number of circumstantial evidences that were independently established and the confessional statement of the son was not used as a substantive piece of evidence. In paragraph 20 of the judgment, this Court observed as follows:

> "20. In this case, the High Court has not relied upon the confessional statement as a substantive piece of evidence to convict Accused 1. It has been used for lending assurance to the proved circumstances. The High Court held that the proved circumstances would not involve

Accused 2 for the offence punishable under Section 302 IPC and the circumstantial evidence does not establish that there was any common intention or conspiracy between the father and the son to commit the offence…."

37. It is, thus, clear that the extra judicial confession of Sunil Rai could not be fastened upon the other two appellants for holding them guilty of murder and the High Court was quite wrong in using the confessional statement of Sunil Rai as a circumstance against the other two appellants.

38. Recovery of the bloodstained jacket of Sunil Rai, the third circumstance obviously does not relate to appellant nos.2 and 3 in any manner. Equally, the theft of the money and clothes of Sunil Rai would be no motive for the other two accused to assault Dile Ram, much less to kill him.

39. Thus, seen for any angle the conviction of the appellants cannot be sustained. The judgments and orders of the High Court and the trial court are completely unsustainable. The two judgments are set aside. The appellants are acquitted of the charges and are directed to be released forthwith unless required in connection with any other case.

40. In the result the appeals are allowed.

R.P. Appeals allowed.

HIMANI ALLOYS LTD.
v.
TATA STEEL LTD.
(Civil Appeal No. 5077 of 2011)

JULY 05, 2011

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

Code of Civil Procedure, 1908 – Or. 12 r. 6 – Judgment on admission – Recovery suit – Respondent filed application praying for decree alleging that appellant had admitted liability for sum of Rs. 74.57 lakhs as per minutes of the meeting held between representatives of the respondent and the appellant – High Court holding that the minutes of the said meeting recorded an admission by the appellant in respect of a sum of Rs.47.06 lakhs and made a judgment on admission u/Or. 12 r. 6 in regard to the said amount in favour of the respondent – Justification of – Held: Not justified – A judgment can be given on an 'admission' contained in the minutes of a meeting – But the admission should be categorical – It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it – Or.12 r. 6 being an enabling provision, it is neither mandatory nor pre-emptory but discretionary – Since a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits, the discretion should be used only when there is a clear 'admission' which can be acted upon – On facts, the sum of Rs. 74.57 lakhs actually figures in minutes of a subsequent meeting held between the parties, thus, the specific case of admission put forth by the respondent in its application seeking a judgment on admission, incorrect – Respondent did not refer to or rely upon any other admission, nor sought judgment in regard to any other admission – High Court could not have embarked upon an enquiry as to whether there was some other admission nor given a judgment on the basis of

such other admission, not pleaded by the respondent – In any event, on examination it is found that the minutes of the meeting (as relied on by the respondent) did not refer to any admission by appellant to pay any amount to respondent which could result in a judgment on admission u/Or. 12 r. 6 – Thus, orders of the High Court are set aside.

Uttam Singh Duggal and Co. Ltd. vs. United Bank of India **2000 (7) SCC 120;** *Karam Kapahi vs. Lal Chand Public Charitable Trust* **2010 (4) SCC 753;** *Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha* **2010 (6) SCC 601 – relied on.**

Case Law Reference:

2000 (7) SCC 120	**Relied on**	**Para 10**
2010 (4) SCC 753	**Relied on**	**Para 10**
2010 (6) SCC 601	**Relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5077 of 2011.

From the Judgment & Order dated 22.9.2008 of the High Court of Calcutta in CS No. 12 of 2003 and APO No. 89 of 2008 and GA No. 940 of 2008.

WITH

S.L.P. (C) CC. No. 7879-7880 of 2009.

K.V. Vishwanathan, Shyam Divan, Gitika Panwar, Kavita Wadia, Ajay Aggarwal, Mohit Mudgal, Nimita Kaul , Rajan Narain for the appearing parties.

The Order of the Court was delivered by

O R D E R

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

2. The respondent ('TISCO' for short) filed a suit (C.S.No.12/2003) in the Calcutta High Court against the appellant for recovery of a sum of Rs.2,02,72,505/40 in regard to supply of steel. In the said Suit, the respondent filed an application on 8.8.2003 praying for a decree upon admission for Rs.74,57,074/50 alleging that the appellant had admitted liability for such sum, as per minutes of the meeting held on 9.12.2000 between representatives of respondent and appellant. The said application was resisted by the appellant contending that there was no such admission on 9.12.2000 or any other date and pointing out that what transpired on 9.12.2000 was only a tentative agreement to have the accounts verified and not a final settlement or admission of liability.

3. A learned single Judge of the Calcutta High Court by order dated 22.2.2008, granted a judgment on admission under Order 12 Rule 6 of the Civil Procedure Code ('Code' for short) for a sum of Rs.47,06,775/- in favour of the respondent-plaintiff, subject to respondent furnishing a bank guarantee for a sum of Rs.48,00,000/- in favour of the Registrar of the High Court. The intra appeal filed by the appellant was dismissed by the Division Bench of the High Court by judgment dated 22.9.2008. The said judgment is under challenge in this appeal by special leave.

4. Order 12 Rule 6 of the Code provides that where admission of facts have been made in the pleadings or otherwise, whether oral or in writing, the Court may at any stage of the suit either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

5. The specific case of the respondent-plaintiff in the application was that at a meeting held on 9.12.2000 for reconciling the accounts as on 31.3.1999, the appellant admitted that a sum of Rs.74,57,074/50 was outstanding to the respondent and therefore it was entitled to a judgment on

admission for that amount. The learned single Judge found that there was no such admission in regard to Rs.74,57,074/50 in the minutes of the meeting dated 9.12.2000. He however held that the minutes of the meeting dated 9.12.2000 recorded an admission by the appellant in respect of a sum of Rs.47,06,775/70 and consequently made a judgment on admission in regard to Rs.47,06,775/70 against the appellant. The question is whether such judgment on admission was justified.

6. The sum of Rs.74,57,074/50 described as the amount admitted to be due by the appellant, has nothing to do with appellant (Himani Alloys Ltd.). It is an amount that actually figures in the minutes of a meeting held on 23.2.2001 between the representatives of the respondent and another company by name Himani Ferro Alloys Ltd. Thus the specific case of admission put forth by the respondent in its application seeking a judgment on admission, was found to be incorrect. The respondent did not refer to or rely upon any other admission, nor sought judgment in regard to any other admission. Once the claim of the respondent regarding admission was proved to be incorrect, its application for judgment on admission ought to have been rejected by the High Court. The High Court could not have embarked upon an enquiry as to whether there was some other admission nor given a judgment on the basis of such other admission, not pleaded by the respondent-plaintiff. If the respondent wanted to rely upon some other admission, it ought to have made a separate application, so that the appellant could have filed its objections to the same. That was not done.

7. Assuming that the High Court could have examined whether there was some other 'admission' in the minutes of the meeting dated 9.12.2000 relied on by the respondent, let us examine whether there was in fact any admission, on the basis of which a judgment on admission could have been passed. The minutes of the meeting dated 9.12.2000 no doubt starts by noting that the "As per Himani's records: credit TISCO

Rs.47,06,789.00" as on 31.3.1999. It also records that as per TISCO's records, as on 31.3.1999, the amount due by Himani(appellant) was Rs.61,49,449/30 and if three deductions (which were yet to be checked) were made, the amount due would be Rs.47,06,775/70. Thereafter, in paragraphs 3,4 and 5, there is a reference to both parties agreeing to provide particulars, agreeing to hold further discussions on 26.12.2000 and respondent agreeing to check up its records to find out the correctness of certain entries. Thereafter the minutes conclude that the "final figure will be arrived at the meeting accordingly". When the minutes merely notes certain figures and states that they are tentative and both parties will verify the same and says that the final figure will be arrived at the next meeting, after discussions, we fail to understand how the same could be termed as an "admission" for the purpose of Order 12 Rule 6 of the Code.

9. Another aspect regarding the minutes dated 9.12.2000 requires to be noticed. The Minutes do not refer to any admission by HIMANI (appellant) to pay any amount to TISCO (respondent). If a buyer states on 9.12.2000 that his account as on 31.3.1999 shows a balance of amount 'X' to the credit of the supplier, it can not be treated as an admission that the said amount 'X' was due to the supplier on 9.12.2000. In a continuing account, it may be possible that between 31.3.1999 and 9.12.2000, there may be debits to the account, or 'reveral of credits' or 'settlement of the account'. We therefore hold that there was no admission on 9.12.2000 which could result in a judgment under Order 12 Rule 6 of the Code.

10. It is true that a judgment can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to

exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear 'admission' which can be acted upon. (See also *Uttam Singh Duggal & Co. Ltd. vs. United Bank of India* [2000 (7) SCC 120], *Karam Kapahi vs. Lal Chand Public Charitable Trust* [2010 (4) SCC 753] and *Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha* [2010 (6) SCC 601]. There is no such admission in this case.

11. In view of the above, we allow this appeal, set aside the orders of the learned Single Judge and the division bench of the High Court dated 22.2.2008 and 22.9.2008. We make it clear that we have not recorded any finding nor expressed any opinion in regard to the merits of the case or in regard to any part of the suit claim. It is possible that on evidence being led, the respondent is able to establish that Rs.47,06,775/70 was in fact due as on 31.3.1999 and that it continues to be due. We request the High Court to dispose of the suit expeditiously.

N.J. Appeal allowed.

ITC LTD.
v.
STATE OF UTTAR PRADESH & ORS.
(Civil Appeal No. 4561 of 2008)

JULY 5, 2011

[R. V. RAVEENDRAN AND B. SUDERSHAN REDDY, JJ.]

Uttar Pradesh Urban Planning and Development Act, 1973:

s.41(3) r/w ss.12 and 14 – Allotment of commercial plots in commercial area for construction of 5 star, 4 star and 3 star hotels on 90 years lease – Plots allotted at industrial rates – Later on, allotments cancelled as the same were made without following the procedure of auction, and the allotment on fixed industrial rates caused loss to government exchequer – HELD: Under private law, a lease governed exclusively by the provisions of Transfer of Property Act could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession – Where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be permissible for an Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute – In the instant case, NOIDA is a statutory authority and it has not alleged or made out any default in payment or breach of conditions of the lease or breach of rules and regulations – Nor is it the case of NOIDA that any of the allottees is guilty of any suppression or misstatement of fact, misrepresentation or fraud – Therefore, the allotment of commercial plots by NOIDA to the allottees

for setting up hotels is valid –There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels – Therefore, cancellation of allotment is unsustainable.

ss. 41(3) – Allotment of plots – Cancellation of – HELD: When valuable rights had vested in the allottees, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties – Natural justice – Opportunity of hearing.

Administrative Law:

Allotment of commercial plots for hotels – Cancellation order – Judicial review of – HELD: In the instant case, the allotments of plots for hotel projects were challenged in writ petitions and in compliance with the direction of the High Court, the state government had a relook at the matter and found some irregularities in allotment – The decision of the state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated – The policy of the state government cannot override the NOIDA Regulations – If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended – The fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use – Allotment of plots for hotels in a commercial area is wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial, institutional, public, semi-public, etc – Therefore, the allotment of plots situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations – NOIDA (Preparation

and Finalisation of Plan) 1991 Regulations, 1991 – Policy dated 22.5.2006 of Government of Uttar Pradesh – Uttar Pradesh Urban Planning and Development Act, 1973.

Public law – Breach of statutory provisions or procedural irregularities – Allotment of plots for hotels on 90 years lease – Cancellation of – Remedial action – Explained.

TOURISM:

Running a hotel/boarding house/restaurant – HELD: Is a commercial activity – By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose – It was not necessary for NOIDA to change the land use of plots to be allotted to hotels, from commercial to industrial use.

Urban Development:

Allotment of commercial plots for 5 star, 4 star and 3 star hotels – Requirement of inviting tenders – Commercial plots in commercial area allotted at fixed industrial rate without inviting tenders – HELD: Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004 – Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction – The allotment of commercial plots at fixed rate was, therefore, clearly contrary to the said regulations of NOIDA – The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer – Therefore, the state government can certainly interfere under its revisional jurisdiction – As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m., allotment at Rs.7,400 per sq.m. caused loss and violated the regulations and policy of NOIDA – However, the violation

occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated 22.5.2006 – The allottees are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70,000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges – NOIDA Policies and Procedures for Commercial Property Management, 2004 – Uttar Pradesh Urban Planning and Development Act, 1973 – s.41.

Words and Phrases:

Expression 'industry' used in the context of tourism/hotel – Connotation of.

Keeping in view the Common Wealth Games 2010 and pursuant to a meeting with the Secretary, Sports and Youth Affairs, Government of India, the NOIDA, on 17.10.2006, invited applications for allotment of plots of industrial land at industrial rates of Rs. 7,400/- per sq. mts. plus location charges for 5 star, 4 star and 3 star hotels on 90 years lease basis. Allotments of 9 plots for 5 star hotels 2 plots for 4 star hotel and 3 plots for 3 star hotels were made on 12.01.2007. The Government scheme dated 22.05.2006 was approved on 05.06.2006 and the lease deeds were registered in two cases and in other cases, the registration was kept pending on the ground of under valuation stating that as against circle rate of Rs.70,000/- per sq. mt., the premium for the sale was only Rs. 7,400 per sq. mts. Writ petitions were filed in the High Court on the ground that the allotment of the said plots was at a very low price. Pursuant to the direction of the High Court to the State Government to exercise its power of revision u/s.41(3) read with s.12 of the U. P. Urban Planning and Development Act, 1973, the Government concluded that the allotments made were irregular for (i) allotments of commercial plots had been made for

industrial purposes at industrial rates without getting the land use changed from commercial to industrial in accordance with the regulations and without obtaining the consent of the state government; and (ii) the plots earmarked for commercial use in a commercial area were allotted at rates applicable to industrial plots, without calling for competitive bids/tenders and without the permission of the state government. It, therefore, directed on 01.08.2007 NOIDA to cancel the allotments and initiate action against the officers of NOIDA responsible for the irregularities. Consequently, the NOIDA issued cancellation letters dated 3.8.2007 canceling the allotments and consequential leases granted in favour of the appellants; and the said writ petitions were dismissed as withdrawn.

The allottees filed writ petitions before the High Court challenging the cancellation of allotment of plots and the leases by communications dated 3.8.2007. A Division Bench of the High Court allowed the writ petitions. It quashed the order dated 1.8.2007 of the State Government and the cancellation orders dated 3.8.2007 passed by NOIDA on the ground that they were opposed to principles of natural justice for want of opportunity of hearing as required under proviso to s.41(3) of 1973 Act. The High Court, therefore, remanded the matters to the State Government for taking decision afresh.

In the instant appeals filed by the allottees, it was contended for the appellants that the High Court, having quashed the order of the State Government dated 1.8.2007 and the consequential orders of cancellation dated 3.8.2007 passed by NOIDA, ought to have upheld the allotments and the leases and should not have remanded the matter to the state government for consideration.

On 9.7.2008 the Court directed status quo regarding possession. On 18.7.2008 the Court, while granting stay of dispossession of the appellants from the respective sites allotted to them, directed the State Government to give a hearing to the appellants and pass a reasoned order in accordance with law. The state government accordingly passed individual orders dated 8.9.2008 in the case of each of the appellants, holding that the allotment of plots to them was bad. It cancelled the allotments and directed action to be taken against the erring officers of NOIDA.

The questions for consideration before the Court were: (1) "Where allotment has been followed by grant of a lease (which is duly executed) and delivery of possession in favour of the lessee, whether the leases could be unilaterally cancelled by the lessor?" (2) "Whether the cancellations were on account of change in policy as a consequence of change of government, or on account of new government's desire to nullify the actions of previous government?" (3) "Whether the allotments of plots to appellants suffer from any irregularity or illegality?"

Disposing of the appeals, the Court

HELD: 1. The High Court rightly set aside the orders dated 1.8.2007 of the State government, because no hearing was given to the appellants as required u/s 41(3) of the 1973 Act. Even otherwise, when valuable rights had vested in the allottees, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties. The High rightly directed the state government to decide the matter afresh after hearing the appellants. This court reiterated the said direction in its interim order dated 18.7.2008. Therefore, there is no need to interfere with the final order of the High Court. [para

16] [107-C-D-F-G]

<u>Whether completed lease can be cancelled:</u>

2.1. Two lease deeds have been duly registered. In regard to other lease deeds, which were presented for registration, though there is no objection for registration, registration formalities are kept pending in view of a demand by the registration authorities for deficit stamp duty and registration charges on the basis of circle rate and the issue is pending before the registration officer concerned or in court. As far as NOIDA is concerned, execution and registration of the leases were completed, and, consequently, possession of the plots was delivered to the allottees/lessees in April and May, 2007. Each appellant has also incurred considerable amount for preliminary expenditure for the hotel project (in addition to the premium, location benefit charges, rent, stamp duty and registration charges) as they were expected to execute the projects in a time bound manner. [para 19] [110-H; 111-A-D]

2.2. Under private law, a lease governed exclusively by the provisions of Transfer of Property Act, 1882 could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession. Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle a lessor to seek possession. This is the position under private law. [para 21] [111-G-H; 112-A]

2.3. But, where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be permissible for an

Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute. [para 22] [112-B]

2.4. In the instant case, NOIDA is an authority constituted under the Uttar Pradesh Industrial Area Development Act, 1976, for development of an industrial and urban township (also known as Noida) in Uttar Pradesh under the provisions of the Act. Section 7 empowers the authority to sell, lease or otherwise transfer whether by auction, allotment or otherwise, any land or building belonging to it in the industrial development area, on such terms and conditions as it may think fit to impose, on such terms and conditions and subject to any rules that may be made. Section 14 empowers the Chief Executive Officer of the Authority to resume a site or building which had been transferred by the Authority and forfeit the whole or part of the money paid in regard to such transfer, in the following two circumstances : (a) non-payment by the lessee, of consideration money or any installment thereof due by the lessee on account of the transfer of any site or building by the Authority; or b) breach of any condition of such transfer or breach of any rules or regulations made under the Act by the lessee. Thus, if a lessee commits default in paying either the premium or the lease rent or other dues, or commits breach of any term of the lease deed or breach of any rules or regulations under the Act, the Chief Executive Officer of NOIDA can resume the leased plot or building in the manner provided in the statute, without filing a civil suit. The authority to resume implies and includes the authority to unilaterally cancel the lease. [para 23] [112-C-H; 113-A]

2.5. NOIDA has not alleged or made out any default in payment or breach of conditions of the lease or breach

of rules and regulations. Nor is it the case of NOIDA that any of the appellants is guilty of any suppression or misstatement of fact, misrepresentation or fraud. Neither the cancellation of the allotment and the lease by NOIDA by letter dated 3.8.2007, nor the orders dated 1.8.2007 or 8.9.2008 made by the state government refer to any of these grounds. Therefore, the allotment of commercial plots by NOIDA to the appellants for setting up hotels is valid. There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels. Therefore, cancellation of allotment is unsustainable. The cancellation cannot be sustained with reference to the grounds mentioned in s. 14 of the Act. The grounds mentioned for cancellation are mistakes committed by NOIDA itself in making allotments and fixing the premium, in violation of the Regulations and policies of NOIDA by officers of NOIDA. These are not grounds for cancellation u/s 14 of the Act. [para 25 and 58] [113-F-H; 114-A; 141-D]

2.6. Section 41(3) of the U.P. Urban Planning and Development Act, 1973 shows that the State government, can examine the legality or propriety of any order of NOIDA and pass appropriate orders. If the state government in exercise of its revisional jurisdiction finds the allotments were irregular or contrary to the regulations or policies of NOIDA and directs cancellation, the allotments become invalid and leases also become invalid. Consequently, NOIDA can resume possession, without intervention of a civil court in a civil suit. [para 27] [116-B-D]

State of Haryana vs. State of Punjab **– 2002 (1) SCR 227 = 2002 (2) SCC 507** and *State of Karnataka vs. All India Manufacturers Organisation* **– 2006 (1) Suppl. SCR 86 = 2006 (4) SCC 683 – held inapplicable.**

Whether cancellation was on account of change in Government?:

3.1. This is not a case where as a consequence of change in government, the new government has reviewed the decision relating to hotel site allotment, merely because it was a decision of the previous government. Nor is it a case of new policy of the new government being at variance with the policy of the previous government. In the instant case, the allotments of plots for hotel projects were challenged in two writ petitions and in compliance with the direction of the High Court, the state government had a relook at the matter, found some irregularities in allotment and, by letter dated 1.8.2007, directed NOIDA to take action to remedy the irregularities found in the allotments. The orders dated 8.9.2008 were made in view of the final order of the High Court and the interim order of this Court directing reconsideration. The decision of the state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated. [para 29] [118-B-D-G-H]

Whether the allotments violate the regulations/policies of NOIDA?

4.1. In the instant case, no amendment was made changing the land use of the plots in question from commercial to industrial. The state government on examination of all the facts in its revisional jurisdiction found that the hotel plots allotted to appellants were part of Sectors 96, 97 and 98 (for five star plots) and other sectors (for plots for 4 star and 3 star hotels) which were earmarked for commercial use under the NOIDA Master Plan. It was of the view that in view of tourism/hotels being declared as an "industry" and the government policy requiring allotment of plots for tourism/hotels at industrial rates, if any plot had to be allotted for a hotel,

the land use of the said plot had to be changed to industrial use in the Master plan by adopting the prescribed procedure under the regulations, before making the allotment. It was also of the view that if the plots were allotted for hotel industry, then the construction should be as per the NOIDA building regulations and directions applicable to industries in regard to FAR, ground coverage, height, setbacks, construction of building etc. It was also of the view that if plots in commercial areas are to be allotted it could be only in accordance with the NOIDA Commercial Property Management Policy which required all commercial plots to be allotted on sealed tender or public auction basis. As NOIDA did not alter the land use of the plots in question from commercial use to industrial use in the Master Plan nor did it amend the definitions of commercial use and industrial use in the 1991 Regulations so that hotels would no longer be a commercial use, but an industrial use, the state government held that statutory regulations and directives of NOIDA had been violated in making the hotel plot allotments. [para 31] [120-D-H; 121-A]

Whether plots earmarked for commercial use in commercial area could be allotted for hotels?:

5.1. The NOIDA Building Regulations and Directions of 2006 make it clear that FAR and the permissible height of the building is far more advantageous in the case of commercial hotel buildings when compared to industrial buildings. It may be mentioned that even when the 1986 Building Regulations were in force till 4.12.2006, the provisions for FAR and height of building were far more advantageous to commercial buildings, when compared to industrial buildings. [Para 36] [126-E-F]

5.2. Running a hotel or boarding house or a

restaurant is a commercial activity and use of a land or building for hotel is commercial use. By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose. An industrial building is defined in Regulation 3.12(e) of the 2006 Building Regulations as a building in which products or materials of all kinds and properties are manufacture, fabricated, assembled or processed. As per the 1991 Regulations, use for a hotel is a commercial use. [para 37] [126-F-H]

5.3. Having regard to the provisions of the NOIDA (Preparation and Finalisation of Plan) 1991 Regulations, 1991 use of land for hotel cannot be considered as an industrial use, but will continue to remain a commercial use. The policy of the state government dated 22.5.2006 cannot override the NOIDA Regulations. If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended. [para 38] [127-F-G]

5.4. When tourism is given the status of an industry, it does not mean tourism involves manufacturing, fabrication, processing or assembling, but it refers to a service industry. By giving the status of 'industry', the policy enabled a particular service activity (in the instant case tourism and hotels) to secure certain benefits in allotment of land at concessional prices and certain tax exemptions. Therefore, the fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use. It does not also mean that all the hotels and tourist offices should be shifted from commercial areas to industrial areas or that hotels or tourist offices cannot operate in commercial areas, or that

they cannot get allotment of land or building earmarked for commercial use. Allotment of plots for hotels in a commercial area is wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial, institutional, public, semi-public, etc. Therefore, the allotment of plots situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations. It was not necessary for NOIDA to change the land use of plots to be allotted to hotels, from commercial to industrial use. [para 39-40] [127-H; 128-B-H]

<u>Whether allotment of hotel sites by NOIDA should have been by inviting tenders/holding auctions?</u>

6.1. Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004. Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction. For this purpose NOIDA has to fix a reserve rate and the person who gives the highest bid/offer above the reserve rate, who is otherwise eligible, is allotted the plot. The said policy in regard to the procedure for allotment of commercial properties was not amended or modified to provide for allotment of commercial properties for hotels at fixed prices. The allotment of commercial plots at fixed rate was, therefore, clearly contrary to the said regulations of NOIDA. [para 44] [131-F-H; 132-A]

Home Secretary v. Darshjit Singh Grewal **1993 (4) SCC 25 – relied on**

Brij Bhusan vs. State of Jammu & Kashmir **– 1986 (2) SCC 354,** *Sachidanand Pandey vs. State of West Bengal* **1987 (2) SCR 223 =1987 (2) SCC 295,** and *MP Oil Extraction*

vs. State of MP **1997 (1) Suppl. SCR 671 = 1997 (7) SCC 592 – distinguihsed**

6.2. The state government policy dated 22.5.2006 or its adoption by NOIDA on 5.6.2006 did not amend to the regulations, instructions, policies and procedures of NOIDA. If the said Tourism/Hotels development policy dated 22.5.2006 contained any procedure which was at variance with the existing regulations or procedures of NOIDA, such procedures in the policy dated 22.5.2006 could come into effect only by NOIDA amending its regulations and Property Management Policies. As per the 1991 Regulations and 2006 Building Regulations, hotel buildings are commercial buildings and use of land for hotels is commercial use and any plot allotted for hotels is a commercial property. Therefore, any allotment of a plot for hotels should comply with the NOIDA Commercial Property Management Policy, 2004. Unless the said Policy was amended, providing for allotment at fixed rates, in regard to any sub-category of commercial plots, allotment of a commercial property belonging to NOIDA otherwise than by sealed tender basis or auction basis will be an allotment in violation of and contrary to, the regulations directives and policies of NOIDA. [para 48] [134-D-G]

6.3. The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer. The violation of the regulations and policies of NOIDA may be unintentional and a bonafide mistake on account of a mis-reading of the requirement of the policy dated 22.5.2006. Nevertheless it is a violation. If there is a violation of the regulations and policies of NOIDA in making allotments, the state government can certainly interfere under its revisional jurisdiction. [para 49-50] [135-A-F-G]

(c) Whether the rate charged was erroneous and has led to any loss?

7.Mere earmarking of particular land for allotment to hotels which is a commercial activity at industrial plot prices, does not mean there is a loss in respect of an amount equal to the difference between the rate of commercial plots and rate of industrial plots. Any decision to allot plots to hotels at industrial rates, by itself, did not cause any loss, as such a decision was intended to be an incentive to attract investment. But there will be a 'loss', if a plot which is earmarked for commercial use, allotted for a commercial purpose, which is required to be allotted at commercial rates by tender or auction, is erroneously charged either at a residential plot rate or an industrial plot rate. The regulations and policies of NOIDA require the allotment of commercial plots to be by sealed tender or by public auction. As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m. it has to be held that allotment at Rs.7,400 per sq.m. caused loss and violated the regulations and policy of NOIDA. [para 53 and 55] [138-D-F; 139-C-E-F]

IV. What should be the consequence of the violation?

8.1. The violation occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated 22.5.2006, which has resulted in lesser allotment price. The allottees were in no way to be blamed for the mistake. Nor were the allottees guilty of any suppression, misstatement or misrepresentation of facts, fraud, collusion or undue influence in obtaining the allotments at Rs.7,400/- per sq.m. According to respondents, the rate of premium ought to have been Rs.70,000/- per sq.m. being the market rate, even though the reserve rate was only Rs.30,000/- per sq.m. The

mistake was found out by the state government, in exercise of revisional jurisdiction. But by then the allotment was followed by payment of premium, execution of the lease deed, and delivery of possession. By the time the state government decided that the allotment should be cancelled the transaction was complete in all respects. The fact that the registration of some of the leases was kept 'pending' in view of a dispute relating to valuation would not be relevant for this purpose. [para 58] [141-E-G]

8.2. In public law, breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider: whether the transferee had any role to play (fraud, misrepresentation, undue influence etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable. If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the

transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short-recovery of the consideration, the transfer may be saved by giving the transferee an opportunity to make good the short-fall in consideration. [para 63.1] [145-F-H; 146-A-D]

8.3. If the government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the government will be shaken. To save the credibility of the government and its instrumentalities, an effort should always be made to save the concluded transactions/ transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation. [para 63.2] [146-E-G]

8.4. If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made by him and all expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming public interest and public exchequer, grant of such equitable relief should also be considered. [para 63.3] [146-H; 147-A-B]

Syed Abdul Qadir vs. State of Bihar **2008 (17) SCR 917 = 2009 (3) SCC 475 – relied on.**

8.5. In the instant case, the allotment of commercial plots to appellants is valid and legal. The violation is in making such allotment on fixed allotment rate which is less than the rate the plots would have fetched by calling

for tenders or by holding auctions. The violation of the guidelines in regard to disposal of commercial plots has resulted only in a loss of revenue by way of premium and if this could be made up, there is no reason why the leases should not be continued. According to the State Government, the commercial plots would have fetched a premium at rate of Rs.70,000 per sq.m at the relevant time (October 2006 to January 2007) and NOIDA had been denied the benefit of that allotment rate, by reason of allotment of the plots at Rs.7400/- per sq.m. Therefore, the equitable solution is to give an opportunity to the lessees to pay the difference thereby in consideration which arose on account of wrong interpretation instead of cancelling the leases and if the appellants are wiling to pay the balance of premium as claimed by respondents, the leases need not be interfered. [para 65-66] [148-B-G]

8.6. Therefore, if the appellants (2006-2007 allottees) are to be extended the benefits offered to allottees under the 2008 scheme, the rate of Rs.70,000/- per sq.m. (the rate of 2008 scheme was 10% more than Rs.70,000/- per sq.m.) claimed by the respondents becomes logical and reasonable. Therefore, there is no reason to reject the claim of respondents that the allotment rate should be Rs.70,000/- per sq.m. The appellants are granted an opportunity to save the leases by paying the difference in premium at Rs.62600/- per sq.m. to make it upto Rs.70,000/- per sq.m. [para 69] [151-D-F]

(i) The order of the High Court setting aside the revisional order dated 1.8.2007 of the State Government and the consequential orders of cancellation of allotment of plots dated 3.8.2007 by NOIDA, is affirmed.

(ii) The revisional orders dated 8.9.2008 passed by the State Government cancelling the allotments of plots to appellants, are set aside.

(iii) The appellants are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges. The appellants shall exercise such option by 30.9.2011. Such of those appellants exercising the option will be entitled to the benefits which has been extended in regard to the allottees under 2008 allotment scheme of NOIDA:

On exercise of such option, the lease shall continue and the period between 1.8.2007 to 31.7.2011 shall be excluded for calculating the lease period of 90 years. Consequently, the period of lease mentioned in the lease deed shall stand extended by a corresponding four years period, so that the lessee has the benefit of the lease for 90 years. An amendment to the lease deed shall be executed between NOIDA and the lessee incorporating the aforesaid changes.

(iv) If any appellant is unwilling to continue the lease by paying the higher premium as aforesaid, or fails to exercise the option as per para (iii) above by 30.9.2011, the allotment and consequential lease in its favour shall stand cancelled. In that event, NOIDA shall return all amounts paid by such appellant to NOIDA towards the allotment and the lease, and also reimburse the stamp duty and registration charges incurred by it, with interest at 18% per annum from the date of payment/incurring of such amounts to date of reimbursement by NOIDA. If NOIDA returns the amount to the appellant within 31.12.2011, the rate of interest payable by NOIDA shall be only 11% per annum instead of 18% per annum. [para 70] [151-G-H; 152-A-C-E-H; 153-A-C]

Case Law Reference:

2002 (1) SCR 227	**held inapplicable**	**para 28**
2006 (1) Suppl.SCR 86	**held inapplicable**	**para 28**
1986 (2) SCC 354	**distinguished**	**para 42**
1987 (2) SCR 223	**distinguished**	**para 42**
1993 (4) SCC 25	**distinguished**	**para 47**
1997 (1) Suppl. SCR 671	**distinguished**	**para 52**
2008 (17) SCR 917	**distinguished**	**para 64**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4561 of 2008.

From the Judgment & Order dated 13.5.2008 of the High Court of Judicature at Allahabad in SLP No. 15375 of 2008.

WITH

C.A. Nos. 4562, 4563, 4564, 4565, 4566, 4567, 4568, 4569, 4570, 4571, 4572 & 4968 of 2008.

Gopal Subramanium, SG, T.R. Andhyarujina, Harish N. Salve, Ranjit Kumar, Maninder Singh, P.P. Rao, S.K. Agarwal, K.K. Venugopal, Satish Chandra Mishra, Ratnakar Dash, Ravinder Srivastava, Fakhruddin, Harish Malhotra, Shail Kumar Dwivedi, AAG, L.K. Bhushan, Swaty Malik (for Dua Associates), Ruby Singh Ahuja, Meenakshi Grover, Manu Aggarwal, Abeer Kumar, R.N. Karanjawala, Manik Karanjawala, Simran Brar, Vedanta Verma (for Karanjawala & Co.), Abhinav Mukerji , Gaurav Sharma, Surbhi Mehta, Bindu Saxena, Aparajita Swarup, Shailendra Swarup, Neha Khattar, D. Bhadra, Hashmi, Ravinder Agarwal, Arun K. Sinha, Rakesh Singh, Sumit Sinha, Dheeraj Malhotra, Aslam Ahmed, Babit Singh Jamwal, Gagan Gupta, D. Bhattacharya, M.K. Singh, Pramod B. Agarwala, Rajul Shrivastav, Abhishek Baid, Antara, Ameet Singh,

Pareena Swarup, Praveen Swarup D. Mehta, Ameet Singh, Nikhil Majithia, Anuvrat Sharma, M.K. Choudhary, Tanuj Khurana, S.K. Verma, R.K. Yadav, Ashutosh Srivastava for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. The appellants in these appeals are the lessees of plots allotted by the New Okhla Industrial Development Authority (for short 'the Authority' or 'NOIDA') for construction of 5 star, 4 star and 3 star hotels in Noida, District Gautam Budh Nagar, Uttar Pradesh. The said Authority was constituted under the provisions of the U.P.Industrial Area Development Act, 1976 ('Act' for short) for development of an Industrial and Urban Township of Noida in Uttar Pradesh, neighbouring Delhi.

2. Tourism was granted the status of an "industry" by the state government during 1997-98, by extending certain concessions and facilities available to industries. However as tourism, in particular hotel industry, had not received the required encouragement, the state government with the intention of attracting capital investment in tourism industry came up with a policy, as per its communication dated 22.5.2006 addressed to the Director General of Tourism, Uttar Pradesh. Relevant portions of the said policy are extracted below :

> (1) Land should be earmarked for hotels by the concerned Development Authorities while preparing the Master Plan with the cooperation of the Tourism Department and such land should be provided for hotels. Where the Master-Plan stands finalized, the said procedure has to be followed in respect of surplus land. In regard to Development Authorities which have not finalised the Master Plan, steps may be taken for reserving land for hotels to the extent possible, near tourist spots/places of tourism with the assistance of the Tourism Department.

Whenever the Master Plans of Authorities are revised, the land should be earmarked for hotels with the assistance of the Tourism Department. The lands earmarked will be kept reserved for tourism/ hotels for five years from the date of publicizing the scheme. If no hotel entrepreneur comes forward in five years, the authority shall be free to alter its land use.

(2) If change in land use by the Authority is necessary for giving the earmarked plot to hotel industry, such change in land use shall be done by the Authority in accordance with the rules and the prescribed procedures on a 'case to case' basis by the competent authority.

(3)

&

(4) x x x x x

(5) Since Tourism including Hotels, has been given the status of Industry, in regard to hotels also plots shall be earmarked as in the case of industries, and shall be allotted **at industrial rates** as in the case of industrial plots. This policy shall be implemented in every district of the State.

(6) x x x x x

(7) They shall be given cent-percent rebate in Sukh Sadhan Tax for five years from the date of starting of new hotels. Other concessions shall be admissible as per industrial policy.

(8) The earmarked land for Hotel industry, shall be allotted only to Tourism entrepreneurs.

(10) Land shall be made available to hotel entrepreneurs by all Authorities including the Housing and Industrial Development Departments, at industrial rates. To ensure that hotel entrepreneurs may get the benefit of this provision, all the above Authorities shall ensure the necessary arrangements/ amendment in their rules so that it may be possible to make available the land to hotel entrepreneurs on industrial rates.

(11) Only in areas where there are Authorities, the estimation of category wise requirement, determination of number of plots and star category wise determination of hotels will be made by the concerned Authorities. In other areas the Tourism Department shall assist in this exercise.

x x x x x

(15) After earmarking the land for hotels, applications will have to be invited for allotment to hotel/tourist entrepreneurs **on industrial rates**. The condition of eligibility for applicant shall be as follows:- x x x

(16) Where there is **industrial lands**, and more than one applicant, the Development Authorities shall allot the **industrial land** on the basis of suitability of the applicants, in accordance with the current procedure."

(emphasis supplied)

3. At the 135th meeting of the Board of Directors/Members of NOIDA (for short 'NOIDA Board') held on 5.6.2006, the said State Policy dated 22.5.2006 to attract more capital investment in tourism/hotel industry was considered. The NOIDA Board resolved to implement the said policy in the areas falling within its jurisdiction and apply the rates applicable to its Industrial area (Phase I) to the plots to be allotted to the hotel industry.

The rate referred was the reserve rate of Rs.7400/- per sq.m. applicable to Industrial Area (Phase I) plots, fixed by the NOIDA Board at its meeting held on 20.3.2006. The resolution also mentioned that the implementation of the said policy should ensure construction of sufficient hotels before the Commonwealth Games to be held in Delhi, which were scheduled to commence in October, 2010. Having regard to the importance of the matter, the Principal Secretary, Tourism, the Commissioner, Meerut Circle and the Director of Industries of the U.P. Government, attended the said meeting as special invitees.

4. At a meeting held by the Circle Commissioner, Meerut on 2.7.2006 with officials of NOIDA, he communicated the direction that construction of Hotels should be completed before the commencement of the Commonwealth Games. At the said meeting the following 14 plots were identified as being suitable for allotment as hotels/plots: (a) six plots each measuring 40000 sq.m. for 5 star hotels in Sectors 96, 97 and 98; (b) five plots each measuring 20000 sq.m. for 4 star hotels in Sectors 72, 101, 105, 124 and 135; and (c) three plots for 3 star hotels (measuring 20000, 20000 & 10000 sq.m.) in Sectors 62, 63, and 142. In view of the Government's Policy dated 22.5.2006 and the decisions taken at the meeting chaired by the Commissioner, Meerut Circle on 6.7.2006, the NOIDA Board took the following decisions at its 136th meeting held on 14.7.2006 : (i) It approved the proposal for making provision for hotels in reserved commercial area – Zone C 3 (as hotels had not been permitted in commercial areas C-1 and C-2 of the master plan reserved for wholesale and retail activities and as there was demand for hotels due to Commonwealth Games 2010) and directed inclusion thereof in the approved proposed NOIDA Master Plan 2021 and reference to the State Government for its approval. (ii) It decided to launch the Hotel Plot Allotment Scheme and authorized the CEO to finalise the terms and conditions for

allotment, so as to ensure construction of hotels by the allottees before the commencement of the Commonwealth Games. In pursuance of the said decision, NOIDA sent a communication dated 20.7.2006 to the State Government seeking approval of its decision to make a provision for hotels in commercial areas under Zone 3 and inclusion of it in NOIDA Master Plan, 2021.

5. The Secretary, Sports & Youth Affairs, Government of India, held meetings with NOIDA officials on 28.7.2006 and 22.8.2006 in connection with preparations for Commonwealth Games scheduled in October, 2010. At those meetings, the Secretary, Sports & Youth Affairs stressed the Government of India's request for earmarking 25 hotel plots in NOIDA. Therefore it was decided to reduce the area of 5 star hotels to 24000 sq.m. (instead of 40,000 sq.m. earlier proposed), the area of 4 star hotels to 12500 sq.m. (instead of 20000 sq.m.) and the area of 3 star Hotels to 7500 sq.m. (instead of 10000 sq.m.) and thereby convert the 14 plots into 25 plots made up of 10 plots for 5 star hotels, 5 plots for 4 star hotels and 10 plots for 3 star hotels. At the meeting held on 28.8.2006 under the chairmanship of the Circle Commissioner, Meerut, the said decision to increase the number of plots for hotels from 14 to 25 by reducing the plot measurements, in the following manner:

(i) *Ten plots for 3 star hotels – (area 7500 sq.m. each)*

Plot Nos. SDC/H1 and SDC/H2 in sector 62, plot Nos.A-155/B and A-155/C in sector 63, plot No. SDC/H 2 in sector 72, plot No.124A/2 in sector 124, plot No.SDC/H-2 in sector 103, plot No.SDC/H-2 in sector 105, SDC/H-2 in sector 135 and plot No.14 in sector 142.

(ii) *Five plots for 4 star hotels : (area : 12,500 sq.m. each)*

Plot No.SDC/H-1 in sectors 72, 103, 105 and 135 and plot No.124A/1 in sector 124.

(iii) *Ten plots for 5 star hotels : (area 24,000 sq.m.)*

Plot Nos.H-1 to H-10 in sectors 96, 97 and 98.

The proposal for approving the increase in number of plots and reductions in their size was placed before the NOIDA Board at the 137th meeting on 1.9.2006. The NOIDA Board approved the proposal. The terms and conditions for allotment drawn by the CEO were also approved with a modification that they should provide for obtaining Hotel Completion Certificate by December 2009 (with authority to CEO to grant extension of time).

6. In pursuance of the said decision, NOIDA published the Hotel Site Allotment Scheme on 17.10.2006, by advertisements in newspapers and by issue of information brochures containing detailed terms and conditions, inviting applications for allotment of plots for 5 star, 4 star and 3 star hotels in NOIDA on 90 years lease basis. Applications were made available between 17.10.2006 and 1.11.2006 (extended till 10.11.2006). We extract below the relevant information from the Brochures. The following eligibility criteria were prescribed:

Eligibility criterion for selection (extracted from clauses 8 to 11 of Brochures)

Minimum experience in Hotel business	10 years for 5 star and 4 star; 5 years for 3 star
Average turnover during the last three years	Rs.100 crores, Rs. 75 crores & Rs.50 crores respectively for five star, four star and three star,
Net worth	Positive

Allotment of hotel sites among the eligible applicants shall

be done on the basis of their experience, turnover and net worth. Allotment of hotel site to the eligible applicants shall be made in descending order, of the plot applied for, on the basis of their evaluation. In case same marks are obtained by more than one applicant, then allotment amongst them shall be made on the basis of draw of lots.

For each hotel that has a tie up/collaboration with international chain of hotels or in case the applicant company/institution is itself an international chain, then three additional marks shall be awarded for each hotel in the 3/4/5 star and above/equivalent rating category owned/ managed by the applicant.

"**Rate of Allotment, that is premium payable** (Clause 13 of the Brochure)

(a) The current rate of allotment is Rs.7,400/- (Rupees Seven Thousand Four Hundred Only) per square metre.

(b) Besides, Location benefit charges as stated below shall be charged in addition to above allotment rate at the following rates :-

(i) 2.5% of above rate if plot is on 18 mtr. but less than 30 mtr. wide road.

(ii) 5% of above rate if plot is on a road having width of 30 mtr. or above.

(iii) 2.5% of above rate if plot is facing/abutting green belt or park.

(iv) 2.5% of above rate if plot is a corner plot.

The maximum location charges would not exceed 10% of the total allotment amount of the plot.

(c) The land rate stated above is subject to change

without giving any notice. The rate prevailing on the date of issue of allotment letter would be applicable."

Payment of annual rent : (extracted from clause E in the Brochures)

In addition to the amount paid/payable for the allotment of plot, allottee shall have to pay yearly lease rent in the manner given below :

(a) The lease rent will be 2.5% of the total amount paid for the plot and will be payable annually.

(b) On expiry of every ten years from the date of execution of the lease deed, lease rent would be enhanced by 50% of the annual rent payable at the time of such enhancement.

x x x x x x

(e) Allottee has the option to pay lease rent equivalent to 11 years of the current lease rent as "One Time Lease Rent" unless the Authority decides to withdraw this facility. On payment of One Time Lease Rent, no further annual lease rent would be required to be paid for the balance lease period. This option may be exercised at any time during the lease period, provided the allottee has paid the earlier lease rent due and lease rent already paid will not be considered in One Time Lease Rent option."

Norms of development (extracted from Clause (I) in the Brochures):

(a) Ground coverage and floor area ratio is as under :

Maximum ground coverage	:	25% [for 5/4 star] 30% [for 3 star]

Maximum FAR	:	2 [for 5/4 star] 1.5 [for 3 star]
Maximum height & set backs	:	as per building bye-laws

(b) Other norms:

i. 5% of the FAR can be used for Commercial space.

ii. Basement below the ground floor to the maximum extent of ground coverage shall be allowed and if use for parking and services would not be counted in the FAR. Basement used for parking will be permitted upto the setback line of the plot."

"*Transfer* (Clause J of the Brochures)

1. The allotted plot shall not be transferred before the allotted premises is declared functional by the Authority. In case the allottee wants to transfer the plot after the hotel is declared functional, the allottee will have to seek prior permission from the Authority. Authority may refuse to allow transfer without giving any reason. However, in case the transfer is permitted, transfer charges shall be payable as per policy of the Authority and all terms and conditions of transfer memorandum shall be binding jointly and severally on the transferee and transferor.

2. No change in shareholding pattern of the members in the Consortium shall be permitted till the project is completed and functionality certificate is obtained from the Authority.

3. In no circumstances, the sub-division of plot will be allowed by the Authority.

4. The allottee shall not be allowed to use any land other than allotted premises and shall also ensure

to keep the allotted premises, environment neat & clean.

Cancellation (Clause (o) of the Brochures)

(i) If it is discovered that the allotment of the plot has been obtained by suppression of any fact or misstatement or misrepresentation or fraud the allotment of the plot shall be cancelled and the entire deposited amount shall be forfeited to the Authority.

(ii) If there is any breach in the terms of allotment, or if the allottee does not abide the terms and conditions of the building rules or any rules framed by NOIDA, the allotment may be cancelled by the Authority and the possession of the demised premises shall be taken over by the Authority from the allottee. In such an event, allottee will not be entitled for any compensation whatsoever and refund of any amount credited or is in arrears/ overdue as Revenue Receipt(s) if any, may be refunded after forfeiting the amount as per rules. However, total forfeited amount would not exceed the total deposits.

7. The number of applications received under the said scheme published on 17.10.2006 and the allotments made after processing and evaluation, are as under :

Category of Hotel Plots	No. of plots offered for allotment	No. of applications received	Number of allotments made
5 star	10	15	9
4 star	5	5	2
3 star	10	11	3
Total	25	31	14

It is stated by NOIDA that the evaluation of applications and recommendations for allotment were made by an independent Screening Committee (U.P.Industrial Consultants Ltd.) and the recommendations for allotments were approved by the CEO of NOIDA. The allotments were made on 12.1.2007 and the allottees were required to pay the premium for the leases at the rate of Rs.7400/- per sq.m. plus location charges. At the 142nd meeting held on 9.2.2007, the Board of Directors of NOIDA approved the CEO's acceptance of the recommendations of the Screening Committee relating to allotment and directed that the remaining 11 unallotted plots (7 plots in 3 star category, 3 plots in 4 star category and 1 plot in 5 star category) be re-advertised.

8. At the 143rd meeting held on 9.3.2007, the Board of NOIDA perused the relevant agenda and noted the allotments made to the allottees, the payments received by way of premium from the allottees and the proposals for execution of lease deeds in favour of the allottees of the hotel plots, under the government scheme dated 22.5.2006 approved on 5.6.2006. In pursuance of the above, lease deeds have been executed and presented for registration in March, April and May, 2007. In two cases the lease deeds have been registered. In other cases, it is stated that the registration is pending in view of proceedings for under-valuation on the ground that as against the circle rate of Rs.70,000 per sq.m., the premium for the lease was only Rs.7,400 per sq.m.

9. At that stage, two writ petitions (Civil Misc. W.P. No.24917/2007 and PIL W.P. No.29252/2007) were filed in the High Court of Allahabad, challenging the allotment of the hotel sites by NOIDA on the ground that the allotment was at a very low price. The first writ petition was filed on 22.5.2007, hardly within one month from date of execution of the lease deeds. In the said writ petition, a division bench of the High Court made a reasoned interim order on 22.5.2007 directing the state government to exercise its power of revision under section

41(3) of the U.P. Urban Planning & Development Act, 1973 (for short '1973 Act') read with section 12 of the Act and take a relook in regard to the allotments made in favour of the appellants by NOIDA and take an independent decision. In pursuance of the said application, the state government examined the matter and concluded that the allotments made to the appellants were irregular on two grounds. Firstly allotments of commercial plots had been made for industrial purposes at industrial rates without getting the land use changed from commercial to industrial in accordance with the regulations and without obtaining the consent of the state government. Secondly, the plots earmarked for commercial use in a commercial area were allotted at rates applicable to industrial plots, without calling for competitive bids/tenders and without the permission of the state government. It therefore directed NOIDA to cancel the allotments and initiate action against the officers of NOIDA responsible for the irregularities.

10. NOIDA implemented the said direction dated 1.8.2007 issued by the State Government by issuing cancellation letters dated 3.8.2007 cancelling the allotments and consequential leases granted in favour of the appellants. NOIDA informed the allottees that action was being taken as per rules to refund the money being paid by them and called upon them to return the possession of the plots. Letters of cancellation stated that as per the NOIDA Development Area Building Regulations and Directions, 1986 and 2006 (published in the Gazettes dated 01.12.1986 and 05.12.2006 respectively), hotels fall under commercial category and therefore the Government Policy dated 22.05.2006 was null and void; and that even if the government policy dated 22.5.2006 was valid, the following mistakes in the allotment could not be legally rectified and therefore the allotments were being cancelled:

(i) F.A.R. of the plots is fixed at 2.00 in the Brochure whereas F.A.R. of industrial plots is 0.60.

(ii) The Government Order dated 22.05.06 issued by

the Tourism department does not refer to 5% of F.A.R. being used for commercial activities. But NOIDA's hotel scheme contained in the Brochures shows that 5% of F.A.R. is fixed for commercial activities,

(iii) According to the Building byelaws of the Authority published in the Gazette dated 16.12.2006, 'hotel' is kept in commercial category. All the allotted plots are shown for commercial use in NOIDA Master Plan. According to the current policy of the Authority, the disposal of commercial plots has to be done by inviting bids/tenders. But the said procedure was not adopted.

(iv) The allotment of plots is made at industrial rates. The then prevailing reserved rates in Industrial Area Phase-I was Rs.7,400/- per sq.mt. And its allotment should be made on the basis of bids/tenders. But in the allotment of hotel, the bids/tender procedure along with the above rates were not followed.

(v) All the plots allotted in the cases in question are shown for commercial purpose. Before including these plots in hotel scheme, according to Para 2 of the Government Order dated 22.05.06 it was necessary to change the use of the land from commercial to industrial, for which permission from N.C.R. Planning Board was necessary which was not complied with in the case at hand."

11. The state government also filed an affidavit before the High Court on 2.8.2007, in the writ petitions challenging the allotments, referring to its aforesaid decision and the consequential direction issued to the NOIDA on 1.8.2007. The relevant portions of the said affidavit are extracted below :

"3. That after receipt of the orders of this Hon'ble Court the

matter was examined by the infrastructure and Development committee in consultation with concerned Officers including chairman & CEO, NOIDA and found that without changing the land use of land in question, the commercial land was given for industrial purpose and opined that the allotment of land by NOIDA does not appear to be justified and seems liable for cancellation in accordance with law."

"4. That the recommendations of Infrastructure and Industrial Development Commissioner was considered by the State Government and a decision was taken in exercise of the power vested under section 41(1) of the U.P.Urban Planning and Development Act, 1973 to direct NOIDA Authority to take action in accordance with law. It was also decided to direct the NOIDA Authority to identify the guilty officials and send the recommendation to the Government."

In view of the affidavit filed by the State Government, and the cancellation of allotments by NOIDA, the writ petitioners sought leave to withdraw the writ petitions. The High Court by a detailed order dated 10.8.2007, dismissed the writ petitions as withdrawn, as the reliefs sought had been granted.

12. Thereafter the appellants filed writ petitions before the High Court challenging the cancellation of allotment of plots and the leases by communications dated 3.8.2007. The said writ petitions were allowed by a Division Bench of the Allahabad High Court by a common order dated 13.5.2008. The High Court quashed the order dated 1.8.2007 of the State Government and the cancellation orders dated 3.8.2007 passed by NOIDA on the ground that they were opposed to principles of natural justice for want of opportunity of hearing as required under proviso to section 41(3) of 1973 Act. The High Court therefore remanded the matters to the State Government for taking a fresh decision, after affording an opportunity of hearing

to the writ petitioners, keeping in view the following observations of the High Court:

"The question as to whether the rates were fixed in the advertisement whereas the same were meant to be only a reserved price, would lead to the conclusion that a minimum price had been fixed and that offers for higher amount could be made but at the same time, it is to be noted that in spite of this price which was indicated in the advertisement, only 14 plots could be settled as against the 25 plots which had been advertised. This clearly indicates that in spite of adequate advertisement having been made, the authority was unable to fetch investors for almost half of the plots. This clearly reflects that the stringent conditions which had been imposed in the advertisement, detracted prospective investors to a great extent. Even before this Court, there is no challenge by way of any such prospective investor to the said advertisement or the procedure adopted by the authority except for two petitions filed as a PIL which were also ultimately withdrawn by the petitioners therein. *Thus, in these circumstances, it cannot be readily inferred that the deal was a mala fide deal or was some sort of underhand dealing merely because plots had been sold at much higher rates in the nearly commercial area.* This, in our opinion, would be comparing uncomparables inasmuch as the terms and conditions in the present allotment are far more stringent and curtail much of the rights as against those plots which have been settled by NOIDA at higher rates on different terms and conditions. *In the instant case, the authority has come up with the plea that there was a mistake in the implementation of the policy on account of an incorrect interpretation with regard to the industrial rates to be applied at the time of allotment*. It is surprising as to how the authority has termed it as a mistake when extensive deliberations had taken place and conscious decisions had been implemented followed by execution of

lease deeds and registration thereof.

Admittedly no misrepresentation had been made by petitioners, on the contrary, it is a clear case of misrepresentation by the NOIDA that land would be allotted at fixed price of Rs.7,400/- per sq. mtr. Not a single person has come forward to offer any higher price for either of the plots. No doubt, statutory rules have been violated but such violations appear to be more technical than contrary to public interest.

It is not in dispute that once the NOIDA had adopted the policy decision dated 22nd May, 2006 in toto, regulations could be amended and if same had not been done, the State Government could have asked the NOIDA to make the amendments for giving effect to the policy decision dated 22nd May, 2006.

The question as to whether the rules and regulations require amendment for the purposes of justifying the advertisement, has not all been considered by the State Government or NOIDA while passing the impugned order. This has vitally affected the rights which accrued in favour of the petitioners on account of the action of the parties in altering their position after the allotment was made. Whether the implementation of the policy without bringing an amendment in the rules and regulations would be fatal, should have been the subject matter of deliberations by the State Government while passing the impugned order inasmuch as we do not find any such reason reflected therein. Even otherwise, if this irregularity did exist, then it was still open to the State Government to have considered the implementation of any such amendment looking to the fact that the hotels were very much urgently required and the work was required to be finished by 2009. It is nobody's case that there was no fair advertisement indicating the terms and conditions on which the allotment was to be made. The policy to invoke the industrial rates

for allotment was only to promote the hotel business in view of the forthcoming Commonwealth Games and, in the long run, to promote tourism. *It is for the State Government to decide as to whether the rates prescribed were reasonable vis-à-vis the object sought to be achieved*. It cannot be lost sight of that there are many allotments made by the Government even free of cost to exclusively charitable institutions or institutions which provide services on 'no profit no loss' basis to the public at large. Can it be said that the allotment of such plots have also to be tuned keeping in view the high rate of revenue that can be collected from the land? Thus, the purpose which has to be seen and the object which is sought to be achieved, in our opinion, is in the realm of policy decision to be taken by the State Government founded on a reasonable basis and which has a rational nexus with the object to be achieved. *The consideration for fixing appropriate rates may also be one of the factors but the same has to be concluded by taking an appropriate decision*. Thus, the decision in this case was required to take after giving opportunity of hearing to the petitioners as the petitioners had acquired valuable rights due to intervening events. This is we are saying again keeping in view the undiluted facts that out of 25 plots that were offered, only 14 prospective allottees have applied and were allotted plots…..

In the absence of any kind of allegation of fraud or misrepresentation or impression of bias or favouritism or nepotism or corruption, the decision to cancel the allotment needs a fresh look by the State Government in the back ground of the observations made.

In our opinion the law laid down by the Hon'ble Supreme Court in the case of *Sachidanand Pandey*. (Supra) is appropriately applicable in the facts of the present case and should have been noticed by the State Government

along with other aspect of the matter before taking a decision in the matter.

The State Government has failed to take note of the fact that the price fetched in respect of plots settled with the petitioners was considered again by the Board of NOIDA in its 137th meeting dated 4th September, 2006 and after noticing the settlement made, at a price of Rs.7,400/- per sq. mtr. with the petitioners, the Board approved the same. Meaning thereby that even if, there may have been some irregularity in the settlement of plots, vis-à-vis policy guidelines stood condoned by the NOIDA itself. The *State Government should have also kept in mind that the petitioners had already been put in actual possession over the land in question, the lease-deeds had already been executed and 11 cases also registered*.

The issue so formulated by us need examination by the State Government afresh in the background that public interest must prevail in all circumstances and all statutory provisions and the power conferred upon the State Government under Section 41 of Act, 1973 must have at its heart larger public good."

(emphasis supplied)

13. The appellants being aggrieved by the said common order of the High Court, to the extent it remanded the matters to the State Government for fresh consideration, have filed these appeals by special leave. The appellants contended that the High Court, having quashed the order of the State Government dated 1.8.2007 and the consequential orders of cancellation dated 3.8.2007 passed by NOIDA, ought to have upheld the allotments and leases and should not have remanded the matter to the state government for fresh consideration. On 9.7.2008 this court directed status quo regarding possession. On 18.7.2008 this court granted leave and issued the following directions :

"Interim stay of dispossession of the petitioners from the respective sites allotted to them. The petitioners shall maintain status quo and shall not put up any construction on the sites and shall not create any third party rights.

The High Court while setting aside the cancellation of letters of allotment has directed the State Government to give a hearing to the petitioners individually and therefore pass a reasoned order, in the light of its observations, in regard to its proposal to cancel the allotment of sites.

We direct that the State Government (Principal Secretary, Industrial Development Department, Uttar Pradesh Government) shall accordingly give a hearing and pass a reasoned order in accordance with law uninfluenced by the observations made by the High Court in the impugned judgment dated 13.5.2008.

All the petitioners agree to appear before the concerned Authority without further notice on 11.08.2008 for such hearing. We make it clear that the participation in such hearing by the petitioners and passing of orders by Uttar Pradesh Government will be without prejudice to the respective contentions of parties.

List on 09.09.2008. The concerned Authority shall take its decision by that date and submit its decision to this Court."

(emphasis supplied)

14. In pursuance of it, the state government (Principal Secretary, Infrastructure and Industrial Development) gave a hearing to the appellants and passed individual orders dated 8.9.2008 in the case of each of the appellants, without reference to the observations or directions of the High Court. The state government has held that the allotment of plots to the appellants was bad and cancelled the allotment and directed action to be taken against the erring officers of NOIDA. In the said orders

dated 8.9.2008 made under section 41(3) of the 1973 Act, the state government has held :

(i) The object of the government policy dated 22.5.2006 was to treat hotels as 'industry', and make allotment of land in favour of hotel entrepreneurs on industrial terms, subject to the statutory Regulations, 1996 and Building Regulations, 2006 on land earmarked for industrial use. Therefore all conditions applicable to industrial buildings will apply to construction of hotels. NOIDA Master Plan had to be amended demarcating Sectors 96, 97, 98 (where five star Hotel Plots H-1 to H-10 are situated) and other commercial areas allotted for hotels, for industrial use.

(ii) Though NOIDA at its 135th meeting on 5.6.2006 while adopting the government policy dated 22.5.2006 resolved to change its rules, regulations and policy, it did not do so and consequently the allotments of plots were in violation of the statutory provisions, in particular Regulations 3(1)(b) and 4(1)(b)(iii) read with Regulation 2(d) and (e) of the 1991 Regulations. The adoption of government policy dated 22.5.2006, did not result in automatic amendment or modification of the regulations of NOIDA.

(iii) The allotments were made at the industrial rate of Rs.7400 per sq.m. The plots allotted were commercial plots, of which the prevailing circle rate was Rs.70,000 per sq.m. As a result, there was a loss of Rs.1643.77 crores to NOIDA in the premium charged for the 14 plots. If the rental income for 90 years, with reference to a premium of Rs.70000/- per sq.m. is calculated, the loss on account of annual rent would be Rs.3077.37 crores. Thus the total loss of revenue by not inviting tenders was Rs.4721.14 crores.

(iv) NOIDA could not have allotted commercial plots at fixed rates, in favour of the appellants without public auction or inviting tenders. If it wanted to allot commercial

plot at a fixed rate, it ought to have amended its regulations and policies, and that was not done.

(v) The allotment of plots at Rs.7400 per sq.m. was illegal as the said price was not approved by the Board of NOIDA. The Board of Directors had directed at the 135th meeting on 5.6.2006 while deciding to implement the Government policy dated 22.5.2006, 'to apply the rate of Industrial Area Phase I' for hotel industry. This meant that the reserve rate was to be fixed at Rs.7400/- per sq.m. for the plots and applications ought to have been invited by sealed tenders. But the CEO of NOIDA had shown in the Brochures, a fixed allotment rate of Rs.7400/- per sq.m. contrary to the decision of the NOIDA Board. Secondly the reserve rate had to be fixed after ascertaining the market value which was also not done. The policy of NOIDA both in regard to allotment of both commercial plots and Industrial area – Phase I plots was on the basis of sealed tenders. That was violated by allotting plots at a fixed rate.

(vi) The policy of the government dated 22.5.2006 adopted by NOIDA by resolution dated 5.6.2006 contemplated change of land use, amendment of regulations and policies of NOIDA, and following the prescribed procedure for allotment of commercial and industrial plots. But neither the amendments were carried out, nor the prescribed procedures followed.

(vii) The following violations make the allotments invalid : (a) reserved price being treated as fixed price; (b) procedure for allotment of plots in commercial areas and industrial areas (Phase I) which was by auction or by bids not being followed; (c) change of land use not being effected; and (d) regulations not being amended to give effect to the policy dated 22.5.2006.

15. As these revisional orders dated 8.9.2008 were passed by the state government, during the pendency of these

appeals, in pursuance of the directions of this court issued on 18.7.2008, this court permitted the appellants to challenge the said orders of cancellation dated 8.9.2008 by filing additional grounds in order to avoid duplication of proceedings. The respondents were also permitted to file their additional counter affidavits. These appeals were therefore heard with reference to the challenge to the orders of cancellation dated 8.9.2008, in addition to the challenge to the order of remand of the High Court dated 13.5.2008.

16. We may first briefly deal with the challenge to the order of the High Court dated 13.5.2008. The High Court rightly set aside the orders dated 1.8.2007 of the state government, because no hearing was given to the appellants as required under section 41(3) of the 1973 Act. Even otherwise, when valuable rights had vested in the appellants, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties. Violation of principles of natural justice was a ground to set aside the order dated 1.8.2007 and the consequential orders dated 3.8.2007. Several objections were raised by appellants to the cancellation. These objections had not been considered by the state government. As the High Court was setting aside the orders dated 1.8.2007 and the consequential order dated 3.8.2007, on the ground of violation of principles of natural justice, necessarily it had to direct the state government to reconsider the entire matter. The High Court therefore referred to the several issues which required to be considered and several admitted facts which will have a bearing thereon, and directed the state government to decide the matter afresh after hearing the appellants. This court reiterated the said direction in its interim order dated 18.7.2008. Therefore there is no need to interfere with the final order of the High Court.

17. Therefore what in effect remains for our consideration is the validity of the orders of cancellation dated 8.9.2008

passed by the state government in exercise of its revisional jurisdiction. On the facts and circumstances and on the contentions urged, the questions that arise for consideration in these appeals broadly are :

I. Where allotment has been followed by grant of a lease (which is duly executed) and delivery of possession in favour of the lessee, whether the leases could be unilaterally cancelled by the lessor?

II. Whether the cancellations were on account of change in policy as a consequence of change of government, or on account of new government's desire to nullify the actions of previous government?

III. Whether the allotments of plots to appellants suffer from any irregularity or illegality?

(a) Whether allotment of commercial plots for hotels, is contrary to the government policy dated 22.5.2006, adopted by NOIDA on 5.6.2006, or the regulations and policies of NOIDA?

(b) Whether allotment of hotel sites by NOIDA should have been only on the basis of sealed tenders/public action?

(c) Whether the allotment rate is erroneous resulting in any loss to NOIDA?

IV. If there is any violation of the regulations/policies of NOIDA in making the allotments, what is the consequence?

(i) Who is responsible for the same?

(ii) Whether there is any suppression, misstatement or misrepresentation of facts, or fraud, collusion or undue influence on the part of any of the appellants in obtaining the allotment/lease?

(iii) What should be the remedial action?

I. Whether a completed lease can be cancelled?

18. The particulars of the lease deeds executed by NOIDA with regard to the hotel buildings allotted on 12.1.2007 to various allottees are as under:

CA No.	Name of the allottee/lessee	Category	Plot Number	Date of execution of lease deed	Date of delivery of possession
4561/08	ITC Ltd.	5 star	Plot No.H-5 Sector 97	11.4.2007 (pending registration)	11.4.2007
4562/08	Indian Hotels Ltd.	5 star	Plot No.H-2 Sector 96	4.4.2007 (pending registration)	9.4.2007
4563/08	Bharat Hotels Ltd.	5 star	Plot No.H-1 Sector 96	28.3.2007 (registered)	29.3.2007
4564/08	Hampshire Hotels & Resorts Pvt.Ltd.	5 star	Plot No.H-3 Sector 96	28.3.2007 (registered)	28.3.2007
4565/08	Arora Holdings Ltd. (consortium)	5 star	Plot No.H-6 Sector 97	18.4.2007 (pending registration)	27.4.2007
4566/08	Crimson Hotels Ltd. through Clarkston Hotels (P) Ltd.	5 star	Plot No.H-7 Sector 97	11.7.2007 (pending registration)	18.4.2007
4567/08	Mariada Holdings Ltd. (consortium)	3 star	Plot SDC-H -1 Sector 62	18.4.2007 (pending registration)	26.4.2007
4568/08	M/s Mast Craft Ltd. (consortium) through M/s. NOIDA Luxury Hotels & Resorts (P) Ltd.	3 star	Plot SDC-H-2 Sector 105	18.4.2007 pending registration)	27.4.2007
4569/08	Swiss-Bell Hotels International Ltd. (consortium)	5 star	H-9 Sector 98	18.4.2007 (pending registration)	24.4.2007
4570/08	Rendezvous	5 star	H - 8	20.4.2007	

	Hotels International Pvt.Ltd. (Consortium) through Somap Hotels (P) Ltd.		Sector 98	(pending registration)	24.4.2007
4571/08	Royal Orchid Hotels Ltd. (consortium)	3 star	124 A/2 Sector 124	20.4.2007 (pending registration)	26.4.2007
4572/08	Orchid Infras-Structure Developers Pvt. Ltd.	4 star	124 A/1 Sector 124	—	—
4968/08	Metrovino Management Ltd. (Consortium)	4 star	SDC/H-1 Sector 105	3.5.2007 (pending registration)	4.5.2007
—	Elbrus Builders (P) Ltd. (Consortium)	5 star	H-4 Sector 96	—	—

19. The appellants applied for allotment in pursuance of advertisements/brochures issued in October 1996 by NOIDA inviting applications from hotel entrepreneurs for allotment of plots for hotels. Each of the appellants fulfilled the elaborate eligibility criteria for allotment of respective category of plot. After detailed comparative evaluation of the applications through an independent agency NOIDA found them fit and eligible for allotment. Out of 25 plots, allotments were made only in respect of 14 plots. NOIDA issued them letters of allotment on 12.1.2007. Each appellant paid the lease premium ranging between Rs.17.76 crores (five star plots) to Rs.5.55 crores (three star plots) as premium plus location benefit charges. Many also exercised the option to pay 27.5% of the premium plus location benefit charges, as eleven years rent in advance in lump sum as 'one time lease rent' instead of paying yearly rent for 90 years. On payment of premium and other dues by the allottes, in terms of the relevant regulations, lease deeds were executed in favour of the appellants, in the standard lease format of NOIDA in the months of March, April and May, 2007 and they were duly presented for registration. The appellants have also incurred stamp duty and registration charges ranging from about Rs.2 crores to Rs.62 lakhs. Two lease deeds (in

favour of Bharat Hotels Ltd. and Hampshire Hotels & Resorts Ltd.) have been duly registered. In regard to other lease deeds, though presented for registration, though there is no objection for registration, registration formalities are kept pending in view of a demand by the registration authorities for deficit stamp duty and registration charges on the basis of circle rate and the issue is pending before the concerned registration officer or in court. As far as NOIDA is concerned, execution and registration of the leases were completed and consequently possession of the plots were delivered to the respective allottee/lessee in April and May, 2007. Each appellant has also incurred considerable amount for preliminary expenditure for the hotel project (in addition to the premium, location benefit charges, rent, stamp duty and registration charges) as they were expected to execute the projects in a time bound manner.

20. In the aforesaid factual background, the first contention of the appellants is that when the leases have been granted, executed and registered, when entire premium and other dues have been paid and possession has been delivered, the lessor (NOIDA) cannot unilaterally cancel the leases. The appellants do not challenge the power of NOIDA as lessor, to terminate the lease on the ground of fraud and misrepresentation under clause XIII(1) of the lease deed or on the ground of breach of the terms of the lease under clause XIV of the lease deed. What is challenged is the right to cancel a concluded lease itself, on the ground that allotment was not valid.

21. A lease governed exclusively by the provisions of Transfer of Property Act, 1882 ('TP Act' for short) could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession. Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle a lessor to seek

possession. This is the position under private law.

22. But where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be permissible for an Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute.

23. NOIDA is an authority constituted for development of an industrial and urban township (also known as Noida) in Uttar Pradesh under the provisions of the Act. Section 7 empowers the authority to sell, lease or otherwise transfer whether by auction, allotment or otherwise, any land or building belonging to it in the industrial development area, on such terms and conditions as it may think fit to impose, on such terms and conditions and subject to any rules that may be made. Section 14 provides for forfeiture for breach of conditions of transfer. The said section empowers the Chief Executive Officer of the Authority to resume a site or building which had been transferred by the Authority and forfeit the whole or part of the money paid in regard to such transfer, in the following two circumstances : a) non-payment by the lessee, of consideration money or any installment thereof due by the lessee on account of the transfer of any site or building by the Authority; or b) breach of any condition of such transfer or breach of any rules or regulations made under the Act by the lessee. Sub-section (2) provides that where the Chief Executive Officer of the Authority resumes any site or building under sub-section (1) of section 14, on his requisition, the Collector may cause the possession thereof to be taken from the transferee by use of such force as may be necessary and deliver the same to the Authority. This makes it clear that if a lessee commits default in paying either the premium or the lease rent or other dues, or commits breach of any term of the lease deed or breach of any rules or regulations under the Act, the Chief Executive

Officer of NOIDA can resume the leased plot or building in the manner provided in the statute, without filing a civil suit. The authority to resume implies and includes the authority to unilaterally cancel the lease.

24. Clause XIV of the lease deeds executed by the NOIDA in favour of the appellants provides that "notwithstanding anything to the contrary contained herein, in the event of breach of terms of lease, or if the lessee does not abide by the terms and conditions of the building regulations and directions or any rules framed by the lessor from time to time", the lease may be cancelled by the lessor and the possession of the demised premises can be taken over by the lessor from the lessee. Clause XIII (i) provides that "if it is discovered that the allotment/ lease of the demised premises has been obtained by suppression of any fact or misstatement or misrepresentation or fraud on the part of the lessee", then the lease shall be cancelled and the entire deposit amount shall stand forfeited. Therefore NOIDA has the authority, having been empowered by the statute, to cancel the lease and resume possession, without recourse to a civil court by a suit, in two circumstances (i) non-payment of the premium/rent/other dues; (ii) breach of conditions of transfer or breach of rules or regulations under the Act (the conditions referred would include any suppression of fact or misstatement or misrepresentation or fraud on the part of the lessee in obtaining the lease).

25. NOIDA has not alleged or made out any default in payment or breach of conditions of the lease or breach of rules and regulations. Nor is it the case of NOIDA that any of the appellants is guilty of any suppression or misstatement of fact, misrepresentation or fraud. Neither the cancellation of the allotment and the lease by NOIDA by letter dated 3.8.2007, nor the orders dated 1.8.2007 or 8.9.2008 made by the state government refer to any of these grounds. Therefore the cancellation cannot be sustained with reference to the grounds mentioned in section 14 of the Act. The grounds mentioned for

cancellation are mistakes committed by NOIDA itself in making allotments and fixing the premium, in violation of the Regulations and policies of NOIDA by officers of NOIDA. These are not grounds for cancellation under section 14 of the Act.

26. The learned counsel for the respondents submitted that the lease was terminated by the state government, in exercise of revisional jurisdiction under section 41 of the UP Urban Planning and Development Act, 1973 read with section 12 of the Act on the ground that there were irregularities and violations of regulations and policies of NOIDA in allotting the hotel plots to the appellants. It is submitted that the state government has such power to cancel the allotment and as a consequence the lease. Let us examine whether the state government has such power. Section 12 of the Act provides that the provisions of Chapter VII and sections 30, 32, 40, 41, 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973 as re-enacted and modified by Uttar Pradesh President's Acts (Re-enactment with Modifications) Act, 1974 shall *mutatis mutandis* apply to the Authority with the adaptations mentioned in the said section. Section 41 of the 1973 Act, relating to control by State Government, is thus applicable to NOIDA. The said section with the adaptations mentioned in section 12 of the Act, reads as under:

> *"41. Control by State Government* – (1) The Authority, the Chairman or the Chief Executive Officer shall carry out such directions as may be issued to it form time to time by the State Government for the efficient administration of this Act.
>
> (2) If in, or in connection with the exercise of its power and discharge of its functions by the Authority, the Chairman or the Chief Executive Officer under this Act, any dispute arises between the Authority, the Chairman or the Chief Executive Officer and the State Government the decision

of the State Government on such dispute shall be final.

(3) The State Government may, at any time, either on its own motion or an application made to it in this behalf, call for the records of any case disposed of or order passed by the Authority or the Chairman for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit.

Provided that the State Government shall not pass on order prejudicial to any person without affording such person a reasonable opportunity of being heard.

(4) Every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court."

27. Sub-section (3) enables the state government, either on its own motion or on an application made to it in this behalf, to call for the records of any case disposed of or order passed by the Authority for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and may pass *such order or issue such direction in relation thereto as it may think fit.* The allotments were challenged in two writ litigations before the Allahabad High Court (Civil Misc.WP 24917/2007 and PIL WP No. 29252/2007). A division bench of the High Court directed the state government to exercise its power of revision and have a relook in regard to the allotments made in favour of the appellants by NOIDA in exercise of its power under section 41(3) of the 1973 Act (read with section 12 of the Act). The order dated 1.8.2007 passed by the state government in pursuance of the said direction of the High Court was set aside by the High Court on the ground that the order violated section 41(3) of the 1973 Act and directed fresh consideration after hearing the parties. This Court also directed the state government to pass a fresh order. Accordingly the state government examined the matter and passed the impugned

orders dated 8.9.2008. The state government has concluded that the allotments by NOIDA were in violation of the regulations and policies of NOIDA and therefore cancelled the allotments and consequential leases. The State Government is empowered to issue such direction. (Whether the order of the State Government is valid on merits is a separate issue). The limited question under consideration is whether the state government can cancel the allotments and consequently the leases. Section 41(3) shows that the state government, can examine the legality or propriety of any order of NOIDA and pass appropriate orders. If the state government in exercise of its revisional jurisdiction finds the allotments were irregular or contrary to the regulations or policies of NOIDA and directs cancellation, the allotments become invalid and leases also become invalid. Consequently NOIDA can resume possession, without intervention of a civil court in a civil suit.

II. Whether the cancellation was on account of the change in government

28. The appellants submitted that the Hotel plot scheme was introduced and allotments were made in pursuance of a policy of the government that was in power in 2006; and that immediately after the allotment and execution of the lease deeds, there were changes in government on 15.5.2007. The appellants contend that the direction to cancel the allotments (issued on 1.8.2007) and the orders of cancellation (issued on 8.9.2008) was apparently a consequence of the new government reviewing and changing the policies by the previous government or as a consequence of the new government's intention to upset the decisions of the previous government. It is submitted that the successor government cannot reopen concluded transactions of the previous government on the ground of change in policy or by merely reconsidering them. Reliance is placed upon two decisions of this Court in support of their contention - *State of Haryana vs. State of Punjab* – 2002 (2) SCC 507 and *State of Karnataka vs. All India*

Manufacturers Organisation – 2006 (4) SCC 683. In *State of Haryana,* this Court observed :

> "…..What really bothers us most is the functioning of the political parties, who assume power to do whatever that suits and whatever would catch the vote-bank. They forget for a moment that the constitution conceives of a Government to be manned by the representatives of the people, who get themselves elected in an election. *The decisions taken at the governmental level should not be so easily nullified by a change of government and by some other political party assuming power,* particularly when such a decision affects some other State and the interest of the nation as a whole. It cannot be disputed that so far as policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. *But in the matter of governance of a State or in the matter of execution of a decision taken by a previous government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same*."
>
> (emphasis supplied)

In *State of Karnataka,* (supra) this Court while reiterating the above principle laid down in *State of Haryana*, added :

> Taking an overall view of the matter, it appears that there could hardly be a dispute that the project is a mega project which is in the larger public interest of the State of Karnataka and merely because there was a change in the Government, there was no necessity for reviewing all decisions taken by the previous Government, which is what appears to have happened. That such an action cannot be

> taken every time there is a change of Government has been clearly laid down ……. "

29. On a careful consideration, we find that the contention has no merit. This is not a case where as a consequence of change in government, the new government has reviewed the decision relating to hotel site allotment, merely because it was a decision of the previous government. Nor is it a case where any new policy of the new government, being at variance with the policy of the previous government. The principles stated in the said two decisions will be relevant in such cases. In this case, the allotments of plots for hotel projects were challenged in two writ petitions – the first of which was filed on 22.5.2007. In the said writ petition, the High Court made an interim order dated 25.5.2007, directing the state government to have a re-look of the entire matter in view of the serious allegations made in the writ petitions about allotment at throw away prices. In fact, the High Court specifically directed the state government to exercise its power of revision under section 41(3) of 1973 Act and take an independent decision. It is in compliance with the said direction that the state government had a relook at the matter, found some irregularities in allotment and directed NOIDA to take action to remedy the irregularities found in the allotments, vide letter dated 1.8.2007. This was confirmed in the affidavit dated 2.8.2007 filed by the state government before the High Court. Therefore, the decision dated 1.8.2007 was not a decision taken by a subsequent government in an attempt to find fault with the policies or actions of the previous government, but a decision taken in exercise of a power under section 41 of the 1973 Act in the normal course of governmental business, in pursuance of specific directions of the High Court. The orders dated 8.9.2008 were made in view of the final order of the High Court and the interim order of this court directing reconsideration. We therefore, reject the contention that the decisions dated 1.8.2007 and 8.9.2008 of the state government were the result of any ulterior motive to interfere with the policies or decisions of the earlier government. The decision of the

state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated.

III. Whether the allotments violate the regulations/policies of NOIDA?

30. The Central Government requested the governments of Uttar Pradesh and Haryana to encourage the high segment hotel industry and add to the available room capacity in areas adjoining Delhi, in time to meet the increased demand expected during the Commonwealth Games scheduled to be held in October, 2010. The Uttar Pradesh government had declared 'tourism' to be an industry as far back as 1997-98 to encourage tourism in the State. It however found that the said incentive did not have any marked effect, as far as increasing the number of quality hotels, an integral part of tourism. To attract the twin objects, that is to comply with the request of the central government for creation of more star hotels, and also to attract capital investment in the hotel segment of tourism industry throughout the state, the state government came out with a policy on 22.5.2006 with the following two new hotel-specific incentives, in addition to the standard incentives available to tourism industry : (i) allotment of plots for hotels at industrial plot prices; and (ii) 100% rebate in *Sukh Sadan Tax* for five years from start-up. When the policy dated 22.5.2006 is read as a whole, the scheme that emerges is this: The development authorities were expected to earmark specific areas for setting up hotels while preparing the Master Plan, with the assistance of tourism department. Where the development authorities had already finalized the master plan, they were required to earmark surplus lands (that is, areas not reserved for any identified or specific use) for allotment to hotels. If suitable surplus land was not available and it becomes necessary to allot plots earmarked for other use, for purposes of hotels, the development authorities were required to follow the rules and change the land use so that the land could be legitimately used for hotel industry.

In areas where there were no development authorities, suitable lands near tourist spots were to be acquired/transferred to tourism department which would allot the land to Hotels/tourism industry. The plots earmarked for hotels had to be allotted to hotels/tourism entrepreneurs at industrial plot rates, as was done in the case of allotments for industries. The policy was a general policy intended to apply for the entire state. It proceeded on the assumption that earmarking areas for hotels and tourism for allotment at industrial rates, would be under a separate and distinct categorization of land use. It apparently did not contemplate high value commercial plots in NOIDA being earmarked for hotel industry and being allotted at industrial rates.

31. The state government on examination of all the facts in its revisional jurisdiction found that the hotel plots allotted to appellants were part of Sectors 96, 97 and 98 (for five star plots) and other sectors (for plots for 4 star and 3 star hotels) which were earmarked for commercial use under the NOIDA Master Plan. It was of the view that in view of tourism/hotels being declared as an "industry" and the government policy requiring allotment of plots for tourism/hotels at industrial rates, if any plot had to be allotted for a hotel, the land use of the said plot had to be changed to industrial use in the Master plan by adopting the prescribed procedure under the regulations, before making the allotment. It was also of the view that if the plots were allotted for hotel industry, then the construction should be as per the NOIDA building regulations and directions applicable to industries in regard to FAR, ground coverage, height, setbacks, construction of building etc. It was also of the view that if plots in commercial areas are to be allotted it could be only in accordance with the NOIDA Commercial Property Management Policy which required all commercial plots to be allotted on sealed tender or public auction basis. As NOIDA did not alter the land use of the plots in question from commercial use to industrial use in the Master Plan nor amend the definitions of commercial use and industrial use in the 1991

Regulations so that hotels would no longer be a commercial use, but a industrial use, the state government held that statutory regulations and directives of NOIDA had been violated in making the hotel plot allotments.

32. The state government contends that the allotment of commercial plots to appellants for establishing hotels without converting them to industrial use violated the NOIDA Regulations and therefore impermissible and illegal. The state government further contends that when hotels were given the status of 'industry', the use of land for hotels would be an industrial use and therefore, the allotment of plots by NOIDA for constructing hotels should have been in areas earmarked as industrial area, and that if any area earmarked for commercial use is to be allotted to hotels, such allotment can be only after change of such land from commercial use to industrial use. Alternatively, it is submitted that even if the plots in area earmarked for commercial use are allotted to hotels such allotment could be only by adopting the procedure applicable to allotments of commercial plots that is by inviting tenders or bids and not by allotment at any fixed rate that too a fixed rate which is a reserved rate for an industrial plot. Lastly, it is contended that if a commercial plot could be allotted to a hotel, it cannot be charged the industrial plot rate, but should have been charged as a commercial plot. It is submitted that charging 14 commercial plots at industrial rates has resulted in a loss of Rs.4721.14 crores.

33. On the other hand, the appellants contend that the policy dated 22.5.2006 did not direct or require that allotment of plots for hotels should be in areas earmarked for industrial use. They point out that the hotel business is a commercial activity and under the 1991 Regulations, commercial use includes use of land or building for a hotel, and use of land or building for locating an industry is an industrial use. It is submitted that allotment of plots in commercial areas to hotels was justified as it is a commercial use. It is next submitted that the policy required only the rates applicable to industrial plots,

to be applied to the plots allotted to hotels wherever they are situated, as an incentive for hotel and tourism industry, and that did not mean that the building regulations should be applied to hotel buildings. The allotment of hotel plots having been done at legitimately fixed allotment rates, there is no question of loss to NOIDA.

These contentions give rise to three sub-issues and we will deal them separately.

(a) Whether plots earmarked for commercial use in commercial area, could be allotted for hotels?

34. We will first examine the question whether commercial plots could not be allotted to hotels, without changing the earmarked land use from 'commercial' to 'industrial' and whether the FAR, maximum height, set backs, ground coverage etc. applicable to hotel plots should be as per the regulations applicable to industrial buildings and not as applicable to commercial buildings.

(34.1) Section 6 of the Act relates to the functions of the Authority. Sub-section (1) specifies the object of the Authority is to secure planned development of industrial development area. Sub-section (2) provides that the functions of the authority include preparation of a plan for the development of the 'industrial development area' to demarcate and develop sites for industrial, commercial and residential purposes, to lay down the purpose for which a particular plot shall be used (that is industrial, commercial, residential or other specified purpose) in the development area. In exercise of its power under section 19 read with section 6 of the Act, the Authority made the NOIDA (Preparation and Finalisation of Plan) Regulations, 1991 ('1991 Regulations' for short).

(34.2) Clauses (d), (e) and (f) of Regulation 2 of the said Regulations define commercial use, industrial use and institutional use as under:

"(d) 'Commercial Use' means the use of any land or building or part thereof for carrying on any trade, business or profession, sale of goods of any type, whatsoever and includes private hospitals, nursing homes, hostels, **hotels**, restaurants, boarding houses not attached to any educational institution, consultant offices in any field, cottage and service industries;

(e) 'Industrial Use' means the use of any land or building or part thereof mainly for **location of industries and other uses incidental to industrial use** such as offices, eatable establishment etc.;

(f) 'Institutional Use' means the use of any land/building or part thereof for carrying on activities like testing, research, demonstration etc. for the betterment of the society and it includes educational institutions;"

(emphasis supplied)

(34.3) Regulation 4 provides that the NOIDA Master Plan may include Sector Plans showing various sectors into which the development area or part thereof may be divided for the purpose of development. It requires the said Plan to show the various existing and proposed land uses indicating the most desirable utilization of land for (i) industrial use by allocating the area of land for various scales or types of industries or both; (ii) residential use by allocating the area of land for housing; (iii) commercial use by allocating the area of land for wholesale or retail markets, specialized markets, town level shops, show-rooms and commercial offices and such allied commercial activities; (iv) public use by allocating the area of land for Government offices, hospitals, telephone exchanges, police lines etc; (v) organized recreational open spaces by allocating area of land for parks, stadium etc.; (vi) agricultural use by allocating the area of land for farming, horticulture, sericulture; (vii) such other purposes as the Authority may deem fit, in the

course of proper development of the development area. The said 1991 Regulations also requires the Plan to include the systematic regulation of each land use area, allocation of heights, number of storeys, size and number of buildings, size of yards and other open spaces and the use of land and buildings.

(34.4) Regulation 9 provides that the plan finalized and approved by the Authority shall be effective for such period as may be specified by the Authority, but not less than five years. Regulation 11 authorises the Authority to make amendment to the Plan and requires the Authority, before making any amendment to the Plan to publish a notice at least in one newspaper having circulation in the area inviting objections and suggestions and further requires every amendment made to the plan to be published. It provides that the amendment shall come into operation either on the date of the first publication or on such other date as the authority may fix. It is of relevance to note that in this case no amendment was made changing the land use of the plots in question from commercial to industrial.

35. The Authority made the NOIDA Building Regulations and Directions, 2006 (for short "2006 Building Regulations"), with prior approval of the state government and in exercise of its powers under sections 9(2) and 19 of the Act. The said Building Regulations replaced the NOIDA Building Regulations and Directions 1986, with effect from 5.12.2006.

(35.1) Regulation 3.12 defines building as any structure or erection or part of a structure or erection which is intended to be used for residential, commercial, industrial or other purposes. Clause (e) thereof defines 'industrial building' as referring to a building in which products or materials of all kinds and properties are fabricated, assembled or processed, such as assembly plants laboratories, power plants, smoke houses, refineries, gas plants, mills, diaries or factories.

(35.2) Regulation 33.3 prescribes the maximum ground

coverage, maximum FAR in percentage and maximum height for industrial building. The same is extracted below :

S. No.	Plot Area	Max. Ground Coverage	Max. FAR in %	Max. height (in mt.)
1.	**Upto 100**	60	120	15
2.	**Above 100 upto 450**			15
a.	First 100	Same as (1) above		
b.	Next 350 or part thereof	60	100	
3.	**Above 450 upto 2000**			15
a.	First 450	Same as (2) above		
b.	Next 1550 or part thereof	55	80	
4.	**Above 2000 upto 12000**			15
a.	First 2000	Same as (3) above		
b.	Next 10000 or part thereof	55	70	
5.	**Above 12000 upto 20000**			15
a.	First 12000	Same as (4) above		
b.	Next 8000 or of part thereof	50	65	
6.	**Above 20000**			15
a.	First 20000	Same as (5) above		
b.	Above 20000	50	60	

The said regulation shows that no industrial building put up in an industrial plot can exceed a height of 15 mtrs. The permissible FAR for industrial use ranges between 1.2 to 0.6 depending upon the size of the plot. The FAR as per the above table would be 0.679 for a plot measuring 24000 sq.m., 0.72 for a plot measuring 12500 sq.m. and 0.74 for a plot measuring 7500 sq.m.

(35.3) Regulation 33.4 divides the commercial buildings into two categories that is hotel buildings and buildings for other

commercial activities and prescribes the maximum ground coverage, FAR and maximum height for both types of commercial buildings. As we are concerned with hotel buildings, the relevant portion of said regulation dealing with hotel building is extracted below :

Sl. No.	Use	Maximum ground coverage %	FAR	Max. height
1.	Hotel Building			
	(a) Below three star category	30%	1.25	24.0 m
	(b) Three star category	30%	1.5	No limit
	(c) Above three star category	25%	2.0	No limit

The said regulation shows that for hotel buildings there is no height restriction at all and the FAR is 2 (for 4 star and 5 star categories) and 1.5 (for 3 star category hotels).

36. The 2006 Building Regulations make it clear that FAR and the permissible height of the building is far more advantageous in the case of commercial hotel buildings when compared to industrial buildings. It may be mentioned that even when the 1986 Building Regulations were in force till 4.12.2006, the provisions for FAR and height of building were far more advantageous to commercial buildings, when compared to industrial buildings.

37. Running a hotel or boarding house or a restaurant is a commercial activity. By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose. An industrial building is defined in Regulation 3.12(e) of the NOIDA Building Regulations and Directions of 2006 as a building in which products or materials of all kinds and properties are fabricated, assembled or processed. As per the 1991 Regulations, use for a hotel is a commercial use; and 'industrial use' refers to manufacturing,

fabrication, assembling and processing activities. If the land allotted to a hotel is to be considered as an allotment for an industrial use and the building constructed in such plot is to be considered as an industrial building, the consequence will be that no five star, four star or three star hotel can be constructed in such plots. Further the restrictions for industrial buildings, relating to permissible FAR (less than 0.75 as against 2 for hotels) and height (maximum of 15 M as against absence of any height restriction for hotels) make industrial plots useless and unviable for a hotel. We note below the comparative table of FAR and the permissible height for industrial and commercial buildings, worked out from Regulations 33.3 and 33.4 of the 2006 Regulations :

S. No.	Plot Size	Under permissible FAR		Permissible Height	
		Industrial	Commercial	Industrial	Commercial
1.	7500 sq.m Three Star	0.74	1.5	15 mtr.	No height restriction
2.	12500 sq.m Four Star	0.72	2	15 mtr.	No height restriction
3.	24000 sq.m Five Star	0.679	2	15 mtr.	No height restriction

38. Having regard to the provisions of 1991 Regulations, use of land for hotel cannot be considered as an industrial use, but will continue to remain a commercial use. The policy of the state government dated 22.5.2006 cannot override the NOIDA Regulations. If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended. Be that as it may.

39. When tourism is given the status of an industry, it does not mean tourism involves manufacturing, fabrication, processing or assembling. The term 'industry' has different

nuances. The traditional meaning of 'industry' may be manufacture or production of goods. When used in the context of an 'industrial area' or 'a land for industrial use' the word 'industry' will refer to use for manufacture, production and allied activities. On the other hand, when the word 'industry' is used in the context of tourism/hotels, hospitals/nursing homes or banking, it refers to a service industry, that is groups engaged in that particular organized activity, and does not refer to any manufacturing, processing, assembling etc. When the government policy gave tourism and hotels, the status of an industry, it did not require hotels to undertake manufacturing or production activities. By giving the status of 'industry', the policy enabled a particular service activity (in this case tourism and hotels) to secure certain benefits in allotment of land at concessional prices and certain tax exemptions. Therefore, the fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use. It does not also mean that all the hotels and tourist offices should be shifted from commercial areas to industrial areas or that hotels or tourist offices cannot operate in commercial areas, or that they cannot get allotment of land or building earmarked for commercial use. Running hotels, to repeat, is a commercial activity and the use of a land or building for a hotel is commercial use and therefore, allotment of plots for hotels in a commercial area is wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial, institutional, public, semi-public, etc.

40. We are therefore of the view that the allotment of plots situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations. We are also of the view that it was not necessary for NOIDA to change the land use of plots to be allotted to hotels, from commercial to industrial use. The contentions of the respondents to the contrary are therefore, rejected.

(b) Whether allotment of hotel sites by NOIDA should have been by inviting tenders/holding auctions?

41. The learned counsel for appellants contended that whenever the State or its authorities decide to dispose of their properties, it need not always be by public auction or by inviting sealed tenders, involving competitive bidding. It is submitted that if the object of a policy relating to allotment of plots is to promote hotel industry and not to earn revenue, it would be open to the state government and its authorities to dispose of their properties by other recognized methods, that is by allotment at fixed rates after inviting applications from eligible applicants, or by allotment after specific invitation and negotiations, depending upon the facts and circumstances. It is pointed out that in pursuing socio-economic goals, as for example when plots are allotted by development authorities to persons belonging to economically weaker sections or persons belonging to middle classes, allotments are always made at fixed rate by drawing lots and not by inviting tenders or by auctions. It is submitted that only a few plots as for example, the corner plots or plots of some special category are normally disposed of by either public auction or by inviting tenders. According to appellants, whether allotment should be by public auction or by inviting tenders or by inviting applications for allotment at fixed rate is a decision to be taken by the authority concerned, on the facts and circumstances of each case; and therefore NOIDA did not commit any irregularity, by adopting the method of allotment of hotel plots at fixed rate applicable to industrial plots, to give a boost to tourism industry in the state, in pursuance of government policy dated 22.5.2006.

42. In support of their contention, the appellants relied upon the decisions of this Court in *Brij Bhusan vs. State of Jammu & Kashmir* – 1986 (2) SCC 354, *Sachidanand Pandey vs. State of West Bengal* – 1987 (2) SCC 295, and *MP Oil Extraction vs. State of MP* – 1997 (7) SCC 592. In *Brij Bhusan* (supra), this Court was considering a case where certain

entrepreneurs had on their own had offered to set up the factories for manufacturing of resin and turpentine derivatives. After negotiations the state government gave licences to them to set up factories and assured supply of the required raw materials (Oleo Resin). No advertisements were issued by the state government inviting tenders for setting up such factories. Other entrepreneurs who were interested in setting up factories, challenged the grant of licences on the ground that due opportunity was not given to all the entrepreneurs to make their applications. This Court rejected the writ petitions holding that in the absence of material to show that the State had acted mala fide or out of improper or corrupt motive or in order to promote the private interest of someone at the cost of the State, the decision to grant licences was not open to interference. It reiterated where State is allocating resources for the purpose of encouraging setting up of industries within the State, the State is not bound to advertise and tell the people that it wants a particular industry to be set up in the State or invite those interested to come up with proposals.

In *Sachidanand Pandey*, this Court held :

> "State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

To the same effect is the decision in *MP Oil Extraction*. The

appellants point out that their cases are much stronger than those considered in those cases, as their allotments were not made on any private negotiations, but after wide advertisement in newspapers inviting applications from all persons who fulfilled the eligibility criteria; and that all applications received were evaluated through an independent agency and allotments were made as per their recommendation. They submit that the process of allotment was fair and normal. They contend that failure to invite tenders or hold public auction would not vitiate the allotments.

43. But the issue in these cases is different. The principle laid down in the cases relied on by the appellants would be of some assistance in a situation where there are no specific rules, regulations or policy guidelines governing the procedure as to how allotments are to be made, or contracts are to be awarded, or licences are to be issued. Those decisions may also be of some assistance while dealing with a grievance that all persons interested or all eligible persons were not given an opportunity to apply. The state government has found that the NOIDA Commercial Property Management Policy required allotment of commercial properties only on sealed tenders or public auction basis; and if the said requirement was ignored and allotment is made at a fixed rate, contrary to the specific terms of the policies of NOIDA; and that allotment at fixed rate basis had resulted in a huge financial loss to NOIDA.

44. Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004. Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction. For this purpose NOIDA has to fix a reserve rate and the person who gives the highest bid/offer above the reserve rate, who is otherwise eligible, is allotted the plot. The said policy in regard to the procedure for allotment of commercial properties was not amended or modified to provide for allotment of commercial properties for hotels at

fixed prices. The allotment of commercial plots at fixed rate was therefore clearly contrary to the said regulations of NOIDA.

45. We may also refer to the NOIDA Policies and Procedures for Industrial Property Management, 2006 as amended on 20.3.2006 ("Industrial Property Management Policy", for short) in this connection. It divides the industrial sectors in NOIDA into three industrial Phases as under :

(1)	Phase I	Sectors from 1 to 11 and 16
(2)	Phase II	Includes Phase-II, Phase-II Extension/ Hosiery Complex, Sector-80, 81 and 83
(3)	Phase III	Includes Sector-57, 58, 59, 60, 63, 64 and 65.

It provided that allotments of industrial plots in Phase I should be made on the basis of sealed tenders, the reserved rate being Rs.7400/- per sq.m. It further provided that allotments of plots in Phases II and III should be made at fixed prices of Rs.2100 and Rs.4000 per sq.m.

46. The appellants submitted that the said NOIDA Commercial Management Policy and NOIDA Industrial Management Policy are not statutory rules made by the state government under section 18 of the Act, nor are they statutory regulations made by NOIDA under section 19 of the Act. It is submitted that the NOIDA Commercial Management Policy is merely a set of guidelines and directives prepared by NOIDA in regard to the terms and conditions for transfer of commercial properties of NOIDA and such guidelines could be altered by NOIDA at any point of time. It is pointed out that the said NOIDA Commercial Management Policy itself stated that it could be amended/modified/altered without any notice. It was submitted that when NOIDA adopted the state government policy dated 22.5.2006 for allotment of plots for hotels at industrial plot rates, the NOIDA Commercial Property Management Policy stood

modified by incorporating an exception to the directive requiring allotment of commercial plots only by sealed tenders/auction, that allotment for hotel plots could be at fixed rate basis instead of tender basis or auction basis. It was further submitted that at all events, when brochures were issued on 17.10.2006 containing the "special terms and conditions for allotment of hotel plots" providing for allotment at the fixed rate of Rs.7400 per sq.m., it amounted to declaration of a separate policy for plots allotted or hotels and the guidelines contained in the NOIDA Commercial Property Policy ceased to apply to hotel plots.

47. In *Sachidanand Pandey* (supra), the legal position as to the need obeying orders/instructions/procedures was succinctly stated by Chinappa Reddy, J.

> "statutes and statutory orders have, no doubt, to be obeyed. *It does not mean that other orders, instructions etc. may be departed from in an individual case, if applicable to the facts*. *They are not to be ignored until amended. The government or the Board may have the power to amend these orders and instructions, but nonetheless they must be obeyed so long as they are in force and are applicable"*
>
> (emphasis supplied)

In *Home Secretary v. Darshjit Singh Grewal* – 1993 (4) SCC 25, the need to adhere to policy guidelines was emphasized:

> "It may be relevant to emphasize at this juncture that while the rules and regulations referred to above are statutory, the policy guidelines are relatable to the executive powers of the Chandigarh Administration. It is axiomatic that having enunciated a policy of general application and having communicated it to all concerned including the Chandigarh Engineering College, the Administration is

> bound by it. *It can, of course, change the policy but until that is cone, it is bound to adhere to it."*
>
> (emphasis supplied)

It is thus clear that where an Authority makes regulations and issues polices and procedures, they are intended to be followed and complied with. They cannot be ignored or avoided unless superseded or amended. The fact that Authority has the power to amend the regulations, policies and procedures, does not mean that they can be ignored. As long as they are in force, they are required to be obeyed by the Authority.

48. The state government policy dated 22.5.2006 or its adoption by NOIDA on 5.6.2006 did not amend to the regulations, instructions, policies and procedures of NOIDA. If the said Tourism/Hotels development policy dated 22.5.2006 contained any procedure which was at variance with the existing regulations or procedures of NOIDA, such procedures in the policy dated 22.5.2006 could come into effect only by NOIDA amending its regulations and Property Management Policies. As per the 1991 Regulations and 2006 Building Regulations, hotel buildings are commercial buildings and use of land for hotels is commercial use and any plot allotted for hotels is a commercial property. Therefore any allotment of a plot for hotels should comply with the NOIDA Commercial Property Management Policy, 2004. Unless the NOIDA Commercial Property Management Policy was amended, providing for allotment at fixed rates, in regard to any sub-category of commercial plots, allotment of a commercial property belonging to NOIDA otherwise than by sealed tender basis or auction basis will be an allotment in violation of and contrary to, the regulations directives and policies of NOIDA. The fact that NOIDA was acting in pursuance of the government policy dated 22.5.2006 would make no difference. The government policy itself very clearly stated that if the implementation of the policy required amendment of the rules, regulations and procedures of the development authorities, the same had to be carried out.

49. The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer. The allotment on sealed tender basis/auction basis is provided, only in regard to commercial properties and not in regard to properties earmarked for residential or institutional uses. It is also not provided for properties earmarked for industrial use (except in regard to plots situated in industrial areas in Phase I which because of their very advantageous locations are apparently considered to be very valuable). The properties are sold by tender/auction basis with a reserve rate, so as to secure a higher price/rate on account of the healthy competition among the applicants. The higher revenue would enable NOIDA to subsidize the price of plots for allotment to weaker sections of the society for residential use or for allotment of plots for institutional use or for various developmental activities. Therefore once a policy is made in regard to commercial properties, it has to be complied with.

50. There is no doubt that the scheme of allotment contained in the NOIDA Commercial Property Policy could be altered or amended by carving out a different procedure for hotel plots. But that should have been by placing the said Commercial Property Policy before the NOIDA Board for consideration and amendment with reference to hotel plots to be allotted as per government policy dated 22.5.2006. The policy was neither before the NOIDA Board for amendment, nor was it amended. The violation of the regulations and policies of NOIDA may be unintentional and a bonafide mistake on account of a mis-reading of the requirement of the policy dated 22.5.2006. Nevertheless it is a violation. If there is a violation of the regulations and policies of NOIDA in making allotments, the state government can certainly interfere under its revisional jurisdiction.

(c) Whether the rate charged was erroneous and has led to any loss?

51. The next question is whether the violation has resulted in any loss of revenue to NOIDA. This requires consideration of the question whether the allotment rate is correct. We have already held that allotment of commercial plots by NOIDA was possible only by inviting sealed tenders or by holding auction. That means that any allotment at a fixed rate (equivalent to the reserved rate for industrial plots) is irregular and in violation of the regulations and policies of NOIDA.

52. But the appellants contend that there was no irregularity in the allotment rate nor any 'loss' to NOIDA by allotting plots at the rate of Rs.7400/- per sq.m. and that it was validly fixed. We may briefly refer to the reasons given in support of their contention : The standard methods of attracting capital investment or to encourage a particular industry is to allot land at attractive terms or at concessional prices and give exemptions and rebates in regard to certain state taxes. Therefore, if the government took a conscious policy decision to allot plots for hotels at industrial plot rates, which is considerably lesser than the commercial plots rates, it is not to be considered as a loss to the exchequer, but should be viewed as a part of its strategy to secure investment in hotel industry in the state. Allotment prices fixed by the Authority mainly depends upon the earmarked use of the land and incidentally upon the situation, proximity or physical advantages of a land. The same land may be allotted at different rates, depending upon its earmarked use. The policy of the government required allotment of plots to hotels at a fixed rate, that is, the rates chargeable to industrial plots. The government policy did not contemplate allotment of plots for hotels by sealed tenders or by auction. NOIDA adopted the government policy and fixed the allotment rate equal to the reserve rate applicable to industrial plots in phase-I which was Rs.7400/- per sq.m. The allotment rate by NOIDA primarily depends upon the earmarked use and secondarily the situation, as can be illustrated from the notified rates of NOIDA itself. The NOIDA Board resolution dated 20.3.2006 shows that the allotment rate varied between

Rs.22100 to Rs.7500 in respect of residential plots depending upon the sector. If the same plots were to be allotted for group housing, the allotment rate varied from Rs.31,000 to Rs.12,000 per sq.m. In and around the same area, if the allotment was for institutional use, the rate could vary between Rs.5000 to Rs.12700 per sq.m and if the allotment was for industrial use depending upon whether the plots were situated in Phase-II and Phase-III, the rate would be either Rs.2100 or Rs.4000 per sq.m, The industrial plots situated in Phase-I, were to be allotted by inviting sealed tenders with the reserve rate being Rs.7400 per sq.m. Thus though the sector in which the property was situated had a bearing on the allotment rate, the main criterion for fixation of rate was the earmarked use, that is whether the land was earmarked for residential, institutional, industrial or commercial use. If the land is earmarked for commercial use, NOIDA resolution dated 20.3.2006 required the allotment to be by sealed tenders or by auction with the reserved rate being Rs.30000 per sq.m. If the very same plots were to be earmarked for institutional use (for research/software/ information technology services) the allotment rate would be only Rs.5000 per sq.m and if they were earmarked for industrial use, the allotment rate would be only Rs.2100 or Rs.4000 per sq.m. It is therefore contented that allotment at a fixed rate determined by NOIDA, does not involve any loss.

53. It is true that allotment of plots at different rates for different purposes may not give rise to a 'loss' to NOIDA. For example, NOIDA at its 141st meeting dated 8.1.2007 fixed different allotment rates for different land uses in a multi-product special economic zone: (a) Commercial land use: Rs.70000/- per sq.m. (b) Residential land use: Rs.12000/- per sq.m. (c) Institutional/recreational land use: Rs.5000 per sq.m. (d) Industrial land use: Rs.4000 per sq.m. All these lands are situated in a specific demarcated area (special economic zone). The above pricing by NOIDA did not depend upon the situational importance of the area or accessibility of the area or nearness to any landmarks or main roads nor on any physical

advantages or disadvantages of the particular lands. The prices were purely dependent upon the earmarked land use. The same land if it was earmarked for commercial purpose would have fetched Rs.70,000 per sq.m. and if it was earmarked for residential use would have fetched Rs.12,000 per sq.m. and if earmarked for industrial use, would have fetched only Rs.4000 per sq.m. Therefore, when NOIDA allotted plots for residential use at Rs.12,000 per sq.m. it could not be said that it lost Rs.58,000 per sq.m. on the ground that the land would have fetched Rs.70,000 if it had been allotted for commercial use. Similarly it cannot be said that NOIDA suffered a loss of Rs.66,000 per sq.m. if the land was allotted for industrial use for Rs.4000/- per sq.m on the ground that it would have fetched Rs.70,000 per sq.m. if it had been allotted for commercial use. Therefore, there is no concept of "loss" to NOIDA, when it takes a decision to earmark different parcels of land for different uses and fixes different rates for them. Therefore mere earmarking of particular land for allotment to hotels which is a commercial activity at industrial plot prices, does not mean there is a loss in respect of an amount equal to the difference between the rate of commercial plots and rate of industrial plots. Any decision to allot plots to hotels at industrial rates, by itself, did not cause any loss, as such a decision was intended to be an incentive to attract investment. But there will be a 'loss', if a plot which is earmarked for commercial use, allotted for a commercial purpose, which is required to be allotted at commercial rates by tender or auction, is erroneously charged either at a residential plot rate or an industrial plot rate.

54. It is next submitted by the appellants that the state government being conscious of the fact that commercial plot prices was many time more than industrial plot prices, and that it will not be possible to attract capital investment in higher category hotels unless some substantive incentive was given, purposefully and deliberately directed that the plots for hotels even though for commercial use should be charged at industrial plot rates. The said policy was accepted and implemented by

NOIDA by fixing the allotment rate at Rs.7400 sq.m. Therefore, in respect of commercial plots allotted for hotels, the rates should be as applicable to industrial plots. In other words, among commercial plots, a sub-category of hotels was created entitling allotment at Rs.7400 in view of the policy of the government. It is pointed out that such sub-categorization with lesser rates is a standard practice with NOIDA with reference to allotment for different institutional uses.

55. The said submission no doubt, is persuasive and attractive. But they ignore the regulations and policies of NOIDA which require the allotment of commercial plots to be by sealed tender or by public auction. If any sub-categorisation was to be made in regard to hotels, it could be only by amendment of the concerned regulations and the Commercial Property Management Policy, to provide for allotment in regard to such sub-category at fixed industrial plot rates, instead of by inviting sealed tenders or holding auction. We have already noticed the scheme envisaged by the policy was to create a separate category of use in regard to hotels and allot surplus land which was not earmarked for any specific use, for the said purpose of hotels. As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m. it has to be held that allotment at Rs.7,400 per sq.m. caused loss and violated the regulations and policy of NOIDA.

56. The respondents have worked out the loss on account of allotments being made at a fixed rate of Rs.7400/- per sq.m. instead of Rs.70,000/- per sq.m, as Rs.4,721/14 crores, as detailed below :

A.	The value of 14 plots (2,62,583 sq. m.) @ Rs.70,000/- per sq.m.	Rs.1838.08 crores
B.	Actual premium received from the appellants in regard to the 14 plots @ Rs. 7400/- per sq.m.	Rs.194.31 crores

C.	Loss of premium (B – A)	Rs.1643.77 crores
D.	Add: Loss of revenue by way of lease rent during the lease period of 90 years as a consequence of lesser premium	Rs.3077.37 crores
E.	Total loss to public exchequer (C + D)	Rs.4721.14 crores

57. We find that the calculational error in arriving at the total loss, even assuming that the commercial rate is Rs.70,000/- per sq.m. The loss of Rs.4721/14 crores arrived at by the state government includes Rs.3077/37 crores as loss of rental revenue during 90 years in future. If today's value of tomorrow's 'loss' income is to be calculated, that can not be done by simply taking the aggregate of the 'loss' over the future period as today's loss. There are well recognised actuarial methods to calculate the present value of a future loss. In fact, this is clearly recognized by NOIDA by giving the option to the lessee to pay by way of a lump sum, an one time lease rent equal to the lease rent of 11 years of the lease instead of paying the annual rent for 90 years. In other words, NOIDA has itself calculated the present value of the future rental income for 90 years as being equivalent to 11 years' current rent. As the rent per year is 2.5% of the total amount paid for the plot, the one time lease rent which is eleven times the present annual rental value, will be 27.5% of the amount paid as premium. On that basis the loss will be as under :

A.	The area of 14 plots	2,63,500 sq.m.
B.	Value of 263500 sq.m. at Rs.70,000/- per sq.m.	Rs.1844.50 crores
C.	Value of 2,63,500 sq.m. at	

	Rs.7400/- per sq.m.	Rs.194.99 crores
D.	Difference in premium (B – C)	Rs.1649.51 crores
E.	Add : One-time lease rent at 27.5% (equivalent to rental income over 90 years)	Rs.453.62 crores
	Total difference (D + E) (*Plus stamp duty & registration charges on the increased premium/rent)	Rs.2103.13 crores*

IV. What should be the consequence of the violation?

58. Let us sum up the position. The allotment of commercial plots by NOIDA to the appellants for setting up hotels is valid. There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels. Therefore cancellation of allotment is unsustainable. There is however violation of the regulations and policies of NOIDA in making such allotment on fixed rate basis, instead of inviting sealed tenders or holding public auction. This violation occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated *22.5.2006.* The allottees were in no way to be blamed for the mistake. Nor were the allottees guilty of any suppression, misstatement or misrepresentation of facts, fraud, collusion or undue influence in obtaining the allotments at Rs.7400 per sq.m. The mistake was found out by the state government, in exercise of revisional jurisdiction. But by then the allotment was followed by payment of premium, execution of the lease deed, and delivery of possession. By the time the state government decided that the allotment should be cancelled the transaction was complete in all respects. The fact that the registration of some of the leases was kept 'pending' in view of a dispute relating to valuation would not be relevant for this purpose. In the circumstances the High Court rightly felt that cancellation was unwarranted and the matter required reconsideration by the State Government. The

High Court directed reconsideration in the light of its observations that the allotments of commercial plots for hotels were not in violation of any regulations and the allottees were not guilty of any objectionable conduct. The High Court therefore wanted to save the allotment but rectify the error committed in regard to the valuation and remanded the matter for fresh consideration. However, the appellants challenged the judgment of the High Court and when this Court gave an opportunity to the State Government to pass fresh orders independent of the observations of the High Court, after hearing the parties, it has reiterated the cancellation, holding that the mistake has resulted in a lesser allotment price. According to respondents, the rate of premium ought to have been Rs.70,000/- per sq.m. being the market rate, even though the reserve rate was only Rs.30,000/- per sq.m. The question is, on the facts and circumstances, when the allotments are valid and only the fixation of premium is erroneous, whether cancellation of leases is warranted or whether charging the rate claimed by the respondents (Rs.70,000/- per sq.m.) would be the appropriate course.

(i) What is the cause for the violation?

59. The NOIDA Board adopted the above policy dated 22.5.2006 at its meeting held on 5.6.2006 and directed implementation of the policy so as to ensure that construction of hotels in the allotted plots could be completed before the commencement of Commonwealth Games in 2010. Thus NOIDA Board was conscious that the policy dated 22.5.2006 had something to do with the time bound need to have several 5/4/3 Star hotels in a functional condition by the year 2010. Taking note of the direction in the government policy, that the allotment of plots for hotel industry should be at industrial rates, NOIDA decided to implement its scheme for allotment of hotel plots, by adopting the rates that were fixed by it as the reserve rate for plots in industrial area Phase I (Rs.7400/- per sq.m.) as the allotment rate. When the said allotment rate was fixed for hotel plots on 5.6.2006, the plots had not been identified

for allotment of hotels. When NOIDA Board resolved to implement the policy dated 22.5.2006 and allot plots for hotels at 'industrial rates' that is rates applicable to its plots in industrial area (Phase I), apparently it interpreted the policy as directing that all plots allotted for hotels should be allotted at fixed industrial rate. It is also possible that when the rate was fixed, it assumed that some surplus land (not earmarked for any specific purpose) or land earmarked for industrial use, will be allotted to hotels; and when the plots for hotels were subsequently identified by a Committee headed by the Circle Commissioner, Meerut, in areas earmarked for commercial use in the Master Plan, it was assumed by NOIDA officials that in view of the policy of the state government and in view of the NOIDA Board resolution dated 5.6.2006, whatever or whichever plots were identified or earmarked as hotel plots should be charged at the industrial plot rate that had been already decided. The error was in assuming that any kind of plot (even commercial plots covered by a special policy requiring disposal by tenders/auctions) should be allotted at fixed industrial rate. The pressure from Central Government regarding need to have several star Hotels before the commencement of Commonwealth Games and the terms of the Government Policy dated 22.5.2006, made them to proceed on that basis, without further verification. That is how the Brochures (advertisements) showed Rs.7400/- per sq.m as the allotment rate for hotel plots. Thus the charging of premium at a rate of Rs.7400/- per sq.m. in regard to hotel plots, is purely on account of the mistake on the part of the officers of NOIDA misreading the government policy dated 22.5.2006 and assuming that it would override NOIDA's regulations and policy regarding commercial properties.

(ii) Whether allottees were guilty of fraud/objectionable conduct

60. The next question that arises for our consideration is whether the charging of a lesser rate for the allotment of plots

or fixation of Rs.7400/- per sq.m. as the premium was a consequence of any misrepresentation, fraud or suppression of fact, or collusion on the part of the appellants. It has never been the case of respondents that any of the appellants had at any time misrepresented or suppressed any fact or had committed any fraud or had colluded with any officer of the State government or NOIDA or in any way influenced the officers of the state government or NOIDA in either obtaining the allotment or in the fixation of the allotment rate. Neither the direction dated 1.8.2007 of the state government under section 41 of the 1993 Act nor the letters of cancellation dated 3.8.2007 issued by NOIDA attribute any such improper motive or conduct to any of the appellants.

61. Before the High Court, the respondents clearly admitted that they were not attributing any misrepresentation or fraud or other objectionable conduct, to the appellants. The stand of the respondents was that the allotments at the rate of Rs.7400/- per sq.m. was due to a mistake on the part of NOIDA officials. The High Court has also ruled out any underhand dealing or malafides in regard to fixation of rate of premium at the rate of Rs.7400/- per sq.m. The said findings of High Court remain unchallenged. In fact the finding is sound and is not open to challenge. Further, when this Court directed the State Government to pass fresh reasoned revisional order, uninfluenced by the reasoning or findings of the High Court, the State Government has passed detailed orders dated 8.9.2008 for cancellation of plots. Even in these orders dated 8.9.2008, the state government has not imputed any mala fides, misrepresentation, fraud or suppression of fact, collusion, undue influence or any other illegal act or improper conduct to any of the appellants. The state government has passed the order of cancellation dated 8.9.2008 on the ground that NOIDA had itself violated the regulations and policies of NOIDA leading to loss to public exchequer.

(iii) What should be the remedial action?

62. If after effecting a transfer, the transferor finds that he had stipulated a lesser consideration (sale price or lease premium) for the transfer, due to a mistake of fact or wrong understanding or misreading of any law (and such mistake was not caused on account of any fraud, coercion or misrepresentation by the transferee) what is the remedy of the transferor? In private law, the transferor may have no remedy, as completed transactions of transfers cannot be re-opened or cancelled. A 'transfer' of property is an executed contract. Section 4 of Transfer of Property Act, 1882 provides that the chapters and sections of that Act relating to contracts, shall be taken as part of the Indian Contract Act, 1872. Section 20 of Contract Act provides that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. But the explanation thereto provides that an erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Section 21 of Contract Act provides that a contract is not voidable because it was caused by a mistake as to any law in force in India. Therefore, having regard to the provisions of Transfer of Property Act and Contract Act, a transfer can not be cancelled on the ground that parties were mistaken about the consideration.

63. The position is however different in public law. Breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider two questions. The first question is whether the transferee had any role to play (fraud, misrepresentation, undue influence etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable.

(63.1) If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again

would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short-recovery of the consideration, the transfer may be saved by giving the transferee an opportunity to make good the short-fall in consideration.

(63.2) The aforesaid exercise may seem to be cumbersome, but is absolutely necessary to protect the sanctity of contracts and transfers. If the government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the government will be shaken. To save the credibility of the government and its instrumentalities, an effort should always be made to save the concluded transactions/transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation.

(63.3) If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made by him and all

expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming public interest and public exchequer, grant of such equitable relief should also be considered.

64. We may give an example from service jurisprudence, where a principle of equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, (usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, courts have recognized the need to give limited relief in regard to recovery of past excess payments, to reduce hardship to the innocent employees, who benefited from such wrong interpretation. A three Judge bench of this Court in *Syed Abdul Qadir vs. State of Bihar* [2009 (3) SCC 475] stated the principle thus :

> "This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/ allowances if (a) *the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.*
>
> The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong

> payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess."

(emphasis supplied)

65. In these cases the allotment of commercial plots to appellants is valid and legal. The violation is in making such allotment on fixed allotment rate which is less than the rate the plots would have fetched by calling for tenders or by holding auctions. Therefore the equitable solution in these cases is to give an opportunity to the lessees to pay the difference thereby in consideration which arose on account of wrong interpretation instead of cancelling the leases. According to the State Government, the commercial plots would have fetched a premium at rate of Rs.70,000 per sq.m at the relevant time (October 2006 to January 2007) and NOIDA had been denied the benefit of that allotment rate, by reason of allotment of the plots at Rs.7400/- per sq.m. Therefore if the appellants are wiling to pay the balance of premium as claimed by respondents, the leases need not be interfered.

66. In this case the violation of the policies of NOIDA in making allotments has resulted in a lesser premium being charged than what would have been applied for commercial plots. According to respondents the premium that would have been charged was Rs.70,000/- per sq.m as against Rs.7,400 per sq.m. Therefore, the violation of the guidelines in regard to disposal of commercial plots has resulted only in a loss of revenue by way of premium and if this could be made up, there is no reason why the leases should not be continued.

67. The appellants of course disputed the claim for a premium at the rate of Rs.70,000/- per sq.m on several grounds. They contended that Rs.70,000/- was only a circle rate for purposes of registration and was not the actual "market value". It is also contended that even if Rs.70,000/- was the

market value, it would represent the value of freehold land and not of a leasehold interest. It is submitted that on account of the following restrictive factors in regard to their leases, the value of the leasehold interest will be far less than the value of freehold property:

(a) A transferee has absolute ownership in a freehold property, whereas in a leasehold for 90 years, the lessee has to surrender the property to the lessor at the end of 90 years.

(b) In regard to a freehold property, there is no liability to pay any rent. But in these leases, the lessees are liable to pay annual rent equivalent to 2½% of the total amount paid for the plot as lease rent with an increase of 50% in the annual rent once every ten years. This is a continuing liability for ninety years, unless the lessee chooses to pay eleven years current lease rent as 'one time lease rent'.

(c) The leases are subject to the following among other restrictive covenants: (i) they should commence construction within six months of the allotment and complete the Hotel Project by December, 2009, so as to make the hotel functional by June, 2010 with the threat of forfeiture if the lessee failed to complete the project; (ii) right to transfer being subject to permission from NOIDA and subject to the claim of NOIDA for unearned increases; (iii) risk of termination for breach and resumption of possession; and (iv) the restriction regarding user, that is, the entire property having to be used only for a hotel with only 5% of the FAR being permitted to be used as commercial space. It is submitted that freehold properties will not be subject to any of these restrictions.

68. The respondents admitted that a transfer by sale is more valuable than a transfer by way of lease, but contended that long term leases for 90 years fetch a premium on par with prevailing sale price. It is further submitted that as most of the

properties in NOIDA are leasehold properties, the circle rate represents the premium for long leases and not freehold prices. It is pointed out that even in regard to any sale by NOIDA, restrictive covenants regarding use could be imposed and enforced. The respondents also alleged that when NOIDA invited applications for the unallotted hotel plots, hardly a year later in March 2008, as against a reserved rate (premium) of Rs.77000/- per sq.m. fixed by NOIDA, prospective applicants were willing to pay more and that would show that their claim that prevailing premium rate in 2006-2007 was Rs.70,000/- per sq.m. was justified. The respondents have produced copies of some of the tenders received in respect of the 2008 offer, in support of their contention.

69. The appellants responded by pointing out that the terms of lease under the 2008 scheme of NOIDA offering hotel plots for allotment were far more favourable to the lessees, when compared to the terms on which plots were offered to them, and therefore neither the reserve rate for 2008 offer, nor the responses thereto will be a safe guide to determine the market value of the leasehold interest (premises) in 2006-07. They referred to the following significant differences in the lease conditions which made the offer under the 2008 scheme far more attractive and valuable for a lessee, when compared to the terms of lease offered in 2006-2007 to the appellants:

S. No.	Description of the term	Position under 2006 allotment	Position under 2008 allotment
1.	Purpose and permitted use	For setting up hotels with only 5% of FAR permitted to be used as commercial space	For development of hotels with commercial activities with 40% of FAR permitted to be used as commercial space
2.	Payment of premium	50% in 30 days 50% in 180 days	25% within 30 days Balance 75% in 16 half

			yearly instalments (alongwith interest at 11% from date of allotment compounded half yearly)
3.	Transfer of rights	The lessee shall not transfer the plot before the hotel becomes functional. The Authority may or may not allow transfer. If transfer is permitted, transfer charges shall be payable to the Authority.	The lessee is entitled to transfer after obtaining completion certificate and no transfer charges will be applicable if the built up commercial space is transferred within two years from the date of issue of completion certificate

Therefore if the appellants (2006-2007 allottees) are to be extended the aforesaid benefits offered to allottees under the 2008 scheme, the rate of Rs.70,000/- per sq.m. (the rate of 2008 scheme was 10% more than Rs.70,000/- per sq.m.) claimed by the respondents becomes logical and reasonable. We therefore find no reason to reject the claim of respondents that the allotment rate should be Rs.70,000/- per sq.m. We accordingly grant the appellants an opportunity to save the leases by paying the difference in premium at Rs.62600/- per sq.m. to make it upto Rs.70,000/- per sq.m.

70. In view of the above we dispose of these appeals as follows :

(i) The order of the High Court setting aside the revisional order dated 1.8.2007 of the State Government and the consequential orders of cancellation of allotment of plots dated 3.8.2007 by NOIDA, is affirmed.

(ii) The revisional orders dated 8.9.2008 passed by the State Government cancelling the allotments of plots to appellants, are set aside.

(iii) The appellants are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges. The appellants shall exercise such option by 30.9.2011. Such of those appellants exercising the option will be entitled to the following benefits which has been extended in regard to the allottees under 2008 allotment scheme of NOIDA :

(a) 40% of FAR can be used by the allottee as commercial space (as stipulated in the 2008 scheme).

(b) Permission to pay at its option, the balance to make up 25% of the premium (after adjusting all amounts paid at Rs.7400/- per sq.m. plus location benefit charges) on or before 30.9.2011 and the balance 75% of premium in sixteen half yearly instalments commencing from 1.1.2012 with interest at 11% per annum (as offered to the applicants in 2008 scheme).

(c) The lessees will be entitled to transfer rights in accordance with the 2008 scheme.

On exercise of such option, the lease shall continue and the period between 1.8.2007 to 31.7.2011 shall be excluded for calculating the lease period of 90 years. Consequently the period of lease mentioned in the lease deed shall stand extended by a corresponding four years period, so that the lessee has the benefit of the lease for 90 years. An amendment to the lease deed shall be executed between NOIDA and the lessee incorporating the aforesaid changes.

(iv) If any appellant is unwilling to continue the lease by paying the higher premium as aforesaid, or fails to exercise the option as per para (iii) above by 30.9.2011, the allotment and consequential lease in its favour shall

stand cancelled. In that event, NOIDA shall return all amounts paid by such appellant to NOIDA towards the allotment and the lease, and also reimburse the stamp duty and registration charges incurred by it, with interest at 18% per annum from the date of payment/incurring of such amounts to date of reimbursement by NOIDA. If NOIDA returns the amount to the appellant within 31.12.2011, the rate of interest payable by NOIDA shall be only 11% per annum instead of 18% per annum.

(vi) Parties to bear their respective costs.

R.P. Appeals disposed of.

BAROT VIJAYKUMAR BALAKRISHNA & ORS.
v.
MODH VINAYKUMAR DASRATHLAL & ORS.
(Civil Appeal Nos. 4959-4962 of 2011)

JULY 5, 2011.

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

Service Law:

Recruitment – Selection of Assistant Public Prosecutors – Minimum qualifying mark for viva voce, though prescribed in the Rules, not specified in the advertisement – State Public Service Commission fixing cut off mark for viva voce after the result of written examination, and notifying the candidates called for interview about it – HELD: The course followed by the Commission was in compliance with the rules and it did not cause any prejudice to any candidate either – Thus, there is no illegality at all in the selection process much less any bias or malice of any kind – Assistant Public Prosecutor, Gujarat General State Service Class II Recruitment (Examination) Rules, 2008 – r. 12(3).

Writ petitions were filed before the High Court challenging the selection of Assistant Public Prosecutors on the ground that introduction of minimum qualifying mark for the viva voce after the commencement of the selection process was illegal and actuated by bias on the part of the State Public Service Commission. The Single Judge of the High Court dismissed the writ petitions. However, the Division Bench in the intra-court appeals filed by the writ petitioners, quashed the select list and directed that a fresh list be drawn up on the basis of the aggregate of the marks obtained by the candidates in the written test and viva voce regardless of the minimum qualifying mark prescribed by the Commission for the

viva voce. Aggrieved, the 102 selected candidates, who were appointed and were not parties in the writ petitions, and the Commission filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. In the facts and circumstances of the case, there is no illegality in the selection process much less any bias or malice of any kind. It is necessary to bear in mind that no objection can be taken to the fixing of the cut off mark separately for the viva voce as that is the mandate of the statutory rules governing the recruitment. [para 20-21] [166-H; 167-A-F-G]

1.2. Further, the marks obtained by the short listed candidates in the written test were kept in a sealed cover and those were taken out only after the oral interview of all the candidates was over. At the time a candidate appeared for the interview, the members of the interview board had no means to know the marks obtained by him/her in the written test. In such a situation it could not be possible for the interview board to purposefully exclude a candidate by giving less than the minimum qualifying mark for the viva voce even though he/she might have been selected on the basis of the marks obtained in the written test alone. In the facts of the case, the examples cited by the respondents do not show that there was any arbitrariness or play of bias in giving marks to the candidates in the viva voce or that there was any flaw in the selection process making it liable to be struck down. [para 22-23] [168-A-E]

Ashok Kumar Yadav v. *State of Haryana*, **1985 (1) Suppl. SCR 657 = (1985) 4 SCC 417 – referred to.**

1.3. It is true that the better and the more proper way to give effect to the provision of r. 12 (3) of the Assistant Public Prosecutor, Gujarat General State Service Class II

Recruitment (Examination) Rules, 2008 was to specify the minimum qualifying mark for the viva voce also in the advertisement itself. But that was not done. Though the rules framed under Article 309 of the Constitution governing the selection process mandated that there would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to carry on with the selection process and to complete it without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. On behalf of the respondents themselves, it was accepted that the direction by the division bench of the High Court to draw up the merit list ignoring the minimum qualifying mark separately fixed for the viva voce may not be sustainable as that would be contrary to the statutory rules governing the selection and appointment. The other course was to fix the cut off mark for the viva voce and to notify the candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the rules and it did not cause any prejudice to any candidate either. Thus, there is no illegality at all in the selection process. [para 6, 25 and 31] [159-C-D; 169-A-C; 173-F-H; 174-A]

K. Manjusree v. State of Andhra Pradesh and another **2008 (2) SCR 1025 = (2008) 3 SCC 512 and the other** *Hemani Malhotra v. High Court of Delhi,* **2008 (5) SCR 1066 = (2008) 7 SCC 11 – distinguished**

Ramesh Kumar v. High Court of Delhi and another **2010 (2) SCR 256 = (2010) 3 SCC 104 – held inapplicable.**

1.4. The Division Bench of the High Court took a

wrong view of the matter and, as such, its judgment is set aside and all the writ petitions filed by the respondents before the High Court are dismissed. [para 32] [174-B-C]

Case Law Reference

1985 (1) Suppl. SCR 657	**referred to**	**para 23**
2008 (2) SCR 1025	**distinguished**	**para 26**
2008 (5) SCR 1066	**distinguished**	**para 26**
2010 (2) SCR 256	**held inapplicable**	**para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4959-4962 of 2011 etc.

From the Judgment & Order dated 10.12.2009 of the High Court of Gujarat in Letter Patent Appeal No. 1586 of 2009 and Special Civil Application No. 7699 of 2009 and Letter Patent Appeal No. 1643 of 2009 in Special Civil Application No. 8287 of 2009 Letter Patent Appeal No. 1644 of 2009 in Special Civil Application No. 8289 of 2009 and Letter Patent Appeal No. 1647 of 2009 in Special Civil Application No. 8292 of 2009.

WITH

Civil Appeal No. 4963 of 2011.

P.P.Rao, Ranjit Kumar, Uday U. Lalit, K.V. Viswanathan, Purushottam Sharma Tripathi, Utsav Sidhu, Filza Mooms, Apeksha Sharan, Sameer Parekh, Shamil Majumdar, Nitin Thukral, Suman Yadav, Parekh & Co., Preetesh Kapur, Hemantika Wahi, Jesal, Nachiketa Joshi, Pankay Chaudhary, Chaitanya Joshi Sudhakar Joshi, Abhishek Kaushik, Minakshi Vij, Praveen Chaturvedi, Jyoti Chaturvedi, Harish Parikh, R.N. Singh, D.B. Vohra for the Appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. These appeals arise from a batch of writ petitions filed before the Gujarat High Court questioning the validity of the appointments of Assistant Public Prosecutor (Class-II) made from the select list prepared on the basis of the written examination and viva voce and personality test held by the Gujarat Public Service Commission. The challenge was based on the ground that the minimum qualifying mark, separately fixed for the viva voce, was introduced just two or three days before the commencement of the oral tests though it was not stipulated in the advertisement issued by the Commission for filling up the posts. According to the writ petitioners (respondents before this Court), the introduction of the minimum qualifying mark for the viva voce, after the commencement of the selection process was, illegal and actuated by bias on the part of the Commission. It led to a number of highly anomalous results and completely vitiated the selections and the appointments made on that basis.

3. A learned single judge of the High Court did not accept the writ petitioners' contention and dismissed all the writ petitions by judgment and order dated August 17, 2009, passed in Special Civil Application No.7699 of 2009 (and other analogous cases).

4. Against the judgment of the single judge, the writ petitioners filed intra-court appeals and a division bench of the High Court allowed the appeals and set aside the judgment of the single judge. It held that the action of the Commission in introducing the minimum qualifying mark for the viva voce, in the middle of the selection process, was bad and "the Commission appears to have guided by legal malafide (sic)". It, accordingly, quashed the select list and the appointments made on its basis and directed that a fresh list be drawn up on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce regardless of the minimum qualifying mark prescribed by the Commission for

the viva voce. It directed the concerned authorities to complete the process within 2 months from the date of the judgment and till then permitted the appointees to continue to serve in their respective positions.

5. Against the judgment of the division bench, the appeals are filed (i) by the candidates (102 in number) who were appointed as Assistant Public Prosecutors on the basis of the impugned selection made by the Commission (and who were not parties in the writ petitions, or the intra court appeals before the court) and (ii) by the Gujarat Public Service Commission.

6. Before proceeding to examine the facts of the case and the rival contentions of the parties, it may be stated that on behalf of the respondents, it was accepted that the direction by the division bench of the High Court to draw up the merit list ignoring the minimum qualifying mark separately fixed for the viva voce may not be sustainable as that would be contrary to the statutory rules governing the selection and appointment. The only course left open, therefore, was to scrap the entire selection process and start from the beginning all over again.

7. Coming to the facts of the case, it is interesting to note how the process of filling up the posts of Assistant Public Prosecutor in such large numbers was put into motion. From a limitation petition, for condoning the inordinate delay of 1695 days in filing a State criminal appeal, it came to light that there was acute shortage of Assistant Public Prosecutors and as a result, the functioning of the subordinate criminal courts in the State badly suffered. The High Court took up the matter and on its initiative, the State Government sanctioned 180 new posts of Assistant Public Prosecutors. After due consultation with the Gujarat Public Service Commission and the concerned authorities of the State Government, the Advocate General of the State, assured the High Court that all the newly sanctioned posts and the vacancies existing in the already sanctioned cadre (242 in total) would be filled up in a time bound manner on the basis of rules especially framed for the purpose as a

one time measure. The statements made by the Advocate General before the High Court are recorded in the order dated October 08, 2008, passed by a division bench of the High Court in Criminal Miscellaneous Application No.13937 of 2007 in Criminal Appeal No.487 of 2006. From the order of the High Court it appears that the Advocate General stated before the court that selection would be made on the basis of a written test followed by oral interviews and minimum qualifying marks would be fixed for the tests. The relevant passage in the High Court order is as follows:

> "…. Shri Trivedi, learned Advocate General, in consultation with the Secretary, GPSC, has further submitted that approximately three times of number of posts to be filled in, starting from top to bottom, the applicants will be called for Oral Interviews. However, minimum qualifying marks will be prescribed and the aforesaid will also be reflected and/or notified in the Advertisement….."

8. The High Court passed the order incorporating the statements made by the Advocate General and directed the concerned authorities to make appointments on all the available posts of Assistant Public Prosecutor following the time schedule given in the order.

9. In furtherance of the Advocate General's assurance given to the court and in compliance with the court's direction on that basis, a set of rules called the Assistant Public Prosecutor, Gujarat General State Service Class II Recruitment (Examination) Rules, 2008 (for short "the Recruitment Rules") were framed by the State Government under the proviso to Article 309 of the Constitution of India and published in the Gujarat Government Gazette, Extraordinary, dated, August 6, 2008. Rule 12 of the Recruitment Rules dealing with the nature of examination provided as under:

"Nature of Examination

12 (1) The examination shall be in two parts as shown in Appendix. Part I shall be written examination and Part II shall be viva-voce and Personality Test.

(2) The Commission shall fix the qualifying marks to be obtained by a candidate in Part-I of the examination in Appendix and shall call only those candidates who fulfil qualifying standard for Viva-voce and Personality Test.

Provided that candidates belongs to the Scheduled Castes, Scheduled Tribes or Socially and Educationally Backward Classes including Nomadic Tribes and Denotified Tribes, may be summoned for viva-voce and Personality Test by applying relaxed standard in Part-I of the examination if the Commission is of the opinion that sufficient number of candidates from those communities are not likely to be called for viva-voce and personality test on the basis of the qualifying standard for general category in order to fill up the vacancies reserved for such categories.

(3) *The commission shall fix the qualifying marks to be obtained by a candidate in the viva-voce and personality test.*

(4) The candidate shall be required to attend the written part of the examination and viva-voce and personality test at his own expense;

(5) If the candidate, who is qualified for the viva-voce and personality test, fails to attend the viva-voce and personality test, shall not be eligible for selection."

(emphasis added)

10. Rule 14 dealt with the result of the examination and in sub-rule (1) provided as follows:

"Result of Examination

14(1) After two stage of the examination are over, the commission shall prepare the result arranging the marks of the candidates seriatim according to merit taking into consideration the total marks obtained by the candidates *as per the qualifying standards fixed for the written examination and viva-voce and personality test* and shall declare a list of qualified candidates accordingly."

(emphasis added)

At the end of the Recruitment Rules there was an Appendix in two parts. Part I contained the details concerning the written examination which would consist of five papers with an aggregate of 600 marks; part II provided that there would be a viva voce and personality test of 75 marks.

11. After the Recruitment Rules were framed and notified, the Commission on October 17, 2008 issued an advertisement inviting applications for filling up 242 posts of Assistant Public Prosecutor (Class II). Of the 242 posts available, 122 were to be filled up on open merits and the remaining was reserved for the different reserved categories. Under the marginal heading, "Particulars of Examination", it was stated that the examination would consist of two parts, i.e., written (objective test) and oral interview. The question paper of written examination (Part I) would be of 300 marks. In connection with the second part of the examination relating to the oral interview it was stated as follows:

"PART- II Oral Interview- 30 Marks

The candidate obtains minimum 105 marks in the written examination i.e. as decided by the Commission, and the candidate who fulfils the educations qualifications, age, experience, etc., as mentioned in the advertisement shall be called for the oral interview in exact numbers and there shall be 30 marks for the oral interview. The final result of

this examination shall be published as per the recruitment rules.

The examination is of objective aptitude type, the provision of re-checking is not adopted. The final result of the examination shall be furnished on the basis of the total marks obtained in written as well as oral examination/ interview….

12. Two things are to be seen from the advertisement. One, though in the Recruitment Rules, 600 marks were allotted for the written examination and 75 for the viva voce, in the advertisement the written examination was given 300 and viva voce 30 marks. The second, though the minimum qualifying mark of 105 out of 300 was fixed for the written examination, no qualifying mark was fixed separately for the viva voce as required by rule 12 (3) of the Recruitment Rules. Nevertheless, there was a broad and general stipulation that, "the final result of this examination shall be published as per the recruitment rules".

13. The first discrepancy in regard to the allotment of marks to the written and oral tests respectively, though not quite vital, was rectified by the notification dated October 24, 2008, issued by the State Government, under the proviso to Article 309 of the Constitution. By this notification, rule 19 was added at the end of the Recruitment Rules which reads as under:

"19. Notwithstanding anything contained in these rules, the competitive examination, held by the Commission pursuant to the advertisement issued during the year 2008 for the recruitment to the post specified in rule 3, shall be the multiple choice objective type written examination for 300 marks from the subjects mentioned in Papers I, II, III, IV and V in Part I of the Appendix,

Provided that

(i) For papers I and II of the Gujarati and English in Part I

of the Appendix respectively except grammar, all other topics be deemed as excluded.

(ii) In Part II Viva-voce and Personality Test, the maximum of 75 marks, shall be read as 30 marks and

(iii) *The provisions of rules 12,13,14 and 16 shall apply mutatis mutandis to such competitive examination"*

(emphasis added)

14. The written test was held by the Commission on January 11, 2009 and its result was published on March 20, 2009 by giving out the roll numbers (and not the names) of the qualifying candidates. Approximately 5,550 candidates sat for the written examination out of which 790 candidates were short-listed for being called for the oral interview. After the publication of the result of the written test the marks obtained by the short-listed candidates were kept in a sealed cover.

15. At this stage, while preparations were underway for holding the viva voce of the short-listed candidates, in the meeting held on April 22, 2009, it was decided that in terms of rule 12(3) of the Recruitment Rules, the Commission was required to decide the minimum qualifying marks for the viva voce. Accordingly, on April 23, 2009, the Secretary to the Commission submitted the proposal together with a copy of the Rules for order of the Commission and on the same day the Commission took the decision fixing 10 out of 30 as the minimum qualifying mark for the viva voce. The proceedings of the Commission dated April 23, 2009 read as follows:

"The Commission has taken following decision after discussion.

The Commission shall decide qualifying marks to be obtained by the candidate in interview under rule 12(3) of Recruitment (Examination) Rules (Page No.5/C) for this post. Accordingly, the Commission is supposed to decide

minimum qualifying marks for considering the candidate successful, in interview. Hence, after careful consideration the Commission decides that to get out of the maximum 30 marks of the interview, 10 marks as minimum qualifying marks.

The intimation of this decision may be given in time, to every candidate before they appear in interview. For this purpose the Commission gives its approval for procedure to be followed as per suggestion made in paragraph No.3 shown against- on previous page. Further, this decision may be displayed on notice board in such a proper way that all the concerned persons may get intimated. It may please be noted that it may get published tomorrow.

Sd/- Member
[Shree Variya]
23.4.09

Sd/- Chairman
(Shree Bhavsar]
23.4.09

Sd/- Secretary
23.4.09
J.S./D.S.
Sd/- (Jt.Secretary)
24.4.09

The details to be displayed on Notice board as well as taken in to register in consonance with the above decision is submitted for approval.

1. Following details may be displayed on notice board.

As per rule 12(3), the Commission has decided the minimum qualifying 10 marks out of 30, for the candidate appearing in interview (Viva-Voce) of Assistant Public Prosecutor Class-II. The candidate getting less marks than the this may not be eligible for selection. Which may be please noted.

Make a note in the register as below, in which

signatures of the candidates are being taken at the time of interview."

16. Here it needs to be clarified that normally the Gujarat Public Service Commission consists of a Chairperson and four members but at that time the positions of three members were vacant and only a Chairman and a member comprised the Commission. Hence, the proceedings are shown to have been signed by the Chairman and one member.

17. In accordance with the Commission's direction, the decision fixing 10 out of 30 marks as the minimum qualifying mark for the viva voce was put up on the notice board. Further, each candidate was individually intimated and was made to sign a declaration/consent form before going for the oral test. The consent form bore the following declaration under which the candidates were required to put their signatures:

"Under recruitment rules 12(3) the commission has prescribed 10 qualifying marks to be obtained by candidates out of 30 in viva-voce test for appointment to the post of Assistant Public Prosecutor (Class –II) and *it is to be noted that the candidates who will secure less than 10 marks will not be eligible for recruitment to the post of Assistant Public Prosecutor."*

(emphasis added)

18. The forms signed by each of the candidates are on record.

19. The viva voce of all the 790 short listed candidates was held from April 27, 2009 to July 9, 2009. On July 15, 2009, marks of the written test of the candidates who were called for interview were taken out of the sealed cover and on July 16, the Commission declared the final result as per Rule 14(1).

20. In the facts as stated above, we are completely unable to see any illegality in the selection process much less any bias

or malice of any kind. But on behalf of the writ petitioners-respondents, it is contended that it is a clear case of bias. It is alleged that in order to bring in its favoured candidates the Commission found it necessary to exclude a sufficient number of meritorious candidates by any ruse and the minimum qualifying mark for viva voce was introduced at the last minute only for that intent and purpose. The respondents pointed out that the application of the minimum qualifying mark separately for the viva voce excluded some candidates who would have been selected only on the strength of their marks in the written test even though they were given nil mark in the viva voce. The respondents cited several kinds of figures before the High Court to high light the "anomalies" resulting from the introduction of the minimum qualifying mark for the viva voce. It was pointed out that 81 out of the 203 selected candidates had got the minimum qualifying mark in the viva voce, i.e., 10 out of the total of 30; 190 candidates out of 790 called for interview got just 8 or 9 marks in the viva voce and were, thus, excluded from the final select list; 503 candidates out of the 790 called for interview got less than the qualifying mark in the viva voce. One or two more examples of a similar nature were also cited by the respondents. The Division Bench of the High Court appears to have attached considerable importance to these so called anomalies and its judgment seems to have been influenced by these results.

21. We are unable to accept or even to follow the allegation based on the figures as cited above. It is necessary to bear in mind that no objection can be taken to the fixing of the cut off mark separately for the viva voce as that is the mandate of the statutory rules governing the recruitment. What alone can be objected to is the omission to specify the cut off mark for viva voce in the advertisement and fixing it later on. But we fail to see any connection between the "anomalies" and the fact that the cut off mark for viva voce was fixed at a later stage, though before the commencement of the interviews and with due intimation to all the candidates.

22. Further, as noted above the marks obtained by the short listed candidates in the written test were kept in a sealed cover and those were taken out only after the oral interview of all the candidates was over. At the time a candidate appeared for the interview the members of the interview board had no means to know the mark obtained by him/her in the written test. In such a situation we don't see how it could be possible for the interview board to purposefully exclude a candidate by giving less than the minimum qualifying mark for the viva voce even though he/she might have been selected on the basis of the mark obtained in the written test alone.

23. When playing around with numbers one is quite likely to come up with some figures that might appear unusual and unexpected but that alone will not make out a case of bias or legal malafide (See the decision by a bench of four judges of this Court in *Ashok Kumar Yadav* v. *State of Haryana*, (1985) 4 SCC 417, paragraph 21). In the facts of the case as noted above we are satisfied that the examples cited by the respondents do not show that there was any arbitrariness or play of bias in giving marks to the candidates in the viva voce or that there was any flaw in the selection process making it liable to be struck down.

24. Mr. Viswanathan, senior advocate, appearing for the respondents submitted that the Advocate General had undertaken before the High Court that the qualifying marks for both the written test and the viva voce would be published in the advertisement. He further submitted that sub-rule (2) of rule 12 provided for fixing the minimum qualifying mark for the written test in the same way as sub-rule (3) provided for fixing the minimum qualifying mark for the viva voce. He argued that the provisions of sub-rules (2) and (3) of rule 12 could not be read and given effect to differently and when the minimum qualifying mark for the written test was specified in the advertisement there was no reason for not indicating the minimum qualifying mark for the viva voce in the advertisement itself.

25. The grievance of Mr. Viswanathan cannot be said to be wholly without substance. It is true that the better and the more proper way to give effect to the provision of rule 12 (3) of the Recruitment Rules was to specify the minimum qualifying mark for the viva voce also in the advertisement itself. But that was not done. The question is what would be the consequence of the omission and was it open to the Commission to rectify the error by fixing the minimum qualifying mark for the viva voce later on and giving intimation of its decision to each of the candidates appearing for the oral interview before the beginning of the test.

26. The Division Bench of the High Court has held that the introduction of the minimum qualifying mark for the viva voce at the later stage in the selection process was not permissible and it completely vitiated the selection process. Mr. Viswanathan strongly supports the view taken by the High Court. In support of its view, the Division Bench of the High Court, has placed reliance on two decisions of this Court, one in *K. Manjusree* v. *State of Andhra Pradesh and another*, (2008) 3 SCC 512 and the other *Hemani Malhotra* v. *High Court of Delhi*, (2008) 7 SCC 11. Mr. Viswanathan also cited before us the decision in *K. Manjusree* and invited our attention particularly to the following passage in paragraph 33 of the judgment:

> "33….. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to

> be illegal is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

27. In our view, both the decisions relied upon in support of the respondents' case are completely distinguishable and have no application to the facts of this case. *K. Manjusree* was a case of selection and appointment to the posts of District & Sessions Judge (Grade II) in the Andhra Pradesh Higher Judicial Service. The selection and appointment to the post of District & Sessions Judge was governed by the resolutions of the High Court and the resolution dated November 30, 2004 decided the method and manner of selection. It resolved to conduct the written examination for the candidates for 75 marks and oral examination for 25 marks. It also resolved that the minimum qualifying marks for the O.C., B.C., S.C. and S.T. candidates would be as prescribed earlier. Following the written examination, the qualified candidates were called for interview before a committee of five judges. After the interview, the select committee of five judges prepared a merit list on the basis of the aggregate of marks obtained by each of the candidates in the written test and the oral interview. At that stage, the select committee did not apply any cut off mark for the viva voce. The list prepared by the select committee was approved by the administrative committee and it finally came before the Full Court of the High Court. The Full Court decided to have the matter reviewed by a committee of two judges constituted by the Chief Justice of the High Court. It was at that stage that the committee of two judges decided that there should have been a minimum qualifying mark for the oral interview as well, in the same ratio as prescribed for the written test. It, accordingly, decided that only those candidates who secured the minimum of 12.5 out of 25 (for the open category), 10 marks (for B.C. candidates), and 8.75 marks (for SC and ST candidates) would be considered as having succeeded in the interview. The decision of the committee of two judges was

approved by the Full Court and consequently, the earlier list prepared by the select committee and approved by the administrative committee was revised and the final recommendation for appointment was made by the High Court on the basis of the revised merit list. It was in those facts that this Court held that the introduction of the cut off mark for the viva voce after the oral interviews were over amounted to changing the rules of the game in mid-play and was not permissible in law. The passage from paragraph 33 of the judgment relied upon by the respondents must be understood in the facts of the case.

28. The decision in *Hemani Malhotra* is equally inapplicable to the facts of the case. *Hemani Malhotra* was a case of selection and appointment to the vacant posts in the Delhi Higher Judicial Service and those appointments too were governed by the administrative resolutions of the High Court. For filling up the posts, the Registrar General of the High Court issued an advertisement that laid down that the minimum qualifying mark in the written examination would be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. In the advertisement there was no indication at all about any cut off mark for the oral interview. After the written examination, no result was published giving out the names or roll numbers of the qualified candidates but the successful candidates were called to appear for the oral interview individually through letters. After the date fixed for oral interview was postponed three or four times the selection committee of the High Court resolved that it was desirable to prescribe a minimum mark for the viva voce and referred the matter to the Full Court. The Full Court accepted the suggestion made by the select committee and resolved that for recruitment to the Delhi Higher Judicial Service from the Bar the minimum qualifying mark in the viva voce will be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. After the decision, interviews were held but significantly the candidates were kept in dark about the decision

fixing the cut off mark for the viva voce. The High Court prepared the select list applying the cut off mark fixed for viva voce but the candidates who appeared for the oral interviews still did not know why they were not selected despite getting higher marks. It was only through applications made under the Right to Information Act that some of the unselected candidates were able to gather that their non-selection was on account of their failure to secure the cut off mark in the viva voce and then the selection was challenged before the Court. It is evident that the facts of the case in hand are entirely different and the decision in *Hemani Malhotra* has no application to this case.

29. Mr. Viswanathan also relied upon the decision of this Court in *Ramesh Kumar* v. *High Court of Delhi and another*, (2010) 3 SCC 104. This decision also has no relevance to the facts of the present case. In *Ramesh Kumar*, what this Court said is that for appointment to the judicial services, *in the absence of any contrary provision in the relevant rules* Delhi High Court should not have fixed any minimum qualifying marks for the viva voce because this Court had accepted Justice Shetty Commission's report which had prescribed not to have any cut off mark for interview. Actually what is said in paragraph 15 of the judgment in *Ramesh Kumar* demolishes the case of the respondents:

> "15. Thus, the law on the issue can be summarised to the effect that *in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly.* In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce.

30. Having, thus, made the legal position clear, the judgment in paragraph 16 went on to say:

"16. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in *All India Judges' Assn. (3) v. Union of India,* [(2002) 4 SCC 247]**,** accepted Justice Shetty Commission's Report in this regard which had prescribed *for not having minimum marks for interview*. The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in *Syed T.A. Naqshbandi v. State of J&K [(2003) 9 SCC 592]* and *Malik Mazhar Sultan (3) v. U.P. Public Service Commission* [(2008) 17 SCC 703]. We have also accepted the said settled legal proposition while deciding the connected cases i.e. *Rakhi Ray v. High Court of Delhi* [(2010) 2 SCC 637] vide judgment and order of this date. It has been clarified in *Rakhi Ray* that where statutory rules do not deal with a particular subject/ issue, so far as the appointment of the Judicial Officers is concerned, directions issued by this Court would have binding effect."

31. Now coming back to the facts of the case in hand, though the rules framed under Article 309 of the Constitution governing the selection process mandated that there would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to carry on with the selection process and to complete it without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. The other course was to fix the cut off mark for the viva voce and to notify the

candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the rules and it did not cause any prejudice to any candidate either. We, thus, see no illegality at all in the selection process.

32. In light of the discussions made above we find that the Division Bench of the High Court took a wrong view of the matter and its judgment and order are quite unsustainable. We, accordingly, set aside the impugned judgment and dismiss all the writ petitions filed by the respondents before the Gujarat High Court.

33. In the result, the appeals are allowed but with no order as to costs.

R.P. Appeals allowed.

KHANDESH COLLEGE EDUCATION SOCIETY, JALGAON & ANR.

v.

ARJUN HARI NARKHEDE & ORS.

(SLP (C) Nos. 17039-17040 of 2008)

JULY 05, 2011

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

Service law – Earned leave – Encashment of unutilized earned leave on retirement – Lecturers/Demonstrators were working in Vacation Department of a private College established by petitioners-College Education Society – Entitlement for earned leave and for encashment of unutilized earned leave on their retirement – Held: The lecturers/ demonstrators were entitled to earned leave and encashment of earned leave as per the provisions of Statutes 424(3) and 424(C) – Though State Government had issued directives from time to time to the Universities to amend the Statutes so as to ensure that lecturers or teachers working in Vacation Department were disentitled to earned leave and encashment of earned leave, but Statutes 424(3) and 424(C) which entitled the said teachers to earned leave and encashment of earned leave, were not modified or superseded – Also no provisions in the Act to the effect that Statutes of a University which are inconsistent with the directives of the State Government would be invalid – Section 115(2) (xii) rather states that Statutes which are not inconsistent with the provisions of the Act and which have not been modified or superseded shall continue to be in force – University of Pune Statutes – Statutes 424(3) and 424(C) – Maharashtra Universities Act, 1994 – s. 115(2) (xii).

Respondent nos.1 to 14 were working as Lecturers/ Demonstrators in a College established by petitioners-College Education Society, which was receiving aid from

the State. The respondents were not granted encashment of their unutilized leave on their retirement despite their demands. Respondent Nos. 1 to 14 made a representation to the Grievances Committee of the North Maharashtra University, to which the petitioner-College Society was affiliated, that under Statute 424(3) and Statute 424(C) of the University of Pune they were entitled for encashment of earned leave after retirement but the Committee did not take any action on their representation. The respondents filed a Writ Petition. The High Court directed the Grievances Committee of the University to dispose of the representation. Pursuant thereto, the Grievances Committee of the University decided that respondent Nos 1 to 14 were entitled to encashment of their earned leave to their credit under Statute 424(C) read with Statute 424(3) of the University of Pune and communicated the same to the college. Thereafter, the petitioner-College Society filed a writ petition challenging the decision of the Grievances Committee of the University as well as the constitutional validity of Statutes 424(3) and 424(C) of the University of Pune while respondent Nos.1 to 14 filed a cross writ petition seeking a direction to the University to direct the petitioner-College Society as well as the Principal of the College to pay their unutilized earned leave with interest and cost. The High Court held that the constitutional validity of Statutes 424(3) and 424(C) of the University of Pune cannot be challenged; that respondents were entitled to leave in accordance with their service conditions; and that the College after discharging its liability of payment of leave encashment would be entitled to claim reimbursement by way of grant from the State of Maharashtra subject to the claim of the College being admissible under law. Therefore, the petitioners filed the instant Special Leave Petitions.

Disposing of the Special Leave Petitions, the Court

HELD: 1.1 From the very language of different provisions of Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981 it is clear that it applies only to 'a Government servant'. Respondent nos.1 to 14 are not Government servants and, therefore, cannot be denied earned leave on the basis of provisions made in Rule 54 of the 1981 Rules. [Para 6] [185-A-B]

1.2 Section 115 of the Maharashtra Universities Act, 1994 while repealing the different Acts applicable to different universities in the State of Maharashtra provides in sub-section (2)(xii) that all Statutes made under the repealed Acts in respect of any existing university shall, insofar as they are not inconsistent with the provisions of the Act, continue in force and be deemed to have been made under the Act in respect of the corresponding university until they are superseded or modified by the Statutes made under the Act. Thus, Statutes 424(3) and 424 (C) of the University of Pune, which were applicable to the university, continue to be in force and are deemed to be made under the Act if they are not inconsistent with any provision of the Act or are not superseded, modified by Statutes made under the Act. Sections 5(60), 8 and 14(5) of the Act confer power on the State Government to exercise control over the University in some matters and also empower the State Government to issue directives to the University and cast a duty on the Vice Chancellor to ensure compliance with such directives, but these provisions in the Act do not prohibit grant of earned leave to a teacher or lecturer of any affiliated college who can avail a vacation from being entitled to earned leave or from being entitled to encashment of accumulative earned leave at the time of retirement. In other words, Statutes 424(3) and 424(C) of the University of Pune are not in any way inconsistent with the provisions of the Act. [Para 7] [185-B-C]

1.3 A reading of Statute 424(3) would show that clause (a) applies to confirmed non-vacation teachers and clause (b) applies to teachers other than non-vacation teachers and clause (b) clearly states that teachers other than non-vacation teachers shall be entitled to earned leave subject to their accumulation of maximum 180 days. Statute 424(C), further provides that teachers shall be entitled to encash earned leave in balance to their credit on the date of his superannuation subject to a maximum of 180 days. It, however, appears that the State Government has issued directives from time to time to the universities to amend the Statutes so as to ensure that lecturers or teachers working in Vacation Department are not entitled to earned leave and encashment of earned lave, but the fact remains that Statutes 424(3) and 424(C) of the University of Pune have not been modified or superseded. There are also no provisions in the Act to the effect that Statues of a University which are inconsistent with the directives of the State Government will be invalid. Section 115(2) (xii) rather states that statutes which are not inconsistent with the provisions of the Act and which have not been modified or superseded shall continue to be in force. Thus, respondent Nos.1 to 14 were entitled to earned leave and encashment of earned leave as per the provisions of Statutes 424(3) and 424(C) of the University of Pune. [Paras 8 and 9] [186-H; 187-A-E]

V.S. Agarkar vs. The chairman, Grievance Cell Committee, Pune University **W.P. No.4936 of 2006 decided by H.C. on 22.01.2007 – referred to.**

CIVIL APPELLATE JURISDICTION : SLP (Civil) Nos. 17039-17040 of 2008 etc.

From the Judgment & Order dated 9.6.2008 of the High Court of Judicature of Bomaby, Bench at Aurangabad in W.P. No. 2881 of 2007 and W.P. No. 1401 of 2008.

WITH

SLP (C) No. 17960-17961 of 2008.

Vinayak J. Dixit, Arvind V. Sawant, Uday, B. Dube, Rajendra S. Kanade, Kuldip Singh, Sachin J. Patil, Pooja Raghuvanshi, Chandan Ramamurthi, Deva Datt Kamat, Manisha T. Karia, Priyanka Telanvi, Nitin Lonkar, Sunil Kumar Verma, Sanjay V. Kharde, Chinmoy Khaldkar, Aprajita Singh, Asha Gopalan Nair, Ravindra Keshavrao Adsure for the appearing parties.

The Order of the Court was delivered by

O R D E R

A.K. PATNAIK, J. 1. These Special Leave Petitions are directed against the common orders dated 09.06.2008 and 20.06.2008 of the Bombay High Court, Aurangabad Bench, in Writ Petition No.2881 of 2007 and Writ Petition No.1410 of 2008. The questions raised in these Special Leave Petitions are whether the Lecturers/Demonstrators working in the Moolji Jeitha College established by the Khandesh College Education Society, Jalgaon, are entitled for earned leave and for encashment of unutilized earned leave on their retirement.

2. The relevant facts very briefly are that respondent nos.1 to 14 in both the Special Leave Petitions have worked as Lecturers/Demonstrators in the Moolji Jeitha College (for short 'the College') which is a private College established by the Khandesh College Education Society, Jalgaon, and has been receiving aid from the State of Maharashtra. After their retirement, respondent nos.1 to 14 were not granted encashment of their unutilized leave despite demands being made on the Principal of the College. Respondent nos.1 to 14 then made a representation to the Grievances Committee of the North Maharashtra University, Jalgaon (for short 'the University') to which the College is affiliated, contending that

under Statutes 424(3) and 424 (C) of the University of Pune, they were entitled for encashment of earned leave after retirement, but have not been paid the same by the College. When the Grievances Committee did not take any action on the representation, respondent nos.1 to 14 filed Writ Petition No.2671 of 2006 in the Bombay High Court, Aurangabad Bench, and by order dated 12.04.2006 the High Court directed the Grievances Committee of the University to dispose of the representation for encashment of unutilized earned leave within three months. Pursuant to this direction of the High Court, the Grievances Committee of the University decided on 10.10.2006 that the Statutes of the University of Pune continued to be applicable to the University by virtue of the provisions of Section 115(xii) of the Maharashtra Universities Act, 1994 (for short 'the Act') and therefore respondent nos.1 to 14 were entitled to encashment of their earned leave to their credit under Statute 424(C) read with Statute 424(3) of the University of Pune. The decision of the Grievances Committee was communicated to the college by letter dated 18.10.2006 of the University.

3. The Khandesh College Education Society thereafter filed Writ Petition No.2881 of 2007 challenging the decision of the Grievances Committee of the University as well as the constitutional validity of Statutes 424(3) and 424(C) of the University of Pune. Respondent nos.1 to 14 also filed Writ Petition No.1410 of 2008 seeking a direction to the University to direct the Khandesh College Education Society as well as the Principal of the College to pay their unutilized earned leave forthwith along with interest and cost. After hearing learned counsel for the parties, the High Court held in the impugned common order dated 09.06.2008 that the constitutional validity of Statutes 424(3) and 424(C) of the University of Pune cannot be challenged merely on the ground that such provisions did not exist in the statutes of other Universities and that these provisions being beneficial provisions, cannot be held to be *ultra vires* the Constitution. The High Court further held that

respondent nos.1 to 14, admittedly, were employed in the College in various capacities and were entitled to leave in accordance with their service conditions and the Bombay High Court has already held in the case of *V.S. Agarkar* vs. *The chairman, Grievance Cell Committee, Pune University* (W.P. No.4936 of 2006 decided on 22.01.2007) that a teacher employed in an Institution affiliated to the University of Pune on retirement is entitled for encashment of unutilized leave on superannuation under Statute 424(C) of the University of Pune. The High Court, however, clarified that the College after discharging its liability of payment of leave encashment would be entitled to claim reimbursement by way of grant from the State of Maharashtra. By the impugned common order dated 20.06.2008, the High Court corrected the earlier order dated 09.06.2008 by clarifying that the liability of the State Government to reimburse the college would be subject to the claim of the College being admissible under law.

4. Mr. Vinayak J. Dixit, learned counsel for the petitioners, submitted that the respondent Nos.1 to 14 were working in the Vacation Department inasmuch as they were not required to work during the vacation period of the College and under Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981, a Government servant serving in a Vacation Department was not entitled to any earned leave in respect of duty performed in any year in which he avails himself of vacation. He further submitted that the State Government, by a Resolution dated 29.03.1997, has taken a decision that only the approved Principals of aided non-Government Colleges, if they are prohibited from enjoying the long term vacations on administrative grounds, would get the benefits of earned leave as per Rules 52, 54 and 68 of the Maharashtra Civil Services (Leave) Rules, 1981 subject to maximum accumulation of earned leave of 240 days. He submitted that since none of the respondent Nos.1 to 14 served as Principals performing administrative functions, they were not entitled to earned leave and consequently they are not entitled to encashment of any accumulative earned leave. He further

submitted that under Section 8 of the Act the State Government has control over the universities and without prior approval of the State Government, the University cannot take a decision which results in increased financial liability, direct or indirect, for the State Government. He argued that under Section 5 (60) of the Act, the University is required to comply with and carry out any directives issued by the State Government from time to time, with reference to the powers, duties and responsibilities of the University and similarly under Section 14 (5) of the Act, the Vice Chancellor has the duty to ensure that the directives of the State Government, if any, are strictly observed. He submitted that although the State Government has issued directives to the University to correct the Statutes to ensure that teachers, who can avail long term vacation, are not entitled to earned leave and encashment of accumulative earned leave at the time of retirement, the University has not amended the Statutes. In this connection, he referred to the various correspondence made by the State Government annexed to the Counter Affidavit of the State Government as Annexure R-5 (Colly). Mr. Sanjay V. Kharde, learned counsel for the State of Maharashtra, adopted these arguments of Mr. Dixit.

5. Mr. Deva Datt Kamat, learned counsel appearing for respondent Nos.1 to 14, in reply, submitted that it is not disputed that the University of Pune Statutes were applicable to the University and under Statute 424(3) of the University of Pune Statutes a teacher other than the non-vacation teacher is also entitled to earned leave and under Statute 424(C) thereof he is entitled to encashment of earned leave in balance to his credit on the date of his superannuation subject to a maximum of 180 days. He submitted that Section 115 of the Act titled 'Repeal and Savings' provides in clause (xii) that all Statutes in respect of any existing university shall, insofar as they are not inconsistent with the provisions of the Act, continue in force and be deemed to have been made under the Act in respect of the corresponding university until they are superseded or modified by the Statutes made under the Act. He submitted that

since Statutes 424(3) and 424(C) of the University of Pune, which were applicable to the University, have not been superseded or modified by Statutes made under the Act, respondent nos.1 to 14 were entitled to earned leave and encashment of earned leave. He argued that Section 14(5) of the Act casts a duty on the Vice Chancellor to ensure that the provisions of the statutes are strictly followed and, therefore, he is required to ensure that respondent nos.1 to 14 are paid their leave encashment as per the provisions of Statute 424(C) of the University of Pune.

6. Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981 on which learned counsel for the petitioners has placed reliance is quoted hereinbelow:

"54. Earned leave for persons serving in Vacation Departments.

(1) A Government servant serving in a Vacation Department shall not be entitled to any earned leave in respect of duty performed in any year in which he avails himself of the full vacation.

(2) (a) In respect of any year in which a Government servant avails himself of a portion of the vacation, he shall be entitled to earned leave in such proportion of 30 days, as the number of days of vacation not taken bears to the full vacation.

Provided that no such leave shall be admissible to a Government servant not in permanent employ in respect of the first year of his service.

(b) If, in any year, the Government servant does not avail himself of any vacation, earned leave shall be admissible to him in respect of that year under rule 50.

Explanation.—For the purposes of this rule, the

term "year" shall be construed as meaning not calendar year but twelve months actual duty in a Vacation Department.

Note 1.— A Government servant entitled to vacation shall be considered to have availed himself of a vacation or a portion of a vacation unless he has been required by general or special order of a higher authority to forgo such vacation or portion of a vacation; provided that if he has been prevented by such order from enjoying more than fifteen days of the vacation, he shall be considered to have availed himself of no portion of the vacation.

Note 2.— When a Government servant serving in a Vacation Department proceeds on leave before completing a full year of duty, the earned leave admissible to him shall be calculated not with reference to the vacations which fall during the period of actual duty rendered before proceeding on leave but with reference to the vacations that fall during the year commencing from the date on which he completed the previous year of duty.

(3) Vacation may be taken in combination with or in continuation of any kind of leave under these rules :

Provided that the total duration of vacation and earned leave taken in conjunction, whether the earned leave is taken in combination with or in continuation of other leave or not, shall not exceed the amount of earned leave due and admissible to the Government servant at a time under rule 50:

Provided that the total duration of vacation, earned leave and commuted leave taken in conjunction shall not exceed 240 days."

From the very language of different provisions of Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981 it is clear that it applies only to 'a Government servant'. Respondent nos.1 to 14 are not Government servants and, therefore, cannot be denied earned leave on the basis of provisions made in Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981.

7. On the other hand, Section 115 of the Act while repealing the different Acts applicable to different universities in the State of Maharashtra provides in sub-section (2)(xii) that all Statutes made under the repealed Acts in respect of any existing university shall, insofar as they are not inconsistent with the provisions of the Act, continue in force and be deemed to have been made under the Act in respect of the corresponding university until they are superseded or modified by the Statutes made under the Act. Hence, Statutes 424(3) and 424 (C) of the University of Pune, which were applicable to the university, continue to be in force and are deemed to be made under the Act if they are not inconsistent with any provision of the Act or are not superseded, modified by Statutes made under the Act. Sections 5(60), 8 and 14(5) of the Act confer power on the State Government to exercise control over the University in some matters and also empower the State Government to issue directives to the University and cast a duty on the Vice Chancellor to ensure compliance with such directives, but these provisions in the Act do not prohibit grant of earned leave to a teacher or lecturer of any affiliated college who can avail a vacation from being entitled to earned leave or from being entitled to encashment of accumulative earned leave at the time of retirement. In other words, Statutes 424(3) and 424(C) of the University of Pune are not in any way inconsistent with the provisions of the Act. Learned counsel for the petitioners and the State Government have also not brought to our notice any statute of the university modifying or superseding Statute 424(3) or 424(C) of the University of Pune which were applicable to the University.

8. Statutes 424(3) and 424(C) of the University of Pune are extracted hereinbelow:

"Statute 424(3) – Leave

a. …….

b. …….

c. Earned Leave

(a) The confirmed non-vacation teacher shall be entitled to earned leave at the rate of one-eleventh of the period spent on duty subject to his accumulating maximum of 180 days of leave.

(b) The teacher other than the one included in (a) above shall be entitled to one twenty seventh of the period spent on duty and the period of earned leave as provided in the proviso to Section 423 subject to his accumulation of maximum of 180 days. For this purpose the period of working days only shall be considered.

"Statute 424(C) - Encashment of Unutilized Earned Leave on Superannuation:

The teacher shall be entitled to encash earned leave in balance to his credit on the date of his superannuation subject to a maximum of 180 days.

In case the teacher is required to serve till the end of academic session beyond the date of his superannuation, he shall be entitled to encash the balance of earned leave to his credit on the date of his actual retirement from service.

A reading of Statute 424(3) extracted above would show that clause (a) applies to confirmed non-vacation teachers and clause (b) applies to teachers other than non-vacation teachers

and clause (b) clearly states that teachers other than non-vacation teachers shall be entitled to earned leave subject to their accumulation of maximum 180 days. Statute 424(C), quoted above, further provides teachers shall be entitled to encash earned leave in balance to their credit on the date of his superannuation subject to a maximum of 180 days.

9. It, however, appears that the State Government has issued directives from time to time to the universities to amend the Statutes so as to ensure that lecturers or teachers working in Vacation Department are not entitled to earned leave and encashment of earned lave, but the fact remains that Statutes 424(3) and 424(C) of the University of Pune have not been modified or superseded. There are also no provisions in the Act to the effect that Statues of a University which are inconsistent with the directives of the State Government will be invalid. Section 115(2) (xii) rather states that statutes which are not inconsistent with the provisions of the Act and which have not been modified or superseded shall continue to be in force. Hence, respondent nos.1 to 14 were entitled to earned leave and encashment of earned leave as per the provisions of Statutes 424(3) and 424(C) of the University of Pune.

10. In the result, we are not inclined to grant leave in these matters but considering financial difficulties of the Petitioners expressed before this Court, we grant three months' time to the Petitioners to comply with the impugned orders of the High Court. The Special Leave Petitions are accordingly disposed of. No costs.

N.J. Special Leave Petitions disposed of.

STATE BANK OF MYSORE AND ORS. ETC.
v.
M.C. KRISHNAPPA
(Civil Appeal Nos.5055-5056 of 2011)

JULY 6, 2011

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

Service law: Dismissal from service – Employee in officer grade found guilty of misappropriation of funds – Order of removal from service – Reviewing authority modified the punishment and reduced it to demotion to cadre of clerk with a further bar against promotion for a period of seven years – Accepting same, employee rejoined but after expiry of seven years filed writ petition challenging the punishment awarded to him – High Court rejected the contention that the employee could not be put down in the clerks' cadre and his demotion could only be confined to a lower rank in the officer grade itself, however, found that the bar against the promotion for the period of seven years was harsh and set it aside – On appeal, held: It is well settled that punishment is primarily a function of the Management and the courts rarely interfere with the quantum of punishment – In the instant case, the proven charge against the employee was of financial irregularities and of making fraudulent withdrawals deriving pecuniary gain for himself – In a bank an offence of this kind is one of the most serious offences and punishment of removal from service could not be said to be unreasonable or unduly harsh – Reviewing Authority modified the order of punishment and gave him a lighter punishment which was accepted by employee without ado – In those facts, there was no scope for interference with the punishment on a purely subjective view taken by the High Court – Order of the High Court set aside and writ petition by employee dismissed – Judicial review.

The respondent was employee of the appellant-Bank. He was originally inducted in the service of the appellant-Bank in the clerical cadre but at the material time, by virtue of promotions, he was in the Junior Management Grade Scale-I. He was served with a charge sheet on the ground that he conducted misappropriation of funds of the appellant-Bank. The charges were duly established in a departmental enquiry and the disciplinary authority passed the order of his removal from service. The appellate authority upheld the order of the disciplinary authority. The reviewing authority, however, modified the punishment and reduced it from removal from service to demotion from the cadre of Junior Management Grade Scale-I to the cadre of clerk with a further bar against promotion for a period of seven years.

The respondent rejoined the service accepting the punishment given to him in terms of the review order. But after the expiry of the period of seven years, he filed a writ petition before the High Court challenging the punishment awarded to him. The Single Judge of the High Court rejected the contention that the respondent could not be put down in the clerks' cadre and his demotion could only be confined to a lower rank in the officer grade itself. However, the Single Judge found that the bar against the promotion for the period of seven years was harsh and set it aside subject to the qualification that the order would not affect the promotion of other employees and their seniority. The appellant-Bank and the respondent filed intra court appeals. The Division Bench of the High Court dismissed both. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: It is well settled that punishment is primarily

a function of the Management and the courts rarely interfere with the quantum of punishment. In the instant case the proven charge against the respondent was of financial irregularities and of making fraudulent withdrawals deriving pecuniary gain for himself. In a bank an offence of this kind is one of the most serious offences and the disciplinary authority had passed an order of removal against the respondent. In the facts of the case even that punishment could not be said to be unreasonable or unduly harsh. The Reviewing Authority modified the order of punishment and gave him a lighter punishment instead. At that time the respondent accepted it without ado. In those facts there was no scope for interference with the punishment on a purely subjective view taken by the High Court. Therefore, the judgments and orders of the High Court are set aside and the writ petition filed by the respondent is dismissed. The period of seven years during which the bar against the respondent's promotion was operating is long over. In case, after the expiry of the period of the bar the respondent is found fit for promotion in terms of the relevant rules he would undoubtedly be entitled to get it in accordance with law. [Paras 8, 11] [193-G-H; 194-A-D]

Administrator, UT of Dadra & Nagar Haveli v. Gulabhia M. Lad **(2010) 5 SCC 775 – relied on.**

Case Law Reference:

(2010) 5 SCC 775	**relied on**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5055-5056 of 2011 etc.

From the Judgment & Order dated 19.7.2007 of the High Court of Karnataka at Bangalore in Writ Appeal No. 915 of 2006 (S.RES) and Writ Appeal No. 989 of 2006 (S-RES).

WITH

Civil Appeal No. 5057 of 2011.

R. Sundaravardhan, Ramesh N. Keshwani, Ram Lal Roy, S. Nanda Kumar, Satish Kumar, Anjali Chauhan, V.N. Raghupthay for the appearing parties.

The Judmgent of the Court was delivered by

AFTAB ALAM, J.

SLP (CIVIL) NOS.20719-20720 OF 2008

1. Leave granted.

2. The respondent - M.C. Krishnappa is an employee of the appellant - State Bank of Mysore. He was originally inducted in the service of the bank in the clerical cadre but at the material time, by virtue of promotions, he was in the Junior Management Grade Scale-I. He was served with a charge sheet on September 25, 1990. The charges, in brief, were as under:-

> "(a) Prepared and passed a withdrawal slip for Rs.10,000/- on 29.05.1989 in the Savings Bank account No.4738 of Smt. Lalithamma despite being aware that there was no sufficient balance in the said account and derived pecuniary gain for himself.
>
> "(b) Caused fraudulent withdrawal of Rs.6,000/- on 02.03.1989 in the Savings Bank account No.941 of Shri N. Narayanappa, without posting the voucher in the said account and to conceal his acts, he had checked the ledgers on the day the voucher was passed."

3. The charges were duly established in a departmental enquiry following which the disciplinary authority passed the order of his removal from service on February 8, 1993. The respondent made an appeal against the order passed by the disciplinary authority but it was rejected by the appellate

authority by order dated July 28, 1993. The respondent took the matter before the Reviewing Authority where he was able to partial relief. The Reviewing Authority, by order dated April 2, 1994, modified the respondent's punishment and reduced it from removal from service to demotion from the cadre of Junior Management Grade Scale-I to the cadre of clerk with a further bar against promotion for a period of seven years.

4. The respondent rejoined the service, accepting the punishment given to him in terms of the review order. But after the expiry of the period of seven years, he moved the Karnataka High Court, challenging the punishment awarded to him, in Writ Petition No.40666 of 2001 (S-RES) which was partly allowed by judgment and order dated April 21, 2006 passed by a learned single judge of the High Court.

5. It was contended on behalf of the respondent that regulation 67(e) of the State Bank of Mysore Officer's Service Regulations, 1979 permitted reduction of rank of an Officer to a lower rank in the Officer Grade itself and the respondent, therefore, could not have been demoted to the cadre of clerks. A grievance was also made in regard to the bar against promotion for the period of seven years. The learned single judge noted that the only grievance of the Writ Petitioner (the respondent in this appeal) was in relation to the levy of penalty. He rejected the contention that the Writ Petitioner could not be put down in the clerk's cadre and his demotion could only be confined to a lower rank in the Officer Grade itself. The learned judge, however, felt that the bar against promotion for the period of seven years was quite harsh and in that connection observed as follows:-

> "There is some force in the contention of the learned counsel for the petitioner that total punishment levied on the petitioner is too harsh and disproportionate to the charge levelled against the petitioner.
>
> xxx xxx xxx

Having regard to the nature of charges, I am of the view that the total penalty levied on the petitioner is little more harsh and shocks my conscience. The petitioner having been demoted from the Officer cadre to the cadre of Clerk, must be given an opportunity to improve himself and if he improves, he should be promoted to further higher cadre if he is so entitled. The total bar on any promotion for a period of 7 long years is too harsh and requires to be modified. If the petitioner improves his performance, his integrity and his devotion to work in the cadre of Clerk, he should not be denied further promotion from that cadre."

6. Having taken the view as appearing from the above, the single judge set aside the bar of promotion against the respondent for the period of seven years subject to the qualification, however, that the order will not affect the promotion of other employees and their seniority.

7. Against the judgment and order passed by the single judge both, the appellant (the bank) and the respondent, preferred intra-court appeals. A Division Bench of the High Court, however, dismissed both, Writ Appeal No.915 of 2006(S-RES) (filed by the respondent – Writ Petitioner) and Writ Appeal No.989 of 2006(S-RES) (filed by the appellants) by judgment and order dated July 19, 2007. The Division Bench did not find any illegality in the order passed by the single judge and rather agreed with the view taken by him that the punishment barring promotion for seven years was too harsh and that it required to be set aside.

8. We are unable to agree with the view taken by the High Court. It is well settled that punishment is primarily a function of the Management and the courts rarely interfere with the quantum of punishment. (See: *Administrator, UT of Dadra & Nagar Haveli* v. *Gulabhia M. Lad* (2010) 5 SCC 775; paragraphs 9 and 14).

9. In this case the proven charge against the respondent

was of financial irregularities and of making fraudulent withdrawals deriving pecuniary gain for himself. In a bank an offence of this kind is one of the most serious offences and the disciplinary authority had passed an order of removal against the respondent. In the facts of the case even that punishment could not be said to be unreasonable or unduly harsh. The Reviewing Authority modified the order of punishment and gave him a lighter punishment instead. At that time the respondent accepted it without ado. In those facts we fail to see any scope for interference with the punishment on a purely subjective view taken by the High Court.

10. We are, therefore, constrained to interfere in the matter. The judgments and orders of the High Court are set aside and the Writ Petition filed by the respondent is dismissed. The appeals arising out of SLP (Civil) Nos. 20719-20720 of 2008 are, accordingly, allowed.

11. It is made clear that the period of seven years during which the bar against the respondent's promotion was operating is long over. In case, after the expiry of the period of the bar the respondent is found fit for promotion in terms of the relevant rules he would undoubtedly be entitled to get it in accordance with law.

SLP (CIVIL) NO.15378 OF 2009

12. Delay condoned.

13. Leave granted.

14. In view of the order passed in civil appeals arising out of SLP(C) Nos.20719-20720 of 2008, this appeal stands dismissed.

D.G. Appeals disposed of.

M/S. GAMMON INDIA LTD.
v.
COMMISSIONER OF CUSTOMS, MUMBAI
(Civil Appeal No. 5166 of 2003)

JULY 6, 2011

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

Customs Act, 1962: Exemption Notification No. 17/2001-cus dated 1.3.2001 – As per Condition 38 of the Notification, a person who has been awarded a contract for the construction of roads in India by or on behalf of the NHAI is entitled to exemption from basic customs duty and additional customs duty in respect of specified machines – Appellant and another company entered into a joint venture agreement for submitting a bid for award of a contract for construction of road on National Highway – Contract given to the said joint venture company – Import of machinery specified in the Notification by appellant – Claim by appellant for exemption under the Notification – Entitlement for – Held: Not entitled – Contract was granted to joint venture company and not to the appellant – Import of the specified machine by appellant could not be considered to be an import by joint venture company "a person who has been awarded a contract for construction of the roads in India", so as to fulfill Condition No.38, laid down in Exemption Notification No.17/2001/Cus – Therefore, neither appellant nor joint venture company fulfilled the requisite requirement stipulated in Condition No.38 of the Exemption Notification No. 17/2001/Cus..

***Joint venture**: Connotation of – Discussed.*

***Interpretation of statutes**: Taxing statutes – Strict construction – Held: A provision providing for an exemption has to be construed strictly.*

***Judicial discipline**: Precedents – Binding effect – Held: If a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that would be destructive of the institutional integrity itself – If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself – A subordinate court is bound by the enunciation of law made by the superior courts – A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench – It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.*

The appellant-company (Gammon) and M/s Atlanta entered into a joint venture agreement on 18th September, 2000 for the purpose of submitting a bid to the National Highways Authority of India (NHAI) for award of a contract for construction of 31.40 Kilometers of road on National Highway-5. The joint venture was named and styled as "Gammon Atlanta JV". In terms of the agreement, each of the said parties was to share financial responsibilities in the form of guarantees, securities etc. to the extent of 50% of the project value and the venture was to be managed by setting up of a management board consisting of a Chairman and one Director to be nominated by Gammon and a Joint Chairman and another Director to be nominated by Atlanta. Although Gammon was to be designated as the lead partner to the venture but both the companies were to be jointly and severally liable to NHAI for due execution of the contract.

The bid tendered by the said joint venture was accepted by NHAI and agreement dated 20th December, 2000 was executed between NHAI as the "Employer" on

the one part and M/s Gammon-Atlanta JV as the "contractor", on the other. On behalf of Gammon-Atlanta JV, the agreement was signed by the representatives of both the companies, i.e. Gammon and Atlanta. On 1st March, 2001, an Exemption notification no.17/2001 cus was issued exempting from basic customs duty and additional customs duty certain goods required for construction of roads. Gammon imported the specified "Concrete Batching Plant" from Germany and filed Bill of Entry for its clearance at nil rate of duty under the Notification. The Department rejected the claim on the ground that the exemption was available only if the goods were imported by "a person who has been awarded the contract" by NHAI for construction of roads in India by or on behalf of Ministry of Surface Transport and since the goods were imported by Gammon to whom no contract was awarded by the authorities, the appellant was not entitled to the benefit of exemption notification in their capacity as a partner in the joint venture, to whom the contract had been awarded.The appellate authority, however allowed the appeal filed by Gammon holding that Gammon having been nominated as the lead partner in the joint venture for due performance of the contract awarded by NHAI, with authority to incur liabilities and to receive instructions for and on behalf of the joint venture, and the machine having been imported on behalf of the joint venture for the purpose of road construction, the benefit of the said exemption notification could not be denied to it. On appeal, the Tribunal held that the benefit of Exemption Notification cannot be availed of by a joint venture because it was nothing more than an association of two persons, having no identity in law.

The question which arose for determination in the instant appeal was whether import of the specified machine by Gammon could be considered to be an import "by a person who has been awarded a contract

for construction of the roads in India", so as to fulfill Condition No.38, laid down in Exemption Notification No.17/2001/Cus dated 1st March, 2001.

Dismissing the appeal, the Court

HELD: 1.1. Though under agreement dated 18th September, 2000, Gammon was notified as the lead partner but agreement dated 20th December, 2000 executed between NHAI as the "employer" and Gammon-Atlanta JV as "contractor" was signed by the representatives of both the companies viz. Gammon and Atlanta, meaning thereby that so far as NHAI was concerned, for them the contractor was Gammon-Atlanta JV and not Gammon or Atlanta individually. [Para 14] [209-E-G]

1.2. Joint venture connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. In view of that M/s Gammon-Atlanta JV, the joint venture could be treated as a 'legal entity', with the character of a partnership in which Gammon was one of the constituents. [Paras 17, 18] [211-F-H; 212-D-E]

New Horizons Limited & Anr. v. Union of India & Ors. **(1995) 1 SCC 478: 1994 (5) Suppl. SCR 310 – relied on.**

1.3. The import of "Concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India.

It was not the case of the appellant before the Adjudicating Authority or before the Appellate Authority or before this court nor it was suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture. On the contrary, the Tribunal recorded in its order that when questioned, the appellant clarified that correspondence with the supplier of goods and placement of order was done by Gammon and not by the joint venture or on their behalf and that the payment for the machine had not been made from the joint venture account but from the funds of Gammon. Therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No.38 of the Exemption Notification No. 17/2001/Cus dated 1st March, 2001. [Paras 20, 21] [213-A-E]

2. It is well settled that a provision providing for an exemption has to be construed strictly. Since in the instant case the language of condition No.38 in the Exemption Notification is clear and unambiguous, there is no need to resort to the interpretative process in order to determine whether the said condition is to be imparted strict or liberal construction. [Paras 22, 23] [213-F-G; 214-F]

Novopan India Ltd., Hyderabad v. Collector of Central Excise& Customs, Hyderabad **1994 Supp (3) SCC 606– relied on.**

3.1. The two Benches of the Tribunal while deciding appeals in the cases of *IVRCL Infrastructures & Projects Ltd.* **and** *Techni Bharathi Ltd.* **noticed the decision of a co-ordinate Bench and still proceeded to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in**

respect of the same Exemption Notification. If a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integrity itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself. [Para 24] [214-G-H; 215-A-C]

IVRCL Infrastructures & Projects Ltd. v. C.C., Chennai (Sea) **2004 (166) E.L.T. 447 (Tri.-Del.);** *Techni Bharathi Ltd. v. Commissioner of Customs, Mumbai-II* **2006 (198) E.L.T. 33 (Tri.-Bang) – referred to.**

3.2. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. Precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. [Para 24] [215-F-H; 216-A-B]

Sub-Inspector Rooplal & Anr. v. Lt. Governor & Ors. **(2000) 1 SCC 644: 1999 (5) Suppl. SCR 310 – relied on.**

4. The decision of the Tribunal, holding that the

appellant was not entitled to the benefit of Exemption notification No. 17/2001-Cus dated 1st March, 2001, cannot be flawed. [Para 25] [216-D]

Ganpati RV-Talleres Alegria Track Private Limited Vs. Union of India & Anr. **(2009) 1 SCC 589: 2008 (17) SCR 215;** *Commissioner of Customs (Preventive), Mumbai Vs. M. Ambalal & Co.* **(2011) 2 SCC 74: 2010 (15) SCR 937;** *C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin* **(2008) 8 SCC 739: 2008 (11) SCR 52;** *Sub-Inspector Rooplal & Anr. Vs. Lt. Governor & Ors.* **(2000) 1 SCC 644: 1999 (5) Suppl. SCR 310 – referred to.**

Case Law Reference:

1994 (5) Suppl. SCR 310	**referred to**	**Para 8,9,15, 16, 17,18,20**
2008 (17) SCR 215	**referred to**	**Para 9**
2004 (166) E.L.T. 447 (Tri.-Del.)	**referred to**	**Para 9,24**
2006 (198) E.L.T. 33 (Tri.-Bang)	**referred to**	**Para 9, 24**
2010 (15) SCR 937	**referred to**	**Para 9**
1994 Supp (3) SCC 606	**relied on**	**Para 11, 22**
2008 (11) SCR 52	**referred to**	**Para 9**
1999 (5) Suppl. SCR 310	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5166 of 2003.

From the Judgment & Order dated 4.4.2003 of the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai in Appeal No. C/298/02-Mum.

J.S. Sinha, Braj Kishore Mishra, Vikas Malhotra, Aparna Jha, Abhishek Yadav, M.P. Sahay, Vikram Patralekh for the Appellant.

Harish Chander, Kiran Bhardwaj, A. Deb Kumar, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This Civil Appeal, under Section 130-E(b) of the Customs Act, 1962 (for short "the Act"), is directed against order dated 4th April, 2003 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal"), in Appeal No. C/298/02-Mum. By the impugned order, the Tribunal has allowed the appeal preferred by the Commissioner of Customs, Mumbai, holding that the appellant is not entitled to claim the benefit of Exemption Notification No. 17/2001/Cus (General Exemption No. 121), issued by the Ministry of Finance, Government of India on 1st March, 2001.

2. Briefly stated, the facts, material for adjudication of the issue arising in this appeal, are as follows:

The appellant namely, M/s Gammon India Ltd. (for short "Gammon") and one M/s Atlanta Infrastructure Ltd., Mumbai, (for short "Atlanta") both incorporated as Public Limited Companies, entered into a joint venture agreement on 18th September, 2000. The joint venture was named and styled as "Gammon Atlanta JV". The agreement was entered into for the purpose of submitting a bid to the National Highways Authority of India (for short "NHAI") for award of a contract for construction of 31.40 Kilometers of road on National Highway-5. The terms of the agreement, *inter-alia,* provided that: each of the said parties would share financial responsibilities in the form of guarantees, securities etc. to the extent of 50% of the project value; the venture would be managed by setting up of a management board consisting of a Chairman and one Director to be nominated by Gammon and a Joint Chairman and another Director to be nominated by Atlanta. Although Gammon was to be designated as the lead partner to the venture but both

the companies were to be jointly and severally liable to NHAI for due execution of the contract.

3. The bid tendered by the said joint venture was accepted by NHAI and an agreement dated 20th December, 2000 was executed between NHAI, referred to as the "Employer" on the one part and M/s Gammon-Atlanta JV, referred to as the "contractor", on the other part. On behalf of Gammon-Atlanta JV, the agreement was signed by the representatives of both the companies, i.e. Gammon and Atlanta.

4. On 1st March, 2001, in exercise of the powers conferred by sub-section (1) of Section 25 of the Act, the Central Government, issued the afore-noted Exemption Notification, *inter alia,* exempting the goods of the description specified in Column (3) of the Table given thereunder, read with the relevant List appended thereto and falling within the Chapter, Heading no. or sub-heading no. of the First Schedule to the Customs Tariff Act, 1975, as specified in the corresponding entry in Column (2) of the said Table. Serial No. 217 of the said Table granted full exemption from basic Customs duty and additional Customs duty, on the goods falling under Chapter 84 specified in List 11, required for construction of roads. However, the said exemption was subject to certain conditions, enumerated in the said notification. Condition No. 38, relevant for this case, reads as follows:

"38. If,-

(a) the goods are imported by-

(i) the ministry of Surface Transport, or

(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the

Government of a State or Union Territory; or

(iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory;

(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation; and

(c) in case of goods of serial nos. 12 and 13 of List 11, the importer, at the time of importation of such goods, also produces to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Surface Transport (Roads Wing), to the effect that the imported goods are required for construction of roads in India."

5. It appears that the appellant approached NHAI for issue of the certificate, as contemplated in para (c) of Condition no.38, for import of one 'Concrete batching plant 56 cum/hr' covered under Item No. 13 of List 11, referred to at Serial No. 217 in the said Exemption Notification. Vide letter dated 3rd August, 2001 NHAI forwarded a Certificate, issued by the

Deputy Secretary, Government of India, Ministry of Road Transport and Highways, addressed to the Assistant Commissioner of Customs, Mumbai, certifying that the said equipment was required for construction of roads and recommending its duty free import.

6. Equipped with the said certificate, Gammon, the appellant herein, imported the specified Concrete Batching Plant from Germany and filed Bill of Entry (for home consumption) for its clearance at 'nil' rate of duty under Notification No.17/2001-cus, dated 1st March, 2001. The Deputy Commissioner of Customs, by his order dated 5th October, 2001 rejected the claim of the appellant for exemption from payment of Customs duty on the ground that the appellant had failed to comply with the conditions stipulated at Serial No. 38 appended to the exemption notification. According to the Adjudicating Authority, as per the said condition, the exemption is available only if the goods are imported by "a person who has been awarded the contract" by NHAI for construction of roads in India by or on behalf of Ministry of Surface Transport, but in the present case the goods have been imported by Gammon to whom no contract had been awarded by the authorities specified in the notification. Admittedly, the contract had been awarded in the name of joint venture - M/s Gammon-Atlanta JV. Thus, the adjudicating authority came to the conclusion that the appellant was not entitled to the benefit of exemption notification in their capacity as a partner in the joint venture, to whom the contract had been awarded.

7. Aggrieved thereby the appellant preferred an appeal to the Commissioner of Customs (Appeals). The Commissioner (Appeals) was of the view that Gammon having been nominated as the lead partner in the joint venture for due performance of the contract awarded by NHAI, with authority to incur liabilities and to receive instructions for and on behalf of the joint venture, and the machine having been imported on behalf of the joint venture for the purpose of road construction,

the benefit of the said exemption notification could not be denied to the appellant. *Inter-alia,* observing that the appellant was not an outsider and perhaps due to some technical reasons the machine had been imported in the name of the appellant, the Commissioner held that outright denial of the benefit of the said notification was not warranted. Accordingly, he allowed the appeal.

8. Being dissatisfied with the decision of the Commissioner (Appeals), the revenue carried the matter in further appeal to the Tribunal. As aforestated, by the impugned order the Tribunal has allowed the said appeal. Distinguishing the case of *New Horizons Limited & Anr. Vs. Union of India & Ors.*[1], relied on behalf of the importer, the Tribunal has come to the conclusion that the benefit of Exemption Notification cannot be availed of by a joint venture because it is nothing more than an association of two persons, having no identity in law. The Tribunal has gone on to observe that had such a bill of entry been filed even by a joint venture, the department would have been justified in rejecting it on the ground that the identity of the real importer was not known. Aggrieved, Gammon is before us in this appeal.

9. We have heard learned counsel for the parties.

10. Mr. J.S. Sinha, learned counsel appearing on behalf of the appellant, strenuously urged that in light of the decision of this Court in the case of *New Horizons* (supra), wherein the concept of a joint venture has been explained and the same has been subsequently followed in *Ganpati RV-Talleres Alegria Track Private Limited Vs. Union of India & Anr.*[2], the view taken by the Tribunal is clearly erroneous. It was contended that since a joint venture is a legal entity with all the trappings of a partnership under the Indian Partnership Act, 1932, the general principles of the said Act were applicable to the joint venture

1. (1995) 1 SCC 478.
2. (2009) 1 SCC 589.

and, therefore, any one of the two partners of the joint venture, viz. Gammon and Atlanta was competent to import the subject machinery for and on behalf of the contractor viz. the joint venture for execution of the road project under contract between the joint venture and NHAI. It was argued that the eligibility certificate dated 3rd August 2001, issued by the Ministry of Road Transport and Highways, stating that the subject machine would be imported by the appellant herein, will sustain the eligibility of the joint venture in view of the law laid down by this Court in *New Horizons* (supra). It was submitted that in view of an inclusive definition of the word "person" in the Export and Import policy for the years 1997-2002, which includes a "legal person", the import of machinery by the appellant for and on behalf of the joint venture is as good as an import by the joint venture who has been awarded the contract for construction of roads, thus fulfilling condition No.38 of the Exemption Notification. Learned counsel asserted that since in identical fact situations in the cases of *IVRCL Infrastructures & Projects Ltd. Vs. C.C., Chennai (Sea)*[3] and *Techni Bharathi Ltd. Vs. Commissioner of Customs, Mumbai-II*,[4] when machinery for a road project was imported by one of the constituents' of the joint venture, the benefit of the same Exemption Notification had been granted by the Tribunal. It was argued that the said orders of the Tribunal having been accepted by the revenue, it cannot be permitted to take a different stand on the same point in the case of the appellant. Lastly, relying on the decision of this Court in *Commissioner of Customs (Preventive), Mumbai Vs. M. Ambalal & Co.*,[5] learned counsel submitted that a beneficial and promotional exemption notification has to be construed liberally.

11. *Per contra,* Mr. Harish Chander, learned senior counsel appearing on behalf of the revenue, supporting the decision of the Tribunal, submitted that the joint venture and Gammon being

3. 2004 (166) E.L.T. 447 (Tri-Del.)

4. 2006 (198) E.L.T. 33 (Tri-Bang.)

5. (2011) 2 SCC 74: 2010 (260) E.L.T. 487 (S.C.).

two independent entities, the eligibility certificate dated 3rd August, 2001 issued in favour of the latter was of no consequence in so far as the Exemption Notification was concerned because the contract for construction of roads had not been awarded to Gammon, who had imported the machine but to the joint venture. It was stressed that Gammon, on their own, were not entitled to import any goods for the execution of road works under the contract awarded to the joint venture by NHAI. Placing reliance on the decision of this Court in *Novopan India Ltd., Hyderabad Vs. Collector of Central Excise & Customs, Hyderabad*[6], learned counsel contended that the Exemption Notification has to be construed strictly. Responding to the allegation of pick and choose policy adopted by the revenue, learned counsel urged that non-filing of an appeal in a similar case does not operate as a bar for the revenue to prefer an appeal in another case. In support, learned counsel commended us to the decision of this Court in *C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin*[7]*.* It was thus, asserted that the decision of the Tribunal did not warrant any interference and the appeal deserved to be dismissed.

12. The short question for determination is whether import of the specified machine by Gammon can be considered to be an import "by a person who has been awarded a contract for construction of the roads in India", so as to fulfill Condition No.38, laid down in Exemption Notification No.17/2001/Cus dated 1st March, 2001?

13. In order to appreciate the contentions advanced on behalf of the parties on the question in issue, it would be expedient and useful to once again notice the salient features of agreement dated 18th September, 2000 entered between Gammon and Atlanta.

6. 1994 Supp (3) SCC 606.

7. (2008) 8 SCC 739 : (2008) 228 ELT 497.

14. Agreement dated 18th September, 2000 provided that: financial responsibilities of each of the parties to be shared equally in the form of guarantees, securities, etc. of the joint venture would be 50% of the project value; the Management of the joint venture would be subject to the overall control of the Management Board, consisting of a Chairman, to be nominated by Gammon, a Joint Chairman to be nominated by Atlanta and one Director each to be appointed by both of them; joint venture bank account would be operated under joint signatures of the authorized representatives of Gammon and Atlanta and neither party would be entitled to borrow for or on behalf of the joint venture or to acknowledge any liability without express prior consent in writing of the other party except to the extent of its share of work; Gammon being most experienced party would be the lead partner of the joint venture for the performance of the contract; the partner-incharge would be authorized to incur liabilities and to receive instructions for and on behalf of the partners of the joint venture, whether jointly or severally, and entire execution of the contract including receiving payment would be carried out exclusively through the partner-incharge but any financial commitment required by the lead partner, on behalf of the joint venture, would always be previously discussed and agreed upon by the parties. As stated above, though under agreement dated 18th September, 2000, Gammon was notified as the lead partner but agreement dated 20th December, 2000 executed between NHAI as the "employer" and Gammon-Atlanta JV as "contractor" was signed by the representatives of both the companies viz. Gammon and Atlanta, meaning thereby that so far as NHAI was concerned, for them the contractor was Gammon-Atlanta JV and not Gammon or Atlanta individually.

15. According to the adjudicating authority, it was clear from both of the said agreements that the contract of construction of roads in India was awarded to the joint venture and, therefore, Gammon was not entitled to avail of the benefit of the Exemption Notification as an independent entity. On the

contrary, the Commissioner (Appeals) allowed the benefit of the Exemption Notification to the appellant on the ground that the Exemption Notification should be given a liberal interpretation and that the revenue should not try to take advantage of ignorance of law and procedure on the part of Gammon. It is the Tribunal which has dealt with the issue in detail by taking into consideration certain factual aspects pertaining to the import of machine like placement of the supply orders by Gammon and not by the joint venture and its payment by Gammon from its own account and not from the joint venture account provided for in the joint venture agreement. Rejecting the plea of the appellant that in light of the decision of this Court in *New Horizons* (supra) wherein it has been held that a joint venture is a legal entity in the nature of a partnership, the import of the machinery by Gammon is to be considered as having been done on behalf of the joint venture, the Tribunal has allowed revenue's appeal.

16. Since the stand of the appellant is that the issue arising in the present appeal stands concluded in their favour by the decision of this Court in *New Horizons* (supra) and a subsequent decision of this Court as also of the Tribunal, in which the said decision has been relied upon, it would be necessary to discern the ratio of the decision in *New Horizons* (supra).

17. In *New Horizons* (supra), a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of telephone directories of Delhi and Bombay. The tender submitted by New Horizons Ltd; (for short "NHL") was not accepted by the tender evaluation committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court

against the decision of the Department of Tele-communications. The said writ petition was dismissed rejecting the plea of the NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court. Explaining the concept of joint venture in detail, it was held that a joint venture is a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contributed assets and shared risks. It was observed that a joint venture could take the form of a Corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore based company which had jointly undertaken the commercial venture by contributing assets and sharing risks. Applying the principle of "lifting the corporate veil", it was held that the joint venture companies' technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed thus:

> **"24.** The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (*Black's Law Dictionary*, 6th Edn., p. 839)

> According to *Words and Phrases*, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (*Black's Law Dictionary*, 6th Edn., p. 342)……."

18. In short, *New Horizons* (supra) recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in *New Horizons* (supra), wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s Gammon-Atlanta JV, the joint venture could be treated as a 'legal entity', with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition No.38 of the Exemption Notification, stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI?

19. In support of his submission that the joint venture is a "person" as contemplated in the Exemption notification, learned counsel for Gammon had relied on the definition of the word "person" as given in para 3.37 of the Export and Import policy for the year 1997-2002. It reads thus:

> "3.37-"Person" includes an individual, firm, society, company, corporation or any other legal person".

20. The argument was that since a joint venture has been declared to be a legal entity in *New Horizons* (supra), it squarely

falls within the ambit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any further. Neither was it the case of the appellant either before the Adjudicating Authority or before the Appellate Authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture. On the contrary, the Tribunal has recorded in its order that when questioned, learned counsel for the appellant clarified that correspondence with the supplier of goods and placement of order had been done by Gammon and not by the joint venture or on their behalf. He also admitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

21. Thus, the inevitable conclusion is that import of "Concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India and therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No.38 of the Exemption Notification No. 17/2001/Cus dated 1st March, 2001.

22. As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In *Novopan India Ltd.* (supra), dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows:

> "**16.** We are, however, of the opinion that, on principle, the decision of this Court in *Mangalore Chemicals*— and in *Union of India* v. *Wood Papers* referred to therein — represents the correct view of law. The principle that in

> case of ambiguity, a taxing statute should be construed in favour of the assessee — assuming that the said principle is good and sound — does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in *Mangalore Chemicals* and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in *Hansraj Gordhandas* v. *H.H. Dave* that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

23. Applying the above principles, we are of the opinion that since in the instant case the language of condition No.38 in the Exemption Notification is clear and unambiguous, there is no need to resort to the interpretative process in order to determine whether the said condition is to be imparted strict or liberal construction.

24. Before parting, we wish to place on record our deep concern on the conduct of the two Benches of the Tribunal deciding appeals in the cases of *IVRCL Infrastructures & Projects Ltd.* (supra) & *Techni Bharathi Ltd.* (supra). After noticing the decision of a co-ordinate Bench in the present case, they still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby

creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in respect of the same Exemption Notification. It needs to be emphasised that if a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integrity itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself. In this behalf, the following observations by a three Judge Bench of this Court in *Sub-Inspector Rooplal & Anr. Vs. Lt. Governor & Ors*[8]*.* are quite apposite :

> "At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement."

8. (2000) 1 SCC 644.

We respectfully concur with these observations and are confident that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit.

25. In view of the foregoing discussion, the decision of the Tribunal, holding that the appellant was not entitled to the benefit of Exemption notification No. 17/2001-Cus dated 1st March, 2001, cannot be flawed. The appeal being bereft of any merit is dismissed accordingly, with costs, quantified at Rs. 50,000/-.

D.G. Appeal dismissed.

SUBA SINGH & ANR.
v.
DAVINDER KAUR & ANR.
(Civil Appeal No. 5197 of 2003)

JULY 06, 2011

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

Fatal Accidents Act, 1855 – Suit for damages – Accused persons convicted under the provisions of Penal Code, 1860 for committing murder of 'S' – Suit filed under the Fatal Accidents Act, 1855 by dependents of 'S' claiming damages for the death of 'S' – Civil Judge awarded compensation of Rs. 3 lakhs with interest @ 12% p.a. – However, first appellate court reduced the compensation to Rs. 2 lakhs with interest @ 12% p.a. – Said order upheld by High Court – On appeal, held: Fatal Accidents Act, 1855 is an Act to provide compensation to the families for loss occasioned by the death of a person caused by actionable wrong – In sub-section (1)(c) of s. 357, there is clear indication that apart from the punishment of fine, the person convicted of any offence of having caused the death of another person or of having abetted the commission of such an offence may also be liable to face a civil action for damages under the Fatal Accidents Act, 1855 in a suit for damages – Rule of double jeopardy is not applicable to the instant case – On facts, there is no scope for any interference with the amount of compensation awarded by the first appellate court – However, rate of interest is modified and reduced to 6% p.a.- Code of Criminal Procedure, 1973 – s. 357.

Legislation – Need for – Matters like payment of compensation and damages for death resulting from a wrongful or negligent act governed by Fatal Accidents Act, 1855 an old antiquate Act – Urgent need to bring a

contemporaneous and comprehensive legislation on the said subject.

Appellants, 'SB' and 'SS' were convicted under the various provisions of the Penal Code, 1860 for committing murder of 'S' and were sentenced to life imprisonment and imposed fine with default clauses by the High Court setting aside the order passed by the trial court. Meanwhile, respondent No. 1, widow of 'S' filed a suit on behalf of herself and her minor daughter against the appellants claiming Rs. 3 lakhs as damages for causing death of 'S'. The Civil Judge decreed the suit and awarded compensation of Rs. 3 lakhs to the respondents along with interest @ 12% p.a. from the date of the filing of the suit. On appeal, the amount of compensation was reduced to Rs. 2 lakhs, thirty two thousand seven hundred, with interest @ 12% p.a. The High Court dismissed the second appeal. Therefore, the appellants filed the instant appeal.

During pendency, the Supreme Court acquitted 'SS' and converted the conviction of 'SB' from s. 302 to s. 304 (I) IPC and reduced the sentence to 5 years rigorous imprisonment and imposed fine.

Dismissing the appeal, the Court

HELD: 1.1. The Fatal Accidents Act, 1855 is an act to provide compensation to the families for loss occasioned by the death of a person caused by actionable wrong. A suit for damages for murder of a person, like the instant one, is filed under the Fatal Accidents Act, 1855. [Para 16 and 17] [226-G-H; 227-B]

1.2. It is elementary that an action for civil damages is not prosecution and a decree of damages is not a punishment. The rule of double jeopardy, therefore, is not applicable to the instant case. [Para 11] [223-H; 224-A]

1.3. Under clauses (b) and (c) of sub-section (1) and sub-section (5) of Section 357 of Cr.P.C. There is a clear and explicit recognition of a civil suit at the instance of the dependents of a person killed, against his/her killers. In sub-section (1)(c) of Section 357, there is clear indication that apart from the punishment of fine, the person convicted of any offence of having caused the death of another person or of having abetted the commission of such an offence may also be liable to face a civil action for damages under the Fatal Accidents Act, 1855 in a suit for damages and sub-section (5) of Section 357 of the Code makes it all the more clear by stipulating that at the time of awarding compensation in a subsequent civil suit relating to the same matter the court shall take into account any sum paid or recovered as compensation under that Section. [Para 12] [225-F-H; 226-A]

1.4. The submission that the widow of 'S' was not entitled to any compensation because she had remarried during the pendency of the suit, cannot be accepted. The first appellate court took the sum of Rs.12,400/- as the annual input by the deceased towards the maintenance of his wife and the minor child. The remarriage of plaintiff No.1 took place after seven years of filing of the suit. The amount of compensation reckoned for 7 years at the rate of Rs.12,400/- per annum would be Rs.86,800/-. The balance being Rs.1,45,900/-, would be a modest and reasonable amount as compensation for defendant No.2, the minor child of the deceased till she attained majority and got married. Therefore, there is no scope for any interference with the amount of compensation awarded by the first appellate court. [Para 13] [226-B-D]

1.5. The courts below have awarded interest at the rather higher rate of 12% p.a. In the facts of the case, simple interest at the rate of 6% p.a. from the date of the filing of the suit till payment would meet the ends of

justice. The rate of interest is modified and reduced to 6% p.a. [Para 14] [226-E]

2. It is a matter of grave concern that such sensitive matters like payment of compensation and damages for death resulting from a wrongful or negligent act are governed by a law which is more than one and a half centuries old. It is unfortunate that the observations of the Supreme Court have so far gone completely unheeded. There is hope and trust that the Union Government would at least now take note of the urgent need to bring a contemporaneous and comprehensive legislation on the subject and proceed to act in the matter without any further delay. [Paras 20 and 21] [228-D; 229-D]

Charan Lal Sahu v. *Union of India* **(1990) 1 SCC 613 – referred to.**

Case Law Reference:

(1990) 1 SCC 613 Referred to. Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5197 of 2003.

From the Judgment & Order dated 3.10.2002 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. 1908 of 2002.

U.U. Lalit, (A.C.), Rajiv K. Garg, Ashish Garg, Annam D.N. Rao, Nitin Sangee, Bansuri Swaraj, Shubhranshu Padhi, Sangram Singh Saro, Debasis Misra for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by special leave arises from a suit for damages filed by the plaintiffs-respondents, the widow and the minor daughter of one Surinder Singh, claiming a sum of rupees three lakhs as damages from the defendants-

appellants for causing the death of Surinder Singh by their wrongful act.

2. In an occurrence that took place on July 1, 1991, Surinder Singh died as a result of gun shot injuries. An F.I.R (no.166) was lodged by his father Balbir Singh, under sections 302/307/ 34 of the Penal Code and section 25/27 of the Arms Act in which the two appellants, Suba Singh and Shingara Singh, father and son respectively, were named as accused.

3. On November 16, 1991, respondent no.1 filed a suit on behalf of herself and on behalf of her minor daughter, who was at that time about 4-5 years old, against the defendants-appellants claiming damages for the death of her husband and the father of the young child. In the plaint, it was alleged that Suba Singh and his son Shingara Singh had committed the murder of Surinder Singh. Shingara Singh came to the place of occurrence armed with the licensed gun of his father and urged by him, he fired a shot killing Surinder Singh on the spot. At the time of death, the age of Surinder Singh was about 25 years. He was a peasant and a motor vehicle driver by vocation. As a professional driver, he was in private service of certain persons named in the plaint. He also used to help his father in agricultural operations and his income from all the sources was about Rs.16,000/- per annum. It was stated that after the death of Surinder Singh, the plaintiffs did not have any source of income to maintain themselves. Hence, the claim for compensation by way of damages of rupees three lakhs from the defendants.

4. The defendants contested the suit questioning its maintainability. They denied the allegations made in the plaint and stated that they were in no way responsible for causing the death of Surinder Singh. It was alleged that Surinder Singh claimed the common wall between their houses and at the time of the occurrence he was throwing brickbats at the defendants causing injuries to them. In that situation Suba Singh fired a shot

and a stray pellet hit Surinder Singh who was sitting on the wall, resulting in his death.

5. During the pendency of the suit, the defendants were tried by the Additional Sessions Judge, Sirsa, in Sessions Trial No.46 of 1991, charged variously of offences under sections 302, 307, 302/34, 307/34 IPC and under section 25/27 of the Arms Act. The learned Additional Sessions Judge, by his judgment and order dated March 6, 1992, acquitted Shingara Singh of all the charges leveled against him but found Suba Singh guilty of the offence under section 304 Part-I, holding that he had exceeded his right of private defence. Accordingly, he sentenced Suba Singh to rigorous imprisonment for 10 years and a fine of Rs.50,000/- and in default, to rigorous imprisonment for a further period of 2 years. The matter was taken to the High Court in appeals preferred both by the State and by Suba Singh besides a revision preferred by the informant Balbir Singh, the father of the deceased. The High Court by a common judgment and order allowed the appeal filed by the State and held Shingara Singh guilty of the offence under section 302 and 307 of the Penal Code. Suba Singh was found guilty and convicted under sections 302/34, 307/34 of the Penal Code. Shingara Singh was also found guilty of the offence under section 27 of the Arms Act. Both, Suba Singh and Shingara Singh were sentenced to life imprisonment and to pay fines with default clauses.

6. While the suit was pending before the trial court, the widow of Surinder Singh plaintiff no.1 got married to his younger brother in the year 1998 and from him, she has two children.

7. On November 27, 1999, the learned Civil Judge, Sirsa (Haryana) decreed the suit and awarded compensation of rupees three lakhs to the plaintiffs-respondents along with interest @ 12% per annum from the date of the filing of the suit. The appellants filed an appeal (Civil Appeal No.191/1999) before the District Judge, The District Judge partly allowed the appeal and by judgment dated March 7, 2002 reduced the

amount of compensation from rupees three lakhs to rupees two lakhs, thirty two thousand seven hundred, leaving the rate of interest unchanged. The appellants took the matter in second appeal before the High Court but the same was dismissed by the impugned judgment and order, dated October 3, 2002, holding that it did not raise any substantial question of law. The matter is now brought before this Court by grant of special leave.

8. To complete the facts it may be stated that shortly after leave was granted in the present appeal, the appellants' criminal appeals against the judgment and order passed by the Punjab and Haryana High Court (registered as Criminal Appeal Nos.682-683 of 1996 with Criminal Appeal Nos.1345-1347 of 2003) came to be heard by this Court. By the judgment and order dated November 4, 2003, the appeal of Shingara Singh was allowed and he was acquitted of all the charges and the conviction of Suba Singh was converted from one under section 302 to section 304 Part I of the Penal Code. In other words, this Court set aside the judgment of the High Court and restored the judgment passed by the trial court, though giving Suba Singh a reduced sentence of 5 years rigorous imprisonment and a fine of Rs.10,000/- and in default of payment of fine to further imprisonment for a period of 1 year.

9. Now, coming back to the present appeal, the judgments of the High Court and the courts below were assailed by the counsel for the appellants on the plea of double jeopardy. It was submitted that the appellants were being punished twice over for the same offence. Learned counsel also referred to section 357 of the Code of Criminal Procedure and submitted that there being a specific provision there for payment of compensation, a suit for damages would not be maintainable.

10. The rule against double jeopardy is contained in sub-article (2) of Article 20 of the Constitution of India which mandates that "no person shall be **prosecuted** and **punished** for the same offence more than once". Now, it is elementary that an action for civil damages is not prosecution and a decree

of damages is not a punishment. The rule of double jeopardy, therefore, has no application to this case.

11. The submission based on section 357 of the Cr.P.C. is equally without substance. Section 357 of the Code reads as under:

"357. Order to pay compensation.- (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, *when compensation is,* in the opinion, of the Court, *recoverable by such person in a Civil Court;*

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, *in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;*

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) *At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."*

(emphasis supplied)

12. The contention made on behalf of the appellants is fully answered by clauses (b) and (c) of sub-section (1) and sub-section (5) of section 357 of the Code. In those provisions there is a clear and explicit recognition of a civil suit at the instance of the dependents of a person killed, against his/her killers. In sub-section (1)(c) of section 357 there is clear indication that apart from the punishment of fine, the person convicted of any offence of having caused the death of another person or of having abetted the commission of such an offence may also be liable to face a civil action for damages under the Fatal Accidents Act, 1855 in a suit for damages and sub-section (5) of section 357 of the Code makes it all the more clear by stipulating that at the time of awarding compensation in a subsequent civil suit relating to the same matter the court shall

take into account any sum paid or recovered as compensation under that section.

13. In the end, counsel for the appellants, rather feebly submitted that the widow of Surinder Singh was not entitled to any compensation because she had remarried during the pendency of the suit. We find no substance in this submission either. It may be noted that the first appellate court has taken the sum of Rs.12,400/- as the annual input by the deceased towards the maintenance of his wife and the minor child. The remarriage of plaintiff no.1 took place after seven years of filing of the suit. The amount of compensation reckoned for 7 years at the rate of Rs.12,400/- per annum would be Rs.86,800/-. The balance being Rs.1,45,900/-, would be a modest and reasonable amount as compensation for defendant no.2, the minor child of the deceased till she attained majority and got married. We, therefore, see no scope for any interference with the amount of compensation awarded by the first appellate court.

14. It is indeed true that the courts below have awarded interest at the rather higher rate of 12% per annum. In the facts of the case, we are satisfied that simple interest at the rate of 6% per annum from the date of the filing of the suit till payment would meet the ends of justice. We, accordingly, modify and reduce the rate of interest to 6% per annum.

15. Having, thus, considered and disposed of all the contentions raised on behalf of the appellants, we would like to advert to another issue that is a cause of no little concern to us.

16. We are constrained to observe that a suit for damages for murder of a person, like the present one, is filed under the Fatal Accidents Act, 1855. As the year of its enactment shows the Act dates back to the period when the greater part of the country was under the control of the East India Company with

the last Mughal "Emperor", Bahadur Shah Zafar as the ineffective, though, titular monarch on the throne of Delhi.

17. The Act is based on the Fatal Accidents Act, 1846 and according to the short title given to it by the Indian Short Titles Act, 1897, it is "An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong". Its Preamble reads as follows:

> "Whereas no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is often-times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him"

18. It originally consisted of three sections, but, the original section 1 was renumbered as section 1A by the Part B States (Laws) Act (3 of 1951), S. 3 and Schedule, with effect from April 1, 1951. Section 1A of the Act provides as follows:

> "1A. Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
>
> Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator,

> or representative of the person deceased; and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

19. Later on the operation of the Act was extended to different parts of the country and as on date it extends to the whole of India except the State of Jammu and Kashmir.

20. It is a matter of grave concern that such sensitive matters like payment of compensation and damages for death resulting from a wrongful or negligent act are governed by a law which is more than one and a half centuries old. Twenty one years ago a Constitution Bench of this Court in *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613, a case arising from the Bhopal Gas Tragedy, had taken note of this antiquated law and in paragraph 168 made the following observations:

> "168. While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. *The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. We are, therefore, of the opinion that the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:*
>
> (i) The payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum;

(ii) The creation of a special forum with specific power to grant interim relief in appropriate cases;

(iii) The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceedings in regular courts; and

(iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks."

(emphasis supplied)

21. It is unfortunate that the observations of the Supreme Court have so far gone completely unheeded. We hope and trust that the Union Government would at least now take note of the urgent need to bring a contemporaneous and comprehensive legislation on the subject and proceed to act in the matter without any further delay.

22. Let a copy of this judgment be brought to the notice of the Attorney General for India. A copy of the judgment may also be sent to the Law Commission of India.

23. In the result, the appeal is dismissed, subject to the modification in the rate of interest. There will be no order as to costs.

N.J. Appeal dismissed.

MATHAI M. PAIKEDAY
v.
C.K. ANTONY
(Civil Appeal No. 5493 of 2011)

JULY 11, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

Code of Civil Procedure, 1908:

O. 33, r.1, Explanation I, and O.44. r.1 – Instituting of suit or appeal as an indigent person – Expression 'sufficient means' – Connotation of – A retired Dy. Conservator of Forest drawing monthly pension of Rs.10,500/- instituting appeals against money decrees with prayer for permitting him to institute the appeals as an indigent person – Prayer allowed by High Court – HELD: The expression "sufficient means" in O. 33, r.1 contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee – Financial assistance received from the family members or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or is indigent to pay requisite court fee – In the instant case, it was stated by the judgment-debtor before the High Court that his son was employed abroad – He did not deny that his son sends him money – He failed to establish that the amount of money received from his son was not sufficient to pay the court fee – Non-production of bank account details amounts to suppression of fact and an adverse inference can be drawn against the judgment-debtor that he is receiving a substantial or sufficient amount of money from his son – Therefore, the amount of money received by the judgment-debtor from his son and by way of pension, amounts to 'sufficient means' to pay court fee which disentitles him to be an indigent person under O. 33,r. 1 and O. 44 r.1 – In the facts and circumstances of the case, the

judgment-debtor cannot be declared as an indigent person in order to prosecute the regular first appeals before the High Court – Impugned order of High Court set aside.

The appellant filed two suits for recovery of money against the respondent, a retired Deputy Conservator of Forest drawing a pension of Rs. 10,500/-. The suits were decreed. The respondent filed regular first appeals before the High Court along with petitions to prosecute the said appeals as an indigent person under O. 44, r. 1 CPC. The judgment-debtor was permitted to prosecute regular first appeals as an indigent person.

In the instant appeals filed by the plaintiff, the issue before the Court was: whether the respondent was an indigent person as not possessed of sufficient means to pay the court fees and, consequently, entitled to avail the benefits under O. 44 of the Code of Civil Procedure, 1908.

Allowing the appeals, the Court

HELD: 1.1. The object and purpose of O. 33 and O. 44 of the Code of Civil Procedure, 1908 are to enable a person, who is ridden by poverty, or not possessed of sufficient means to pay court fee, to seek justice. Order 33 and O. 44 exempts such indigent person from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in *forma pauperis***. [para 12] [237-B-C]**

A.A. Haja Muniuddin v. Indian Railways, **1992 (3) Suppl. SCR 72 = (1992) 4 SCC 736;** *Union Bank of India v. Khader International Construction*, **2001 (3) SCR 580 = (2001) 5 SCC 22; and** *R.V. Dev v. Chief Secretary, Govt. of Kerala,* **2007 (6) SCR 886 = (2007) 5 SCC 698 – referred to.**

Corpus Juris Secundum **(20 C.J.S. Costs § 93); and** *American Jurisprudence* **(20 Am. Jur. 2d Costs § 100) – referred to.**

1.2. The indigent person, in terms of Explanation I to r.1 of O. 33 CPC is one who is either not possessed of sufficient means to pay court fee when such fee is prescribed by law, or is not entitled to property worth one thousand rupees when such court fee is not prescribed. In both the cases, the property exempted from the attachment in execution of a decree and the subject-matter of the suit shall not be taken into account to calculate financial worth or ability of such indigent person. Moreover, the factors such as person's employment status and total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, and person's total indebtness and financial assistance received from the family member or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or is indigent to pay requisite court fee. Therefore, the expression "sufficient means" in O. 33, r.1 Code of Civil Procedure, 1908 contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee. [para 18] [239-H; 240-A-D]

1.3. In the instant case, admittedly the respondent is a retired Deputy Conservator of Forest, and drawing a pension of Rs. 10,500/-. It was also stated by him in his deposition before the High Court that his son is employed abroad. However, it is noteworthy to mention that respondent has never denied that his son sends him money. Furthermore, the respondent had failed to establish that the amount of money received from his son is not substantial or is insufficient to pay court fee by not producing passbook of his bank account. [para 19] [240-E-G]

1.4. Non-production of bank account transaction details, amounts to suppression of the facts and in view

of this, an adverse inference can be drawn against the respondent that he is receiving a substantial or sufficient amount of money from his son. Therefore, the amount of money received by the respondent from his son and by way of pension, amounts to 'sufficient means' to pay court fee which disentitles him to be an indigent person under O. 33,r. 1 and O. 44 r.1 CPC. [para 19] [240-G-H; 241-A]

1.5. In the facts and circumstances of the case, the respondent cannot be declared as an indigent person in order to prosecute the regular first appeals before the High Court. The impugned final order of the High Court dated 11.08.2008 is set aside. The respondent is granted time to deposit the court fee if he desires to prosecute regular first appeals filed before the High Court. [para 20] [241-B-C]

Case Law Reference:

1992 (3) Suppl. SCR 72	**referred to**	**para 13**
2001 (3) SCR 580	**referred to**	**para 14**
2007 (6) SCR 886	**referred to**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5493 of 2011.

From the Judgment & Order dated 11.8.2008 of the High Court of Kerala at Ernakulam in C.M.C.P.No. 60 of 2004.

WITH

C.A. No. 5494 of 2011

Jawaharlal Gupta, Shishir Pinaki, Amit Singh for the Appellant.

Subramonium Prasad for the Respondent.

The Judgment of the Court was delivered by

O R D E R

H.L. DATTU, J.

Delay condoned.

1. Leave granted.

2. These appeals, by special leave, are directed against the common final order passed by the High Court of Kerala at Ernakulam in C.M.C.P. Nos. 53 and 60 of 2004 dated 11.08.2008, whereby the High Court has allowed the petitions and has permitted the respondent to prosecute the appeals as an indigent person.

3. The brief factual matrix relating to these appeals :- The appellant had filed two suits for recovery of money against the respondent, who is a retired Deputy Conservator of Forest drawing a pension of '10,500/-. These suits were decreed in favour of the appellant. Being aggrieved, the respondent had preferred Regular First Appeals before the High Court of Kerala along with petitions to prosecute the said appeals as an indigent person under Order 44 Rule 1 of the Code of Civil Procedure, 1908. The High Court of Kerala, without holding any inquiry as contemplated under Order 33 Rule 1A of the Code of Civil Procedure, permitted the respondent to institute the said appeals as an indigent person, against which a special leave petition was preferred before this Court. This Court remanded the matter to the High Court for passing fresh orders after conducting an inquiry in accordance with Order 33 Rule 1A of the Code of Civil Procedure.

4. Subsequently, the High Court after conducting the inquiry into the means and financial capacity of the respondent, has permitted the respondent to prosecute Regular First Appeals as an indigent person vide its order dated 11.08.2008.

Aggrieved by the same, the appellant is before us in these appeals.

5. The issue involved in the present appeals for our consideration is: Whether the respondent is an indigent person as not possessed of sufficient means to pay the court fees and, consequently, entitled to avail the benefits under Order 44 of the Code of Civil Procedure.

6. Shri. Jawahar Lal Gupta, learned senior counsel, appears for the appellant and the respondent is represented by Shri. Subramonium Prasad, learned counsel.

7. The learned senior counsel Shri. Jawahar Lal Gupta submits that the respondent has admitted during the inquiry before the High Court that he is a retired Government employee and receives Rs. 10,500/- by way of pension and also receives money from his son who is employed in a foreign country. The learned senior counsel further submits that the respondent had failed to produce passbooks of his bank account in order to deny the fact of receiving money from his son. In other words, the failure of the respondent to produce bank accounts and passbooks amounts to suppression of the fact of receiving substantial amount of money from his son. The learned senior counsel further argues that the respondent is having sufficient means to pay court fees and is not entitled to prosecute the Regular First Appeals before the High Court as an indigent person in terms of Order 44 Rule 1 of the Code of Civil Procedure.

8. These arguments of the learned senior counsel for the appellants were refuted by Shri. Subramanion Prasad, the learned counsel for the respondent, who supported the impugned final order of the High Court.

9. Order 33 of the Code of Civil Procedure deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons.

10. Order 33 Rule 1 of the Code of Civil Procedure provides for instituting of suits by indigent person, stating:

> "1. Suits may be instituted by indigent person—Subject to the following provisions, any suit may be instituted by an indigent person.
>
> Explanation I.—A person is an indigent person,—
>
> (a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or
>
> (b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.
>
> Explanation II.—Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.
>
> *Explanation III.—Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.*"

11. Order 44 of Code of Civil Procedure provides for instituting an appeal as an indigent person. The provision reads :-

> *"1. Who may appeal as an indigent person* – Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal,

and may be allowed to appeal as an indigent person, subject, in all matters, including the presentation of such application, to the provisions relating to suits by indigent person, in so far as those provisions are applicable."

12. The object and purpose of Order 33 and Order 44 of the Code of Civil Procedure are to enable a person, who is ridden by poverty, or not possessed of sufficient means to pay court fee, to seek justice. Order 33 and Order 44 of the Code of Civil Procedure exempts such indigent person from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in *forma pauperis*.

13. In *A.A. Haja Muniuddin v. Indian Railways*, (1992) 4 SCC 736, this Court has observed:

"5. … Access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee."

14. In *Union Bank of India v. Khader International Construction***,** (2001) 5 SCC 22, this Court has held:

"**20.** Order 33 CPC is an enabling provision which allows filing of a suit by an indigent person without paying the court fee at the initial stage. If the plaintiff ultimately succeeds in the suit, the court would calculate the amount of court fee which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person and that amount would be recoverable by the State from any party ordered by the decree to pay the same. It is further provided that when the suit is dismissed, then also the State would take steps to recover the court fee payable by the plaintiff and this court fee shall be a first charge on the subject-matter of the suit. So there is only a provision for the deferred payment of the court fees and this benevolent provision is intended to help the poor litigants who are unable to pay the requisite court fee to file a suit

because of their poverty. Explanation I to Rule 1 Order 33 states that an indigent person is one who is not possessed of sufficient amount (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit. It is further provided that where no such fee is prescribed, if such person is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree and the subject-matter of the suit he would be an indigent person."

15. In *R.V. Dev v. Chief Secretary, Govt. of Kerala, (2007) 5 SCC 698*, this Court has held:

"8. Order 33 of the Code of Civil Procedure deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons. When an application is filed by a person said to be indigent, certain factors for considering as to whether he is so within the meaning of the said provision are required to be taken into consideration therefor. A person who is permitted to sue as an indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue in that capacity, if he fails in the suit at the trial or even without trial. Payment of court fee as the scheme suggests is merely deferred. It is not altogether wiped off."

16. The concept of indigent person has been discussed in Corpus Juris Secundum (20 C.J.S. Costs § 93) as following:

"§ 93. What constitutes indigency: The right to sue in forma pauperis is restricted to indigent persons. A person may proceed as poor person only after a court is satisfied that he or she is unable to prosecute the suit and pay the costs and expenses. A person is indigent if the payment of fees would deprive one of basic living expenses, or if the person is in a state of impoverishment that substantially and effectively impairs or prevents the pursuit of a court

remedy. However, a person need not be destitute. Factors considered when determining if a litigant is indigent are similar to those considered in criminal cases, and include the party's employment status and income, including income from government sources such as Social Security and unemployment benefits, the ownership of unencumbered assets, including real or personal property and money on deposit, the party's total indebtedness, and any financial assistance received from family or close friends. Not only personal liquid assets, but also alternative sources of money should be considered."

17. The eligibility of person to sue in *forma pauperis* has been considered in American Jurisprudence (20 Am. Jur. 2d Costs § 100) as thus:

"§ 100. Eligibility to sue in forma pauperis; generally: The burden of establishing indigency is on the defendant claiming indigent status, who must demonstrate not that he or she is entirely destitute and without funds, but that payments for counsel would place an undue hardship on his or her ability to provide the basic necessities of life for himself or herself and his or her family. Factors particularly relevant to the determination of whether a party to a civil proceeding is indigent are: (1) the party's employment status and income, including income from government sources such as social security and unemployment benefits; (2) the ownership of any unencumbered assets, including real or personal property and monies on deposit; and finally (3) the party's total indebtedness and any financial assistance received from family or close friends. Where two people are living together and functioning as a single economic unit, whether married, related, or otherwise, consideration of their combined financial assets may be warranted for the purposes of determining a party's indigency status in a civil proceeding."

18. To sum up, the indigent person, in terms of explanation

I to Rule 1 of Order 33 of the Code of Civil Procedure, is one who is either not possessed of sufficient means to pay court fee when such fee is prescribed by law, or is not entitled to property worth one thousand rupees when such court fee is not prescribed. In both the cases, the property exempted from the attachment in execution of a decree and the subject-matter of the suit shall not be taken into account to calculate financial worth or ability of such indigent person. Moreover, the factors such as person's employment status and total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, and person's total indebtness and financial assistance received from the family member or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or indigent to pay requisite court fee. Therefore, the expression "sufficient means" in Order 33 Rule 1 of the Code of Civil Procedure contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee.

19. Admittedly the respondent is a retired Deputy Conservator of Forest, Government of Kerala and drawing a pension of '10,500/-. It was also stated by him in his deposition before the High Court on 03.01.2008 that his son is employed abroad and does not regularly send him money and in response to a suggestion, whether his bank account discloses the amount of money sent by his son, he does not deny the suggestion. However, it is noteworthy to mention that respondent has never denied that his son sends him money. Furthermore, the respondent had failed to establish that the amount of money received from his son is not substantial or insufficient to pay court fee by not producing passbook of his bank account. In our considered opinion, non-production of bank account transaction details, amounts to suppression of the facts and in view of this, an adverse inference can be drawn against the respondent that he is receiving a substantial or sufficient amount of money from his son. Therefore, the amount of money

received by the respondent from his son and by way of pension amounts to a sufficient means to pay court fee which disentitles him to be an indigent person under Order 33 Rule 1 and Order 44 Rule 1 of the Code of Civil Procedure.

20. In the light of above discussion and facts and circumstances of the present case, the respondent cannot be declared as an indigent person in order to prosecute Regular First Appeals before the High Court. Accordingly, the present appeals are allowed and the impugned final order of the High Court dated 11.08.2008 is set aside. However, the respondent is granted 45 days time from today to deposit the court fee if he desires to prosecute Regular First Appeals filed before the High Court. Costs are made easy.

R.P. Appeals allowed.

JAIPUR DEVELOPMENT AUTHORITY AND OTHERS
v.
VIJAY KUMAR DATA AND ANOTHER
(Civil Appeal No. 7374 of 2003)

JULY 12, 2011

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

Rajasthan Land Acquisition Act, 1953:

ss. 4 and 6 – Acquisition of land – For planned development of Jaipur city – Scheme popularly known as 'Lal Kothi Scheme' – Transfers of portions of the acquired land effected after publication of notification u/s 4 and declaration u/s 6 – Land Acquisition Officer awarding compensation to landowners and beneficiaries of illegal transfers and also ordering allotment of plots of 1000-2000 sq. yd. to landowners, their transferees and nominees/sub-nominees out of the acquired land – In the instant case, transferee of the Khatear obtaining 1500 sq. yd. land through execution proceedings, pursuant to the allotment order of LAO and further transferring the same to respondents and others – Respondents filing applications u/s 83 of Jaipur Development Authority Act questioning auction of plot nos. C-113 and C-114 by the Development Authority – Applications rejected by Appellate Tribunal – The writ petitions filed by respondents dismissed by single Judge of High Court – However, Division Bench of the High Court directing regularization of plots in their favour – HELD: Division Bench of the High Court committed serious error by entertaining an altogether new case set up on behalf of the respondents (writ petitioners), who had not even prayed for amendment of the pleadings, and granting relief to them by declaring that they are entitled to get benefit of the policy of regularization contained in the letter dated 6.12.2001 – The Division Bench could not rely upon the so-called policy decision stated to have been taken by the Government in

flagrant violation of the judgments of the Supreme Court wherein it was categorically held that the transactions involving transfer of land after the issue of notification u/s 4 were nullity and the Land Acquisition Officer did not have the jurisdiction to direct allotment of land to the awardees/sub awardees, their nominees/sub-nominees – The basics of judicial discipline required that the Division Bench of the High Court should have followed the law laid down by Supreme Court in ***Radhey Shyam's*** *case and* ***Daulat Mal Jain's*** *case and refused relief to the respondents – Further, the Division Bench of the High Court ignored the unchallenged findings recorded by the Tribunal and the trial court that the khatedar's transferee, from whom the respondents (writ petitioners) had purchased the plots, did not have valid title over the land and he had no right to secure allotment of 1500 sq. yd. land in the 'Lal Kothi Scheme' – The order of High Court set aside with cost of Rs. 5 lac to be paid by the respondents for pursuing unwarranted litigation for the last 15 years – Cost to be deposited with Rajasthan State Legal Services Authority – Jaipur Development Authority Act, 1982 – s.83 – Rajasthan Improvement Trust (Disposal of Urban Land) Rules, 1974 – Judicial discipline – Precedent – Constitution of India, 1950 – Article 226 – Writ petition – New Plea – Costs – Administration of Justice – Party pursuing unwarranted litigation – Imposition of cost.*

Constitution of India, 1950:

Articles 77 and 166 – Policy decision – Connotation of – Acquisition of land – Land Acquisition Officer awarding compensation to land owners and beneficiaries of illegal transfers and ordering allotment of 1000-2000 sq. yd. plots to landowners their transferees and nominees/sub-nominess, out of the acquired land – Courts holding that Land Acquisition Officer did not have jurisdiction to direct such allotment – Recommendations made by Committee set up by Minister of Urban Development and Housing, suggesting the

methodology for allotment of land in terms of directions given by Land Acquisition Officer –Letter dated 6.12.2001 issued purporting to contain the policy – HELD: Unless an order is expressed in the name of the President or the Governor, as the case may be, and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government – In the instant case, a reading of letter dated 6.12.2001 shows that it was neither expressed in the name of the Governor nor was it authenticated in the manner prescribed by the Rules – That letter merely speaks of the discussion made by the Committee and the decision taken by it – By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 – Since the so called policy decision contained in letter dated 6.12.2001 is contrary to the law declared by Supreme Court, the State Government and the appellant are restrained from taking any action in future on the basis of the said letter – Administrative Law – Policy decision.

The State Government, pursuant to the notification dated 13.5.1960 issued u/s 4 of the Rajasthan Land Acquisition Act, 1953 (the 1953 Act), acquired 552 bighas 8 biswas land for planned development of Jaipur city. The land was to be utilised by Urban Improvement Trust, Jaipur, for construction of new building of the Legislative Assembly, educational institutions, stadium complex, district shopping Centres, M.L.A. quarters etc. The scheme came to be popularly known as 'Lal Kothi Scheme'. Subsequent to the notification u/s 4 and declaration u/s 6, several persons purchased the portions of the acquired land from the khatedars. The Land Acquisition Officer passed an award dated 9.1.1964 whereby he not only determined the amount of compensation payable to the landowners and the beneficiaries of illegal transfers, but also directed

allotment of plots measuring 1000-2000 square yards to the owners, their transferees and nominees/sub-nominees out of the acquired land. After the award was passed, one 'GN', who purchased the acquired land much after publication of notification u/s 4 and declaration u/s 6, filed an execution application and succeeded in getting an order for delivery of possession of 1500 square yards of land in the 'Lal Kothi Scheme'. Subsequently, when large number of execution applications were filed by the beneficiaries, the State and the Urban Improvement Trust, Jaipur (predecessor-in-interest of Jaipur Development Authority) questioned the authority of the Land Acquisition Officer to give direction for allotment of land. The executing court partly upheld the objection but the revisions filed by the beneficiaries were allowed by the Division Bench of the High Court, holding that the legality of the award could not be challenged in the execution proceedings.

During the pendency of litigation before different courts, the then Minister of Urban Development and Housing, who was also Chairman of the Trust, constituted a Committee for suggesting the methodology for allotment of land in terms of the directions given by the Land Acquisition Officer. The members of the Committee recommended that land be allotted to the beneficiaries of illegal transactions. A circular disguised as policy decision was issued to this effect.

'GN' had filed a suit (Civil Suit No.270/1985) for injunction, with the prayer that the defendant-Authority (the appellant) be restrained from interfering with his possession over plot Nos.C-112 to C-115 in the Lal Kothi Scheme. During the pendency of the suit, he transferred the plots to the respondents and two others by registered sale deeds, who were impleaded as plaintiff Nos. 2 to 5 to the suit. The trial court held that plaintiff No.1 ('GN') was

not entitled to relief of injunction because he could not prove his ownership over the suit land. The respondents filed applications u/s 83 of the Jaipur Development Authority Act, 1982 questioning the notice dated 19.12.1996 issued by the appellant for auction of plot Nos. C-113 and C-114. The Appellate Tribunal relied upon the judgments in *Radhey Shyam's*[1] case and *Daulat Mal Jain's*[2] case and held that the respondents did not have the locus to challenge the proposed auction because transactions involving purchase of land by 'GN' from the original Khatedar and subsequent purchase of plots by the respondents were nullity. The respondents challenged the orders passed by the Tribunal in writ petitions which were dismissed by the single Judge of the High Court. However, the Division Bench of the High Court entertained and accepted an altogether new case put forward by the writ petitioners that in terms of the policy decision taken by the State Government, which was circulated by letter dated 6.12.2001 and order dated 9.1.2002 passed by another Division Bench in D.B. Civil Writ Petition No.5776/2001 (suo motu) – *Rajasthan High Court v. State of Rajasthan and others,* the writ petitioners (respondents in the instant appeals) were entitled to regularization of the plots in question. Aggrieved, the Jaipur Development Authority and others filed the appeals.

The question for consideration before the Court was: whether the Division Bench of the High Court could have granted relief to the respondents by entertaining an altogether new case set up with reference to the so called policy framed by the State Government for regularization of the illegal allotments/ encroachments of the acquired

1. *Jaipur Development Authority v. Radhey* 1994 (2) SCR 1 = (1994) 4 SCC 370.
2. *Secretary, Jaipur Development Authority v. Daulat Mal Jain and Others* 1996 (6) Suppl. SCR 584 = (1997) 1 SCC 35.

land in the Lal Kothi and Prithviraj Nagar Schemes?

Allowing the appeals, the Court

HELD: 1.1. It is not in dispute that the only issue raised in the writ petitions filed by the respondents was whether the Tribunal was right in dismissing the applications filed by them against the auction of plot Nos. C-113 and C-114, Lal Kothi Scheme. The Tribunal had negated the respondents' challenge on the ground that 'GN', from whom they had purchased the plots under sale deeds dated 18.4.1993, did not have valid title. The Tribunal noted that 'GN' had purchased the land from its Khatedar after publication of the notification issued u/s 4 and held that such transactions did not create any title in his favour. The Tribunal also relied upon the judgments of this Court in Radhey Shyam's case and Daulat Mal Jain's case and held that once the Supreme Court had declared the transactions involving purchase of the acquired land and the direction given by the Land Acquisition Officer for allotment of land to the awardees, sub-awardees and their nominees/sub-nominees to be nullity, the transferees of such purchasers cannot claim any right over the plots which were auctioned by the appellant. In the opinion of the Tribunal, when the purchase of land by 'GN' was null and void, he could not have transferred a valid title in favour of the respondents so as to enable them to challenge the advertisement issued by the appellant for auction of the two plots. The single Judge of the High Court dismissed both the writ petitions. [para 27] [274-B-G]

1.2. The Division Bench of the High Court committed serious error by entertaining an altogether new case set up on behalf of the respondents, who had not even prayed for amendment of the pleadings, and granted relief to them by declaring that they are entitled to get

benefit of the policy of regularization contained in the letter dated 6.12.2001. The recommendations made by the Committee were given the colour of the Government's decision (though, no material has been placed on record to show that the recommendations made by the Committee were accepted by the State Government) as would appear from letter dated 6.12.2001 written by Deputy Secretary (Administration), Urban Development Department to the Secretary, Jaipur. The Division Bench could not have rely upon the so called policy decision taken by the Government in flagrant violation of the two judgments of this Court wherein it was categorically held that the transactions involving transfer of land after the issue of notification u/s 4 were nullity and the Land Acquisition Officer did not have the jurisdiction to direct allotment of land to the awardees/sub awardees, their nominees/sub-nominees. The basics of judicial discipline required that the Division Bench of the High Court should have followed the law laid down by this Court in Radhey Shyam's case and Daulat Mal Jain's case and refused relief to the respondents. [para 28-29] [275-A-D; 279-C-E]

Jaipur Development Authority v. Radhey Shyam **1994 (2) SCR 1 = (1994) 4 SCC 370;** *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and others* **1996 (6) Suppl. SCR 584 = (1997) 1 SCC 35 - relied on.**

Narpat Singh vs. Jaipur Development Authority **2002 (3) SCR 365 = (2002) 4 SCC 666 – referred to.**

1.3. Another grave error committed by the Division Bench of the High Court is that it ignored the unchallenged findings recorded by the Tribunal and the trial court that 'GN' did not have valid title over the land and he had no right to secure allotment of 1500 sq. yds. land in the Lal Kothi Scheme and that the order passed by the executing court for delivery of possession was liable to be ignored in view of the law laid down in *Radhey*

Shyam's **case and** *Daulat Mal Jain's* **case. [para 30] [279-F-G]**

1.4. As regards the order dated 9.1.2002 passed by the other Division Bench of the Rajasthan High Court in D.B. Civil Writ Petition No.5776/2001 (suo motu) titled *Rajasthan High Court v. State of Rajasthan,* **the single Judge of the High Court suo motu took cognizance of three different news items dated 8.12.2001, 10.12.2001 and 11.12.2001 published in the daily newspaper, and the matter was subsequently placed before the Division Bench which had the roster to hear such matters. In the considered view of this Court, the single Judge was not at all justified in suo motu taking cognizance of the newspaper reports and the order made by him could appropriately be termed as** ***coram non judis*****. On behalf of the State Government and the appellant, affidavits were filed to justify the so called policy contained in letter dated 6.12.2001. The Division Bench did take cognizance of the fact that people having connection in the power corridors and those who were economically affluent had illegally taken possession of the acquired land and raised construction, but approved the so-called policy decision taken by the State Government to regularize the illegal transfers. [para 31] [279-H; 280-A-F]**

1.5. The High Court had undertaken a wholly unwarranted and unjustified exercise for putting the seal of approval on the so called policy contained in letter dated 6.12.2001 and, that too, by ignoring the law laid down by this Court in Radhey Shyam's case and Daulat Mal Jain's case. What the High Court has done is to legitimize the transactions, which were declared illegal by this Court and this was clearly impermissible. The High Court's understanding of the so called policy framed by the Government was clearly erroneous. The letter written by Deputy Secretary (Administration), Urban

Development Department to the Secretary, Jaipur Development Authority, Jaipur cannot, by any stretch of imagination, be treated as a policy decision taken by the State Government. No document was produced before the High Court and none has been produced before this Court to show that the recommendations made by the Committee of Ministers had been approved by the State Government culminating in issuance of a policy circular. [para 32] [282-F-H; 283-A-B]

2.1. It is trite to say that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State are required to be authenticated in such manner as may be specified in rules to be made by the President or the Governor. [Articles 77(2) and 166(2)]. Unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government. In the instant case, a reading of letter dated 6.12.2001 shows that it was neither expressed in the name of the Governor nor was it authenticated in the manner prescribed by the Rules. That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution. [para 32-33] [283-A-C; 285-C-D]

State of Bihar v. Kripalu Shankar **1987 (3) SCR 1 = (1987) 3 SCC 34 – relied on.**

2.2. Even otherwise, the High Court should have quashed the said policy because it was clearly contrary

to the law declared by this Court in Radhey Shyam's case and Daulat Mal Jain's case and was a crude attempt by the political functionaries concerned of the State to legalise what had already been declared illegal by this Court. [para 34] [285-E-F]

2.3. Since the so called policy decision contained in letter dated 6.12.2001 is contrary to the law declared by this Court, the State Government and the appellant are restrained from taking any action in future on the basis of the said letter. [para 37] [286-C]

3.1. Although, *prima facie* the Court is satisfied that execution of lease deeds by the appellant in favour of some persons in 2002 and 2003 is a clear indication of deep rooted malaise in the functioning of the appellant and is also indicative of sheer favouritism and nepotism, this Court refrains from pronouncing upon the legality of those transactions because the beneficiaries are not parties to these appeals. [para 35] [285-G]

3.2. The impugned judgment is set aside. The writ petitions filed by the respondents are dismissed and they are directed to pay cost of Rs.5 lac for pursuing unwarranted litigation for last over 15 years. The amount of cost shall be deposited with the Rajasthan State Legal Services Authority. The respondents shall be entitled to recover the price paid to the 'GN' along with the amount of cost by availing appropriate legal remedy. [para 36] [286-A-B]

Case Law Reference:

1994 (2) SCR 1	**relied on**	**para 3**
1996 (6) Suppl. SCR 584	**relied on**	**para 10**
2002 (3) SCR 365	**referred to**	**para 11**
1987 (3) SCR 1	**relied on**	**para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7374 of 2003.

From the Judgment & Order dated 29.7.2002 of the High Court of Judicature for Rajasthan at Jaipur in D.B. Civil Special Appeal No. 767 of 2000 in S.B. Civil Writ Petition No. 1047 of 1997.

WITH

C.A. No. 7375 of 2003.

S.K. Bhattacharya, Niraj Bobby Paonam, Prashant Kumar, Anurag Sharma (for Ap & J Chambers) for the Appellants.

M.L. Lahoty, Paban K. Sharma, Gargi B. Bhavali, Sukumar Agarwal, Himanshu Shekhar, Annam D.N. Rao for the Respondent.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. These appeals filed by the Jaipur Development Authority against judgment dated 29.7.2002 of the Division Bench of the Rajasthan High Court, Jaipur Bench are illustrative of how unscrupulous elements within the State apparatus connived with the private individuals and succeeded in partly frustrating one of the most ambitious schemes framed by Urban Improvement Trust, Jaipur (for short, "the Trust") (predecessor of the appellant), which came to be popularly known as Lal Kothi Scheme, for construction of new building of the Legislative Assembly, educational institutions, stadium complex, district shopping centre, MLA quarters etc.

2. By notification dated 13.5.1960 issued under Section 4 of the Rajasthan Land Acquisition Act, 1953 (for short, "the 1953 Act"), which was published in the official gazette dated 29.6.1960, the State Government proposed the acquisition of 552 bighas 8 biswas land of village Bhojpura and Chak Sudershanpura for planned development of Jaipur city. The

land was to be utilised for the purpose mentioned in the preceding paragraph. Declaration under Section 6 was issued on 3.5.1961 and was published in the official gazette dated 11.5.1961. Thereafter, notice dated 18.7.1961 was issued to the land owners (Khatedars) under Section 9(1) and (3). Initially, 65 Khatedars filed claims for compensation but this figure swelled to more than 137 because those who purchased land from the Khatedars after publication of the notification issued under Section 4 and their nominees/sub-nominees also filed claims for compensation. The second category of persons included Shri Ganesh Narayan Gupta, Advocate and Dr. Bhagwan Das Khera, both of whom managed to purchase portions of the acquired land from one of the Khatedars, namely, Shri Vijay Lal son of Ram Sukhji. The Land Acquisition Officer, Jaipur passed an unusual award dated 9.1.1964 whereby he not only determined the amount of compensation payable to the landowners and the beneficiaries of illegal transfers, but also directed allotment of plots measuring 1000 to 2000 square yards to the owners, their transferees and nominees/sub-nominees out of the acquired land.

3. After passing of the award, Shri Ganesh Narayan Gupta filed execution application and succeeded in getting an order for delivery of possession of 1500 square yards land in the Lal Kothi Scheme. The revision filed against the order of Executing Court was dismissed by the High Court and in that sense, the order passed by the Executing Court became final. However, as will be seen hereinafter, in view of the judgment of this Court in *Jaipur Development Authority v. Radhey Shyam* (1994) 4 SCC 370, all such orders and judgments will be deemed to have become nullity.

4. In the meanwhile, 12 of the awardees filed applications for enhancement of the compensation. District Judge, Jaipur City, Jaipur accepted their claim. Simultaneously, he rejected the objection raised by the State Government that the Land Acquisition Officer did not have the jurisdiction to allot land in lieu of or in addition to the monetary compensation. The

appeals filed against the judgment of the learned District Judge were disposed of by the High Court on the basis of compromise arrived at between the awardees and the Trust.

5. With a view to favour those who manipulated to create documents showing purchase of land after publication of the notification issued under Section 4 and who had access to the power corridors, the State and the Trust deliberately omitted to challenge the direction contained in the award of the Land Acquisition Officer for allotment of land to the land owners (awardees), transferees (sub-awardees) and their nominees/sub-nominees. However when large number of execution applications were filed by the beneficiaries, the functionaries of the State and the Trust appear to have become alive to the grave consequences which would have ensued by implementing the direction given by the Land Acquisition Officer. Therefore, they questioned the authority of the Land Acquisition Officer to give direction for allotment of land. The Executing Court partly upheld the objection but the revisions filed by the beneficiaries were allowed by the Division Bench of the High Court, which held that the legality of the award cannot be challenged in the execution proceedings.

6. During the pendency of litigation before different courts, another attempt was made by the functionaries of the State to confer legitimacy on the illegal transactions involving purchase of the acquired land. The then Minister of Urban Development of Housing, who was also Chairman of the Trust, constituted a Committee for suggesting the methodology for allotment of land in terms of the directions given by the Land Acquisition Officer. The members of the Committee obliged their master i.e. the Minister and recommended that land be allotted to the beneficiaries of illegal transactions at the rate of Rs.8/- per square yard. Thereafter, a circular disguised as policy decision was issued in 1978 for allotment of land to sub-awardees and their nominees/sub-nominees at the rate of Rs.8/- per square yard.

7. In furtherance of the so called policy decision, draw of lots was held on 23.12.1980 for allotment of plots to the awardees and the beneficiaries of illegal transfers of the acquired land and those who were successful were allotted plots. This exercise did not satisfy all and those who could not get plots filed writ petitions questioning the draw of lots. The Division Bench of the High Court held that the directions given by the Land Acquisition Officer and the Minister for allotment of plots were ex-facie illegal and had the effect of defeating the public purpose for which the land was acquired. Notwithstanding this, the High Court granted relief to the writ petitioners on the ground of violation of the equality clause enshrined in Article 14 of the Constitution and directed that they should also be allotted plots as per their entitlement.

8. In the meanwhile, the Lokayukta of Rajasthan made inquiry under Section 10 of the Rajasthan Lokayukta and Up-Lokayuktas Act, 1973 in the matter of illegal allotments of plots in the Lal Kothi Scheme and submitted report dated 12.11.1992, the operative portion of which reads thus:

> "In view of what has been stated above, it is prima facie established that Smt Kamala, the then Hon'ble Minister, Urban Development and Housing Department, Government of Rajasthan-cum-Chairman, JDA Jaipur, Shri M.D. Kaurani, IAS, the then Commissioner, Jaipur Development Authority and Shri Subhebhan Mitra, the then Zonal Officer, Lal Kothi Scheme, JDA, Jaipur, have blatantly misused their official position to favour a few influential and highly placed individuals and have also thereby caused wrongful gain to them and wrongful loss to the Jaipur Development Authority and the public at large. But Smt Kamala, the then Hon'ble Minister, Urban Development and Housing Department-cum-Chairman, JDA is not now a public servant as defined in Section 2(1) of the Rajasthan Lokayukta and Up-Lokayuktas Act, 1973 (for short 'the Act') because she has ceased to be a Minister. So investigation is not being commenced against her but the investigation deserves to be commenced against S/Shri M.D. Kaurani, IAS and Subhebhan Mitra under Section 1 of the Act, and I order accordingly."

However, as has happened with hundreds of similar reports submitted by the Lokayukta and other statutory authorities entrusted with the task of making investigation into the acts of favouritism, nepotism and corruption committed by the bureaucrats and public representatives, no tangible action appears to have been taken on the recommendations contained in report dated 12.11.1992.

9. The question whether the Land Acquisition Officer could issue direction for allotment of land to the awardees, sub-awardees and their nominees/sub-nominees was considered by this Court in *Radhey Shyam's* case. After noticing the provisions of Section 31(3) and (4) of the 1953 Act on which reliance was placed by the senior counsel appearing for the respondents, this Court held that the Land Acquisition Officer did not have the jurisdiction, power or authority to direct allotment of land to the claimants. This is clearly borne out from the following extracts of paragraph 7 of the judgment:

> "A reading of sub-section (4) of Section 31, in our considered view, indicates that the Land Acquisition Officer has no power or jurisdiction to give any land under acquisition or any other land in lieu of compensation. Sub-section (4) though gives power to him in the matter of payment of compensation, it does not empower him to give any land in lieu of compensation. Sub-section (3) expressly gives power "only to allot any other land in exchange". In other words the land under acquisition is not liable to be allotted in lieu of compensation except under Section 31(3), that too only to a person having limited interest.
>
> …….The problem could be looked at from a different

angle. Under Section 4(1), the appropriate Government notifies a particular land needed for public purpose. On publication of the declaration under Section 6, the extent of the land with specified demarcation gets crystallised as the land needed for a public purpose. If the enquiry under Section 5-A was dispensed with, exercising the power under Section 17(1), the Collector on issuance of notice under Sections 17, 9 and 10 is entitled to take possession of the acquired land for use of public purpose. Even otherwise on making the award and offering to pay compensation he is empowered under Section 16 to take possession of the land. Such land vests in the Government free from all encumbrances. The only power for the Government under Section 48 is to denotify the lands before possession is taken. *Thus, in the scheme of the Act, the Land Acquisition Officer has no power to create an encumbrance or right in the erstwhile owner to claim possession of a part of the acquired land in lieu of compensation. Such power of the Land Acquisition Officer if is exercised would be self-defeating and subversive to public purpose."*

(emphasis supplied)

The Court also considered the question whether the appellant could challenge the award in the execution proceedings and answered the same in affirmative. The reasons for this conclusion are contained in para 8 of the judgment, the relevant portion of which is extracted below:

"…..We have already said that what is executable is only an award under Section 26(2), namely, the amount awarded or the claims of the interests determined of the respective persons in the acquired lands. Therefore, the decree cannot incorporate any matter other than the matters determined under Section 11 or those referred to and determined under Section 18 and no other. *Since we have already held that the Land Acquisition Officer has*

no power or jurisdiction to allot land in lieu of compensation, the decree even, if any, under Section 18 to the extent of any recognition of the directions in the award for the allotment of the land given under Section 11 is a nullity. It is open to the appellant to raise the invalidity, nullity of the decree in execution in that behalf. Accordingly we hold that the execution proceedings directing delivery of possession of the land as contained in the award is, invalid, void and inexecutable……"

(emphasis supplied)

10. The legality and correctness of order dated 24.9.1993 passed by the Division Bench of the Rajasthan High Court in D.B.C.S.A.W. No.680 of 1992 was considered in *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and others* (1997) 1 SCC 35. This Court noted that the Lokayukta of Rajasthan had severely criticized the actions of the then Minister of Urban Development and Housing Department, Commissioner, Jaipur Development Authority and Zonal Officer of Lal Kothi Scheme, referred to the Rajasthan Improvement Trust (Disposal of Urban Land) Rules, 1974 and held:

"Therefore, there was no policy laid by the Government and it cannot be laid contrary to the aforestated rules and no such power was given to individual Minister by executive action, as the land was already notified conclusively under Section 6(1) for public purpose, namely, earmarked scheme. Since the persons whose land was acquired were not owners having limited interest therein, qua the owners having lost right, title and interest therein, the sub-awardees or nominees, after the acquisition under Section 4(1), would acquire no title to the land nor such ultra vires acts of the Minister would bind the Government. The actions, therefore, taken by the Minister-cum-Chairman of the appellate authority and bureaucrats for obvious reasons would not clothe the respondents with any vestige of right to allotment.

Acceptance of the contentions of the respondents would be fraught with dangerous consequences. It would also bear poisonous seeds to sabotage the schemes defeating the declared public purpose. The record discloses that such allotment in many a case was in violation of the Urban Land Ceiling Act which prohibits holding the land in excess of the prescribed ceiling limit of the urban land. In some instances, a person whose land of 500 square yards was acquired, was compensated with allotment of 2000 square yards and above, which is against the public policy defeating even the Urban Land Ceiling Act. Would any responsible Minister or a bureaucrat, with a sense of public duty and responsibility, transfer such land to sabotage the planned development of the scheme? Answer has obviously to be in the negative. The necessary inference is that the policy does not bear any insignia of a public purpose, but appears to be a device to get illegal gratification or distribution of public property defeating the public purpose by misuse of public office."

(emphasis supplied)

The Court further held that the decision taken by the Minister and the actions of the bureaucrats were meant to benefit only those who had illegally secured transfer of land after the publication of the notification issued under Section 4 and that the so called policy is a policy to feed corruption and to deflect the public purpose. This is evinced from para 23 of the judgment, which is extracted below:

"There is no iota of evidence placed on record that under the so-called policy, anyone from general public could equally apply for allotment of the plots or was eligible to apply for such allotment nor any such general policy was brought to our notice. The allotment has benefited only a specified class, namely, the awardees, sub-awardees or nominees and none else. *The decision by the Minister or*

the actions of the bureaucrats was limited to the above class which included the respondents. Legitimacy was given to the void acts of Chottey Lal, the erstwhile owner as well as the LAO. Directions were given by the Minister and the bureaucrats acted to allot the land under the very void acts. They are ultra vires the power. These acts are in utter disregard of the statute and the rules. Therefore, by no stretch of imagination it can be said to have the stamp of public policy; rather it is a policy to feed corruption and to deflect the public purpose and to confer benefits on a specified category, as described above."

(emphasis supplied)

The plea of discrimination which found favour with the High Court was also negatived by this Court by making the following observations:

"The question then is whether the action of not delivering possession of the land to the respondents on a par with other persons who had possession is an ultra vires act and violates Article 14 of the Constitution? We had directed the appellants to file an affidavit explaining the actions taken regarding the allotment which came to be made to others. An affidavit has been filed in that behalf by Shri Pawan Arora, Deputy Commissioner, that allotments in respect of 47 persons were cancelled and possession was not given. He listed various cases pending in this Court and the High Court and executing court in respect of other cases. It is clear from the record that as and when any person had gone to the court to get the orders of the LAO enforced, the appellant-Authority resisted such actions taking consistent stand and usually adverse orders have been subjected to decision in various proceedings. Therefore, no blame of inaction or favouritism to others can be laid at the door of the present set-up of the appellant-Authority. When the Minister was the Chairman and had made illegal allotments following which possession was

delivered, no action to unsettle any such illegal allotment could have been taken then. That apart, they were awaiting the outcome of pending cases. It would thus be clear that the present set-up of the bureaucrats has set new standards to suspend the claims and is trying to legalise the ultra vires actions of Minister and predecessor bureaucrats through the process of law so much so that illegal and ultra vires acts are not allowed to be legitimised nor are to be perpetuated by aid of Article 14. That apart, Article 14 has no application or justification to legitimise an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the same benefit. The rational relationship and legal back-up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead, nor the court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously no."

While repelling the argument made on behalf of the respondents that the judgment in *Radhey Shyam's* case was *per incuriam*, this Court observed:

"The basic postulate of the contention is the omission to refer to Rules 31 and 36 of the Rajasthan Land Acquisition Rules, 1956. Rule 31 was made to guide the exercise of power of the Collector (LAO) under Section 31(3) of the Act. As seen, the Government has empowered the Collector to allot "any other land' in lieu of money compensation only when the land acquired belongs to a person having "limited interest in the land", like widow's

estate or minor's estate, Mutawali etc. In that behalf, Rule 31 amplifies the exercise of the power by the authorised LAO. It says that the Collector cannot force a party to take land in lieu of cash. Where, however, the interest of the party is so limited, as in the case of a trustee of a wakf property or a Hindu widow, as to make it extremely difficult, if not impossible, to arrive at an adequate cash estimate of its value or where, from the circumstances of a case, it is impossible to place the parties concerned by cash compensation in the same or nearly the same position as before acquisition, sub-section (3) enables the Collector to arrange to award land (subject to the same limitation of interest) in lieu of cash. In Radhey Shyam case the scope of sub-section (3) of Section 31 has been considered and explained in extenso. Rule 31 is only to elongate the discretion which the LAO is expected to exercise in awarding land in lieu of cash consideration and the circumstances in which it would be done. Equally, Rule 36 deals with disposal of the excess land acquired by the Collector for a company and imposition of the conditions for sanction of transfer of excess land. Therefore, the absence of reference to them does not make any dent into the principle of law laid in Radhey Shyam case."

11. In *Narpat Singh v. Jaipur Development Authority* (2002) 4 SCC 666, this Court again considered whether the Land Acquisition Officer could direct allotment of plots measuring 1000 to 2000 sq. yds. to the landowners and their transferees etc. The appellants in that case were the owners of some parcels of land acquired by the State Government. They were also beneficiaries of the direction given by the Land Acquisition Officer. After disposal of the appeals filed by the Trust against the award passed by District Judge, Jaipur City, Narpat Singh and others filed execution application seeking implementation of the award made by the High Court. The appellant, who had succeeded the Trust, did not contest the application. Therefore, the Executing Court passed *ex parte*

order and issued warrant of possession. The revisions filed against the order of the Executing Court were dismissed by the High Court, but in the special leave petitions, this Court gave liberty to the State Government and the appellant to raise objections before the Executing Court with a direction to the latter to decide the same after hearing the parties. Thereafter, the Executing Court reconsidered the matter and passed order dated 1.6.1990 whereby it rejected the objections filed against the prayer made by Narpat Singh and others for delivery of possession of the plots. This time, the High Court allowed the revision filed against the order of the Executing Court and declared that the earlier judgment, which was based on compromise, suffered from inherent lack of jurisdiction and, as such, the same could not be executed. In taking this view, the High Court relied upon the judgments of this Court in *Radhey Shyam's* case and *Daulat Mal Jain***'s** case. Before this Court, it was argued that the law laid down in the two cases was not applicable to the appellants' case because the decree was passed in their favour in terms of the compromise, but this argument was not accepted by the Court and the appeals were dismissed by making the following observations:

> "Without entering into the question whether it is permissible for the Land Acquisition Officer or the Reference Court or the High Court hearing an appeal against an award made by the Reference Court to record a compromise whereunder the beneficiary of land acquisition agrees to offer land in lieu of monetary compensation and whether such a compromise would be legal and not opposed to public policy, we are of the opinion that the facts and circumstances of this case are enough to decline exercise of jurisdiction by this Court under Article 136 of the Constitution to the appellants. The exercise of jurisdiction conferred by Article 136 of the Constitution on this Court is discretionary. It does not confer a right to appeal on a party to litigation; it only confers a discretionary power of widest amplitude on this Court to be exercised for

> satisfying the demands of justice. On one hand, it is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations or situations occasioning gross failure of justice; on the other hand, it is an overriding power whereunder the Court may generously step in to impart justice and remedy injustice. The facts and circumstances of this case as have already been set out do not inspire the conscience of this Court to act in the aid of the appellants. It would, in our opinion, meet the ends of justice, and the appellants too ought to feel satisfied, if monetary compensation based on the principles for assessment thereof in land acquisition cases is awarded and in addition they are given each a plot of reasonable size to rehabilitate themselves so as to meet the demands of reasonability and consistency."

12. We may now advert to the facts of these cases. Shri Ganesh Narayan Gupta, who had purchased the acquired land in 1963 i.e. much after publication of the notification issued under Section 4 and declaration issued under Section 6, filed suit for injunction, which came to be registered as Civil Suit No.629/1983 and was renumbered as Civil Suit No.270/1985 with the prayer that the defendant (appellant herein) may be restrained from interfering with his possession over plot Nos.C-112 to C-115, Lal Kothi Scheme. During the pendency of the suit, Ganesh Narayan Gupta transferred the plots to he respondents and two others by registered sale deed , who were impleaded as plaintiff Nos. 2 to 5 vide or er dated 19.1.2001. Shri Ganesh Narayan Gupta claimed title over the plots on

he basis of the sale deed executed in his favour by K atedar - Shri Vijay Lal and subsequent allotment of plots in his favour by the Trust. The respondents laid their claim on the basis of registered sale deeds dated 18.4.1993 executed in their favour by Shri Ganesh Narayan Gupta.

13. In the written statement filed on behalf of the appellant,

it was pleaded that in view of the judgments of this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case, the orders passed in favour of Shri Ganesh Narayan Gupta as also the allotment of plots by the Trust were nullity and, as such, he did not acquire any right over the suit land and he could not have transferred the plots to the respondents.

14. On the pleadings of the parties, the trial Court framed the following issues:

"1. Whether the plaintiff is owner in possession over the plot since 24.12.82.

2. Whether the defendant out of prejudice and anger is neither accepting the application and site plan from the plaintiff nor is approving them.

3. Whether the defendant wants to demolish the construction existing on the disputed plot in an illegal manner without giving notice?

4. Whether against handing over possession in execution proceedings, appeal has been preferred and what is its effect on the suit.

5. Whether possession of the plaintiff is not legal possession and he is encroacher.

6. Relief.

Additional Issue No.7

7. Whether the plaintiff No.1 has cased to have any interest with the property in dispute. In place of plaintiff No.1, the plaintiffs Nos. 2 to 5 have got right over the disputed property in consequence of sale of property."

15. The trial Court considered the evidence produced by the parties, referred to the judgments of this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case and held that plaintiff

No.1 – Shri Ganesh Narayan Gupta is not entitled to relief of injunction because he could not prove his ownership over the suit land. The process of reasoning by which the trial Court reached this conclusion is evinced from the discussion made under issue No.1, the relevant portions of which are extracted below:

"The burden of proof regarding this issue lay on the plaintiffs part. The plaintiff side was required to prove that since 24.12.82 he has been owner in possession over the plot in dispute. The case of the plaintiff as per plaint is that on 6.1.64 the Land Acquisition Officer passed a joint award under which the land of the plaintiff No.1 was also acquired and the plaintiff No.1 was recommended a residential plot of 1500 square yards and compensation amount in lieu thereof as mentioned in the award. When the defendant as per the award did not give plot of land and compensation to the plaintiff No.1, then he filed execution application and over so many dates when compliance of the award was not made, then warrant of possession was issued from the court and the court through sale Ameen handed over physical possession on site by beating the drum on 24.12.82. The plaintiff since then as per para 5 of the plaint has been in possession over the disputed plot situated in Lal Kothi Bhojpura and Chak Sudarshanpura Scheme. The defendant in the written statement has denied these facts alleging to be wrong and has stated that under the judgment of Hon'ble Supreme Court, the Award in respect of the disputed land has been set aside. Filing of execution application by the plaintiff is admitted and rest of the averment is denied.

The plaintiffs have not led any oral and documentary evidence in support of their case inspite of affording opportunity nor filed process fee for summoning the record of Execution Case nor obtained dasti from the court. The plaintiffs for continuously five years have not taken any

steps for summoning the record of Execution Case inspite of court direction nor adduced any evidence while on the other hand the defendant produced in evidence officer incharge Shri Maghraj Ratnu D.W.1, who has stated in his statement that the Land Acquisition Officer passed award dated 9.1.64 for the land in connection with planned development under the Lalkothi Scheme under which besides cash compensation simultaneous recommendation to allot plots of different size was made. Many awardees were allotted plots. In this connection various litigations were initiated in the Court. Similar award was passed in the year 1974. In the case of Civil Appeal J.D.A. versus Radheyshyam and others and Secretary J.D.A. versus Daulatmal Jain and others the Hon'ble Supreme Court has affirmed payment of compensation to be right and recommendation regarding allotment of plots is held to be illegal and void. The Land Acquisition Officer while passing the award for compensation was not competent to recommend for allotment of plot of land in lieu thereof. In this way the plaintiffs have got neither any proprietary right nor any possession over the disputed plot of land. The plaintiffs have concealed the facts. The plaintiff Ganesh Narayan has not been allotted plot of land by the J.D.A.

The plaintiff has not cross examined the said witness D.W.1 produced by the defendant in evidence. I have sought guidance from judgments in both the cited cases namely Civil Appeal No.12370/96 Secretary J.D.A. versus Daulatmal Jain and Civil Apepal No.4209 and 4210/09. In both the judgments the Hon'ble Supreme Court has held award in respect of allotment of plot of land by way of compensation under the Lalkothi Scheme to be illegal and initially null & void. The plaintiffs have not rebutted the evidence adduced from the defendant's side nor produced any evidence. In the light of citations produced the ownership of the plaintiff No.1 over the disputed plot since

24.12.82 is not found. For want of evidence the possession of the plaintiff is also not proved. Consequently this issue is decided against the plaintiff."

16. After purchasing the plots from Shri Ganesh Narayan Gupta, the respondents filed applications under Section 83 of the Jaipur Development Authority Act, 1982 (for short, "the 1982 Act") questioning notice dated 19.12.1996 issued by the appellant for auction of the two plots. The Appellate Tribunal constituted under the 1982 Act (hereinafter referred to as, `the Tribunal'), relied upon the judgments in *Radhey Shyam's* case and *Daulat Mal Jain's* case and held that the respondents do not have the locus to challenge the proposed auction because transactions involving purchase of land by Shri Ganesh Narayan Gupta from the original Khatedar and subsequent purchase of plots by the respondents were nullity. Paragraphs 7, 9 and 11 of order dated 22.1.1997 passed in Vijay Kumar Data's case (identical order was passed in Daya Kishan Data's case), which contain the detailed reasons recorded by the Tribunal are extracted below:

"7. The Land Acquisition Act provides some powers and jurisdiction in favour of the Land Acquisition Officer, but simultaneously regarding awarding of land out of the land acquired to the khatedar or erstwhile owner some powers are vested about which the Hon'ble High Court in 1994(4) S.C.C. 370 and earlier cited judgment in the case of J.D.A. versus Daulatmal Jain, it is clearly laid down that the Land Acquisition Officer out of the acquired land at the time of passing the Award cannot award land by way of consideration and if he has done so, the act of the Land Acquisition Officer is ab initio void, illegal and ineffectual and on that basis no proprietary rights can accrue in respect of that land in favour of any body and the Award which in the shape of a decree has reached the final stage that too cannot bestow any right upon the appellant, because this decree is ab initio void, illegal and

proceedings done in compliance of it and possession given is also illegal and irregular. The Hon'ble Supreme Court in this judgment under citation has held the allotment of the plot to be illegal. In view of these two cited judgments it is clearly ensured that the Land Acquisition Officer had no right to award land by way of consideration out of the acquired land and on the basis of ab initio void and illegal act Ganesh Narayan Gupta could never acquire proprietary right because neither Ganesh Narayan Gupta could be owner of this acquired land nor the Land Acquisition Officer award any basis for right of ownership to Ganesh Narayan Gupta. *Thus on the given land no right of ownership is accrued in favour of Ganesh Narayan Gupta and entire subsequent proceedings done in respect of this land is void in itself. Under the circumstances in view of the cited judgment of Hon'ble Supreme Court when Ganesh Narayan had no proprietary right, then after him question does not arise that the subsequent owners would have any right. Therefore the appellant also cannot have any basis or right in respect of this land.*

9. When the notification under section 4 regarding acquisition of this land was published on 19.6.60 and declaration under section 6 was published in 1961, then Ganesh Narayan had no right to purchase this land in 1963 and after publication of this notification out of the land to be acquired if Ganesh Narayan at all purchased any land, even then no right of ownership can accrue to Ganesh Narayan Gupta in respect of this land. Thus the act of Ganesh Narayan to purchase this land is in contravention of rules and is void.

11. The act of the Land Acquisition Officer of giving plot of land to Ganesh Narayan out of the land acquired is ab initio void, publication of notifications under sections 4 and 6 in 1960 and 61 and after publication of this notification purchasing of land by Ganesh Narayan and subsequently by the appellant from Ganesh Narayan is void, and no right is available under

the circumstances to the appellant and on the basis of law laid down in the cited judgments in 1994(4) S.C.C. 370 and in J.D.A. versus Daulatmal Jain, the appellant has failed to establish any of his right or basis. Therefore, this appeal of the appellant against the respondent is not maintainable."

(emphasis supplied)

17. The respondents challenged the orders passed by the Tribunal in S.B. Civil Writ Petition Nos.1047 of 1997 and 1046 of 1997. They pleaded that by virtue of the sale deeds executed by Shri Ganesh Narayan Gupta, they have become owners of the plots and the appellant has no right to auction the same. They relied upon Section 144 of the Code of Civil Procedure and claimed that the appellant is duty bound to restore the land to them because the action taken for depriving them of the possession was wholly illegal.

18. In the written statement filed on behalf of the appellant, it was pleaded that plot Nos.C-113 to C-117, Lal Kothi Scheme were allotted to Bhagwan Das Khera in 1979 but, later on, the said allotment was cancelled. It was further pleaded that in view of the law laid down by this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case, the allotment made in favour of Shri Ganesh Narayan Gupta in compliance of the order passed by the Executing Court has to be treated as nullity and he had no right to transfer the plots to the writ petitioners.

19. The learned Single Judge dismissed the writ petitions by observing that the dispute regarding title of plot Nos.C-113 to C-114 cannot be decided under Article 226 of the Constitution. The learned Single Judge noted that no material was placed before the Court to show that the two plots were allotted either to the original Khatedar or to the writ petitioners whereas the respondents had produced documents to prove that the plots were allotted to one Bhagwan Das Khera and the allotment made in his favour was also cancelled.

20. The Division Bench of the High Court did not find any error in the view taken by the learned Single Judge that dispute relating to title of the property cannot be decided under Article 226 of the Constitution of India, but entertained and accepted an altogether new case put forward by the counsel for the writ petitioners (the respondents herein) that in terms of the policy decision taken by the State Government, which was circulated vide letter dated 6.12.2001 and order dated 9.1.2002 passed by another Division Bench in D.B. Civil Writ Petition No.5776/ 2001 (suo motu) – Rajasthan High Court v. State of Rajasthan and others, his clients were entitled to regularization of the plots in question.

21. Shri S.K. Bhattacharya, learned counsel for the appellant assailed the impugned judgment mainly on the ground that it runs contrary to the law laid down in *Radhey Shyam's* case and *Daulat Mal Jain's* case. Learned counsel submitted that in view of the declaration of law made in *Radhey Shyam's* case that the Land Acquisition Officer did not have the jurisdiction to allot land to the awardees, sub-awardees and their nominees/sub-nominees, the so-called policy framed by the State Government for regularisation of illegal allotments is liable to be treated as nullity and the Division Bench of the High Court committed serious error by extending the benefit of that policy to the respondents ignoring that Shri Ganesh Narayan Gupta from whom they had purchased the plots did not have title over the land and also that no such case was set up in the writ petition filed by them. Shri Bhattacharya then argued that the concurrent finding recorded by the Tribunal and the trial Court that the transaction involving purchase of land by Shri Ganesh Narayan Gupta after publication of the notification under Section 4 was nullity is binding on the respondents and they did not have the locus to take benefit of the so called policy of regularization contained in letter dated 6.12.2001.

22. Shri M.L. Lahoty, learned counsel for respondent – Vijay Kumar Data argued that the order passed by the

Executing Court for delivery of possession of 1500 square yards land to Shri Ganesh Narayan Gupta will be deemed to have become final and is binding on the appellant because revision filed against that order was dismissed by the High Court and it is not open for the appellant to indirectly question the allotment of plot Nos. C-113 to C-117 to Shri Ganesh Narayan Gupta. Shri Lahoty submitted that in compliance of the direction given by the Executing Court, the concerned authority had delivered possession of the plots to Shri Ganesh Narayan Gupta and being bonafide purchasers, the respondents are entitled to seek protection of their possession. He then argued that the policy contained in circular dated 6.12.2001 is based on the decision taken by the Cabinet Sub-Committee and the Division Bench of the High Court did not commit any error by directing regularisation of the allotment of plot Nos.C-113 to C-114 in favour of the respondents by relying upon order dated 9.1.2002 passed by the coordinate Bench in D.B. Civil Writ Petition No.5776 of 2001 (Suo Motu). Shri Lahoty pointed out that in furtherance of the policy decision taken by the State Government, the appellant has executed lease deeds in favour of large number of persons who had been benefited by the direction contained in the award passed by the Land Acquisition Officer and argued that the appellant cannot adopt different yardsticks while dealing with similarly situated persons.

23. In furtherance of the liberty given by the Court on 31.3.2011, Shri M.L. Lahoty filed written arguments on 7.4.2011 enclosing therewith documents marked as Annexures 'A' to 'E'. Of these, Annexure 'A' is xerox copy of order dated 20.11.1987 passed by Civil Judge, Jaipur City, Jaipur whereby he dismissed an application filed by Dr. Bhagwan Das Khera under Section 47 read with Order XXI Rules 97 and 99 of the Code of Civil Procedure, 1908. Annexure 'B' is the copy of sale deed dated 18.4.1993 executed by Shri Ganesh Narayan Gupta in favour of respondent-Vijay Kumar Data. Annexure 'C' is the copy of order dated 30.10.2001 by which a Committee consisting of Minister of Urban Development, Home Minister, Finance Minister, Industries Minister, State Minister for Mines

was constituted for solving the problems pertaining to regularisation of illegal construction and encroachment of land in the Lal Kothi and Prithviraj Nagar Schemes. Annexure 'D' is xerox copy of order dated 9.1.2002 passed by the Division Bench of the High Court in D.B. Civil Writ Petition No.5776 of 2001 (Suo Motu). Annexure 'E' is a bunch of lease deeds dated 1.1.2003, 24.8.2002 and 16.8.2002 executed by the appellant in favour of different persons in respect of different plots of land situated in the Lal Kothi Scheme.

24. Shri A.D.N. Rao, learned counsel for Smt. Sunita Agarwal, whose application for impleadment was allowed on 31.3.2011, argued that the direction given by the Division Bench of the High Court should be set aside because plot No.C-114, Lal Kothi Scheme was purchased by his client in the auction held by the appellant on 26.12.1996. Shri Rao pointed out that possession letter was issued in favour of his client on 17.6.2000 and registered sale deed was executed on 21.6.2000. Similar prayer has been made on behalf of Shri D.S. Bhandari and two others, who also filed impleadment application being I.A. No.3/2008. In that application, it has been averred that the applicants were successful in the auction held by the appellant on 19.6.2000 in respect of plot No.C-113, Lal Kothi Scheme and after deposit of the entire money, the appellant executed sale deed dated 7.4.2005 and delivered possession on 13.5.2005. It has been further averred that after getting necessary approval from the appellant on 23.1.2007, the applicants have constructed house on the plot and occupied a portion thereof and leased out another portion to one Mr. Vijay Sharma.

25. We have considered the respective arguments and submissions and carefully scanned the records. We have also gone through the written arguments furnished by learned counsel for respondent – Vijay Kumar Data.

26. The first question which needs consideration is whether the Division Bench of the High Court could have granted relief

to the respondents by entertaining an altogether new case set up by their counsel with reference to the so called policy framed by the State Government for regularization of the illegal allotments / encroachments of the acquired land in the Lal Kothi and Prithviraj Nagar Schemes.

27. It is not in dispute that the only issue raised in the writ petitions filed by the respondents was whether the Tribunal was right in dismissing the applications filed by them against the auction of plot Nos. C-113 and C-114, Lal Kothi Scheme. The Tribunal had negated the respondents' challenge on the ground that Shri Ganesh Narayan Gupta from whom they had purchased the plots vide sale deeds dated 18.4.1993 did not have valid title. The Tribunal noted that Shri Ganesh Narayan Gupta had purchased land from its Khatedar Shri Vijay Lal son of Shri Ram Sukhji after publication of the notification issued under Section 4 and held that such transactions did not create any title in his favour. The Tribunal also relied upon the judgments of this Court in Radhey Shyam's case and Daulat Mal Jain's case and held that once the Supreme Court had declared the transactions involving purchase of the acquired land and the direction given by the Land Acquisition Officer for allotment of land to the awardees, sub-awardees and their nominees/sub-nominees to be nullity, the transferees of such purchasers cannot claim any right over the plots which were auctioned by the appellant. In the opinion of the Tribunal, when the purchase of land by Shri Ganesh Narayan Gupta was null and void, he could not have transferred a valid title in favour of the respondents so as to enable them to challenge the advertisement issued by the appellant for auction of the two plots. The learned Single Judge dismissed both the writ petitions primarily on the ground that the disputes questions of fact relating to title of the plots cannot be determined under Article 226 of the Constitution and the writ petitioners are free to avail any other alternative remedy for determination of their rights.

28. What is most significant is that till the disposal of the

writ petitions by the learned Single Judge, the seeds of the so called policy decision, which was allegedly circulated vide letter dated 6.12.2001 had not even been sown. A reading of Annexure 'C', which forms part of the written arguments filed by Shri M.L. Lahoty, learned counsel for respondent – Vijay Kumar Data, shows that the Committee of Ministers was formed vide order dated 30.10.2001 to suggest solution of the problems in the regularization of illegal constructions/ encroachments of land under the Lal Kothi and Prithviraj Nagar Schemes in relation to which several cases were pending in different Courts. The recommendations made by the Committee were given the colour of the Government's decision (though, no material has been placed on record to show that the recommendations made by the Committee were accepted by the State Government) as would appear from letter dated 6.12.2001 written by Deputy Secretary (Administration), Urban Development Department to the Secretary, Jaipur Development Authority, Jaipur. That letter reads as under:

"GOVERNMEN OF RAJASTHAN
URBAN DEVELOPMENT DEPARTMENT

No.F.3(32)UDD/3/2001 Jaipur Dated: Dec. ,2001
6 DEC 2001

The Secretary,
Jaipur Development Authority,
Jaipur.

Subject: Regarding regularization of illegal construction /encroachment under Lal Kothi Scheme.

Sir,

In the above context it is stated that under the Ministerial Secretariat Order No.F. 4(1)M.M./99 dated 30th October, 2001 for the solution of problems arising from comp1ications of regularization of illegal construction/ encroachments under Lal Kothi and Prithviraj Nagar

Schemes, a sub committee was constituted. This Sub Committee comprised of Minister, Urban Development as convenor and Home Minister, Finance Minister, Minister for Industries and State Minister for minerals were nominated its members and Secretary Administration, Urban Development Department was nominated as member secretary of this sub committee.

The Committee discussed in detail over various aspects of Lal Kothi Scheme and after taking into consideration the entire facts unanimously took the following decision:

1. As per the awards pronounced so far under the Lal Kothi Scheme, whatever amount is due for payment to the awardees, that may be paid to the concerned cultivators.

2. The awardees who besides compensation amount could not be allotted plot of land or after allotment were cancelled, may now be allotted per awardee a plot measuring 250 square yards in other schemes of J.D.A. Such plot be awarded at rate of 25 percent of the prevalent residential reserved rate under the scheme.

3. The developed and vacant plots be regularized in the similar manner. These may be regularized at the following rates:

A) up to 200 sq.yards	25 percent of the reserved residential rate.
B) More than 200 sq. yards	35 percent of the reserved residential rate

4. In the remaining cases of worth regularizing plots of Everest and Salt colonies (which are about 80 plots) which could not be regularized inspite of decision of 1976, the rate of regularization is fixed at 25 percent of the reserved residential rate.

5. In connection with regularization of the plots the amount on the basis of self-assessment be asked to be deposited by 28.2.2002.

6. Those who fail to get regularisation within stipulated time limit, it is decided to afford them opportunity of depositing the amount by 31.3.2002 with 5 per cent, additional amount to obtain regularization. After expiry of the said date, it is decided that no regularization be done and after notice to such occupants over the plots their construction shall be demolished and such plot's shall then vest in the Authority and for the purpose of rehaoi1itation they shall be allotted as residential plots under other schemes of Jaipur Development Authority.

7. The plots which are not regularized under this order, they be finally refused and their list be published in the news paper, and possession on the site if any, be removed.

8. The awardees/sub awardees whose allotments have not yet been cancelled, but they have construction on site of their plots, it is decided that their earlier allotment be cancelled and treating the plot as acquired, on the basis of possession, be regularized under this order. It is decided to adjust the amount deposited earlier. On interest shall be chargeable on this amount.

9. In the cases wherein litigation is pending in courts, in connection with them it is decided to follow action as under:

(a) Such of the vacant plots where there is stay order from the court or any adverse order etc. in force and which have been taken over in possession by the Jaipur Development Authority as per rules, it is decided to sell them through auction. It is decided to draw a list or such plots.

(b) In cases of acquired or under acquisition and / plot of land/constructed building which is under effect of any order or stay order from the court, in connection with them it is decided to follow action as under:

Where in connection with acquired or under acquisition land/plot of land/constructed building stay order/ order for status quo is issued in favour of cultivator, it is decided to follow regularization proceeding in favour of such cultivator treating the land/ plot of land/ constructed building in his favour. If the order/ stay order/ order for status quo is in favour of J.D.A. then treating the concerned plot/land to be of J.D.A. it is decided to follow further taken and such plot/land is decided not to be regularized. On the contrary if such orders are in favour of other person and he is in possession, and he withdraws the case from the court, then regu1arization of that plot/land be done in his favour. In cases of plots where J.D.A. has gone in appeal and no decision is taken by the court in favour of the Authority then honouring the judgment of the court below, case shall be withdrawn by the J.D.A. the plot/ land/ constructed building is decided to be regularised in favour of concerned person. In such cases the basis of regularization will be physical possession. In connection with regularization on above basis, the Samjhota Samiti will review each and every case and give its decision which shall he binding on J.D.A.

10. In connection with land under acquisition, land of 9 bigha 6 biswa of Pratap Nursary, 5 bigha of Anand Nursary, 2 bigha 12 biswa of Kailashwati, Maharchand & Sons is decided not to acquire. Simultaneously it is decided to regularize on payment of 25 percent of reserved residential rate of these land.

No decision was taken in connection with land of Amrudon

Ka Bagh. It is thought proper to take any action after decision from Delhi High Court.

Yours faithfully,
Sd/- 6.12.01
(H.S. Bhardwaj)
Dy. Secretary Administration"

29. In our view, the Division Bench of the High Court committed serious error by entertaining an altogether new case set up on behalf of the respondents, who had not even prayed for amendment of the pleadings and granted relief to them by declaring that they are entitled to get benefit of the policy of regularization contained in letter dated 6.12.2001. It is difficult, if not impossible, to comprehend as to how the Division Bench could rely upon the so called policy decision taken by the Government in flagrant violation of the two judgments of this Court wherein it was categorically held that the transactions involving transfer of land after the issue of notification under Section 4 were nullity and the Land Acquisition Officer did not have the jurisdiction to direct allotment of land to the awardees/ sub awardees, their nominees/sub-nominees. The basics of judicial discipline required that the Division Bench of the High Court should have followed the law laid down by this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case and refused relief to the respondents.

30. Another grave error committed by the Division Bench of the High Court is that it ignored the unchallenged findings recorded by the Tribunal and the trial Court that the transferor of the respondents, namely, Shri Ganesh Narayan Gupta did not have valid title over the land and he had no right to secure allotment of 1500 sq. yds. land in the Lal Kothi Scheme and that the order passed by the Executing Court for delivery of possession was liable to be ignored in view of the law laid down in *Radhey Shyam's* case and *Daulat Mal Jain's* case.

31. At this juncture, we may notice order dated 9.1.2002 passed by the Division Bench of the Rajasthan High Court in

D.B. Civil Writ Petition No.5776/2001 (Suo Motu) titled Rajasthan High Court v. State of Rajasthan and others. The preface of that order shows that a learned Single Judge of the High Court had suo motu taken cognizance of three different news items dated 8.12.2001, 10.12.2001 and 11.12.2001 published in the daily newspaper – Rajasthan Patrika, Jaipur edition. The first news item highlighted the grievance of one Lali Devi against the construction of road through her land. The second news item related to regularization of the Lal Kothi Scheme and the third news item related to the alleged irregularities committed in the construction of high rise buildings. When the matter was listed before the Bench, which had the roster to hear such matters, it was felt that the issue raised in the order passed by the learned Single Judge who, in our considered opinion, was not at all justified in suo motu taking cognizance of the newspaper reports and the order made by him could appropriately be termed as *coram non judis*, directed that the matter be placed before the Division Bench. On behalf of the State Government and the appellant, affidavits were filed to justify the so called policy contained in letter dated 6.12.2001. 15 villagers of village Herver and some residents of Everest Colony, Lal Kothi also appeared before the Division Bench through their advocates. While dealing with the second news item, the Division Bench did take cognizance of the fact that people having connection in the power corridors and those who were economically affluent had illegally taken possession of the acquired land and raised construction, but approved the so called policy decision taken by the State Government to regularize the illegal transfers. The reasons recorded by the Division Bench of the High Court for adopting this course are extracted below:

> "The second item with regard to the regularisation of Lal Kothi Scheme is concerned, declaration has been taken as a part of the policy by the Government and there is ample authority of law to support the contention that such policy decisions cannot be made the subject matter of the

judicial review. No doubt in the cases where any policy decision is taken for any reasons which are against the public interest, the judicial review is possible, but in case of this nature, 'it cannot be said in the facts and circumstances of this case which have been established before us with support of documents Including documentary evidence of contemporaneous nature that public interest has not suffered in any manner by the decision of regu1arisation. To bring an end to a 40 years prolonged agony of litigation without any avail to the State, realising the ground realities that demolition of hundreds of constructed houses of the members of public belonging to middle/lower middle class is a tough task coupled with other considerations which are germane, if the popular (elected) Government has taken a policy decision in tune with the pulse of masses, it is difficult for this Court to say that it is contrary to public interest. Public interest litigation is of-course meant to protect the rights and to take care of the problems of those who cannot take care of themselves in want of awareness of their own rights or to espouse a common cause and in such cases, the cognizance can certainly be taken by the Court even by way of suo-motu action in a given case on the basis of the news item or otherwise, but the public interest is neither an unbridled nor an unruly horse, which can enter any arena in an aimless race. In view of the reply public interest is transparent in the State action and we are satisfied and convinced that had there been a correct and complete disclosure of full facts perhaps the cognizance may not have been taken by the Court suo-motu. Be that as it may, now that the full facts have come on record and we have heard all the parties which are present, we have no hesitation in holding that in the instant case, there is no scope of any judicial review and to sit over the wisdom of the state functionaries and therefore, no interference is warranted by this Court with the decision which has been taken by the Government, as a part of public policy. In

larger public interest even if the Government has to pay a little price, it is a small price in deed, which has to be paid, if at all we want the object of a welfare State to prevail.

It may also be observed in all fairness to the State that after the suo-motu action had been taken by this Court and the notices had been issued, the Government has shown due regard for Court's cognizance by, staying its own order as it is stated before us that the State Government honoured the pendency of the matter in Court by directing the J.D.A. vide order dated 31st December, 2001 not to act upon the decision dated 6th December, 2001 and not to proceed further with the process of regu1arisation and has directed the J.D.A. to produce all the relevant records before the Court. It is, therefore, clear that the decision as had been taken on 6th December, 2001 had been stayed by the Government itself, showing due regard for the action initiated by the Court. Having heard all the parties, we find that the policy decision hardly warrants any interference by this Court. The Government and all concerned are free to proceed on the basis of the order dated 6th December, 2001 as had been passed by the Government."

32. In our opinion, the High Court had undertaken a wholly unwarranted and unjustified exercise for putting the seal of approval on the so called policy contained in letter dated 6.12.2001 and, that too, by ignoring the law laid down by this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case. What the High Court has done is to legitimised the transactions, which were declared illegal by this Court and this was clearly impermissible. The High Court's understanding of the so called policy framed by the Government was clearly erroneous. The letter written by Deputy Secretary (Administration), Urban Development Department to the Secretary, Jaipur Development Authority, Jaipur cannot, by any stretch of imagination, be treated as a policy decision taken by the State Government. No document was produced before the High

Court and none has been produced before us to show that the recommendations made by the Committee of Ministers had been approved by the State Government culminating in issuance of a policy circular. It is trite to say that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in such manner as may be specified in rules to be made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. Article 77(3) lays down that:

> "The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

Likewise, Article 166(3) lays down that:

> "The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Article 166 was interpreted in *State of Bihar v. Kripalu Shankar* (1987) 3 SCC 34 and it was observed:

> "Now, the functioning of Government in a State is governed by Article 166 of the Constitution, which lays down that there shall be a Council of Ministers with the Chief Minister at the head, to aid and advise the Governor in the exercise of his functions except where he is required to exercise his functions under the Constitution, in his discretion. Article 166 provides for the conduct of government business. It is useful to quote this article:

> '166. Conduct of business of the Government of a State.—(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
>
> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.'

Article 166(1) requires that all executive action of the State Government shall be expressed to be taken in the name of the Governor. This clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this article nor even noting by a Minister. Every executive decision need not be as laid down under Article 166(1) but when it takes the form of an order it has to comply with Article 166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be

authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2)."

33. It is thus clear that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government. A reading of letter dated 6.12.2001 shows that it was neither expressed in the name of the Governor nor it was authenticated manner prescribed by the Rules. That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution.

34. We are further of the view that even if the instructions contained in letter dated 6.12.2001 could be treated as policy decision of the Government, the High Court should have quashed the same because the said policy was clearly contrary to the law declared by this Court in *Radhey Shyam's* case and *Daulat Mal Jain's* case and was a crude attempt by the concerned political functionaries of the State to legalise what had already been declared illegal by this Court.

35. Although, we are prima facie satisfied that execution of lease deeds by the appellant in favour of some persons in 2002 and 2003 is a clear indication of deep rooted malaise in the functioning of the appellant and is also indicative of sheer favouritism and nepotism, we refrain from pronouncing upon the legality of those transactions because the beneficiaries are not parties to these appeals.

36. In the result, the appeals are allowed. The impugned judgment is set aside. The writ petitions filed by Vijay Kumar Data and Daya Kishan Data are dismissed and they are directed to pay cost of Rs.5 lacs for pursuing unwarranted litigation for last over 15 years. The amount of cost shall be deposited with the Rajasthan State Legal Services Authority within a period of two months. The respondents shall be entitled to recover the price paid to Shri Ganesh Narayan Gupta along with the amount of cost by availing appropriate legal remedy.

37. Since we have found that the so called policy decision contained in letter dated 6.12.2001 is contrary to the law declared by this Court, the State Government and the appellant are restrained from taking any action in future on the basis of the said letter.

R.P. Appeals allowed.