STATE OF KARNATAKA AND ORS.
v.
JANTHAKAL ENTERPRISES AND ANR.
(Civil Appeal Nos.3293-3294 of 2011)

APRIL 15, 2011

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

Constitution of India, 1950 – Art. 226 – Writ petitions involving disputed questions of fact in regard to forest/mining/ environment matters – Duty of the Court – Held: The courts should share the legislative concern to conserve the forests and the mineral wealth of the country – Courts should be vigilant in issuing final or interim orders in forest/mining/ Environment matters so that unscrupulous operators do not abuse the process of courts to indulge in large scale violations or rob the country of its mineral wealth or secure orders by misrepresentation to circumvent the procedural safeguards under the relevant statutes – Central Government and the State Government are huge and complex organizations and many a time require considerable time to secure information and provide them to court, in matters requiring enquiry, investigation or probe – Where writ petitions involving disputed questions of fact in regard to forest/mining/ environment matters, come up for consideration, courts should give sufficient time and latitude to the concerned ministries/departments to file their objections/counters after thoroughly verifying the facts – If there is undue hurry, the concerned ministries/departments will not be able to make proper or thorough verifications and place the correct facts – A wrong decision in such matters may lead to disastrous results – in regard to public interest – financially and ecologically – Therefore, writ petitions involving mineral wealth, forest conservation or environmental protection should not be disposed of without giving due opportunity to the

concerned departments to verify the facts and file their counters/objections in writing – The instant case is a typical example where a writ petition requiring decision of disputed and unascertained factual allegations filed on 30.3.2009 was disposed of on 2.7.2009 without giving due opportunity to the mining and forest departments of the State Governments and the MoEF, to file their counter-affidavits – When there was delay of nearly a quarter century on the part of the writ petitioner in approaching the court, the writ petition ought not to have been disposed of in hardly three months, without counter-affidavits from the concerned respondents – Even though there were no counter affidavits, nor any opportunity to the respondents in the writ petition to file counter-affidavits, the High court assumed that the State and the Central Governments had conceded the claims of the first respondent in the writ petition and allowed the writ petition on 2.7.2009 – Again, the High Court without calling for objections from MoEF or the state government, on an application by the writ petitioner, amended the final order – Anxiety to render speedy justice should not result in sacrifice of the public interest – The High Court committed a serious error in hurriedly deciding seriously disputed questions of fact without calling for a counter and without there being any proper verification of the claim of the first respondent by the authorities concerned – The order of the High Court cannot be sustained –Costs of Rs.50,000/- imposed upon the first respondent payable to the State Government – Environment – Forest (Conservation) Act, 1980 – s.2 – Environment Protection Act, 1986.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3293-3294 of 2011.

From the Judgment & Order dated 2.7.2009 & 27.8.2009 of the High Court of Karnataka at Bangalore in W.P. No. 8094 of 2009.

Anitha Shenoy for the Appellants.

Dr. Abhishek M. Singhvi, V. Giri, Rohit M. Alex, P.S. Sudheer, Rishi Maheshwari, Haris Beeran, Amer Mushtaq, Radha Shyam Jena for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted. Heard.

2. The first respondent was the holder of a mining lease (No.593/993) for the period 6.7.1965 to 5.7.1985 under registered lease dated 6.7.1965 in respect of an area of 80.94 hectares in Survey No. 35(Part) of Tanigehalli and Survey No.107(Part) of Hirekandawadi villages, Holalkere Taluk, Chitradurga District, Karnataka. The first respondent filed an application for renewing the mining lease, on 22.6.1984, without seeking clearance under Section 2 of the Forest (Conservation) Act, 1980. The application for renewal was rejected on 30.9.1996. However subsequently by two notifications dated 23.8.2007, the State Government accorded sanction for the first renewal of the mining lease retrospectively for a period of twenty years (from 5.7.1985 to 4.7.2005) and for the second renewal for another period of twenty years (from 5.7.2005 to 4.7.2025) subject to clearance under Section 2 of the Forest (Conservation) Act, 1980 and environment clearance under Environment Protection Act, 1986. But the said renewals have not been granted as the first respondent did not obtain the required clearances. In fact, the proposals submitted by the first respondent, for obtaining forest clearance were returned several times for not submitting a complete proposal. In view of it, the first respondent alleges that mining activity has been carried on by the first respondent in the mining lease area, after 5.7.1985.

3. The first respondent produced before the Director, Mines & Geology, State of Karnataka, an alleged permission letter dated 14.2.2008 purportedly issued by the Ministry of

Environment and Forest, (for short 'MoEF') Government of India, addressed to the Principal Chief Conservator of Forests, Karnataka according permission to the first respondent for lifting upto one lakh Tonnes of old waste dumped in the leased area, made up of natural soil erosions and waste thrown by neighbouring mining lessees. On routine verification about the genuineness of the said communication, the MoEF informed the Secretary (Forests), Government of Karnataka, that the said letter dated 14.2.2008 was a fake letter and directed the state government to initiate criminal action against the first respondent and others responsible for the same. The first respondent subsequently admitted that the letter dated 14.2.2008 was not genuine. According to the first respondent, one Irfan Shaikh representing himself to be a clerk working at MoEF, had represented to the first respondent that he would be able to get any clearance from MoEF; that the first respondent explained its case to him; that the said Irfan Shaikh thereafter provided the said letter dated 14.2.2008 authorising lifting the old waste dumps; and that believing the said letter to be a genuine letter issued by MoEF, the first respondent had furnished it to the Director, Department of Mines and Geology, State of Karnataka. The first respondent submitted that once it came to know that the letter was a fake, it neither relied on it nor used it.

4. The first respondent filed IA Nos.2419 and 2420 of 2008 in WP (C) No.202 of 1995 (*T N Godavaraman Thirumulpad vs. Union of India)* in this Court, seeking permission to intervene and seeking direction for grant of approval of its proposal for diversion of 80.94 Hectares of forest land, for non-forest mining activity under the Forests (Conservation) Act and permission to lift 75000 MT of iron ore and 25000 MT of Manganese ore which had been previously mined and lying in the dump area of the mine. In the said applications, the petitioner averred as under :

"That in the mine in question, around 75000 MT of iron ore and 25000 MT of manganese which were previously mined and stored in the dump area are lying there (material mined before 1980). The appellant prays that it may be permitted to lift the same from the dump and sell it.

The first respondent also offered to pay the NPV for the said forest area of 80.94 Hectare, as also the amount to be paid for carrying out compensatory afforestation. The said applications were however dismissed by this court, as withdrawn, on 20.3.2009.

5. The first respondent thereafter filed a writ petition on 30.3.2009 before the Karnataka High Court (WP No.8094/2009) seeking the following relief:

"Issue a writ of mandamus directing the respondents to permit the petitioner to lift the dumped material lying in the mining yard of ML 593/993 at Hirekandawadi & Thanigehalli village of Holalkere Taluk, Chitradurga District, by collecting the requisite fee and royalty."

The State of Karnataka, Director of Mines and Geology (Karnataka), Secretary, Ministry of Environment and Forests, (Government of India), Principal Chief Conservator of Forests, Karnataka and the Conservator of Forests, Chitradurga Division were arrayed as respondents 1 to 5 in the said writ petition. The first respondent alleged as follows in support of the said prayer in the writ petition :

(a) The leased area under ML No.593/993 had been declared as reserved forest area wherein mining or other non-forest activities were prohibited without obtaining necessary clearance.

(b) When the mining activities were carried on by the first respondent between 1965 and 1980, there was no value for iron ore of grades less than 62% or 63% and the

excavated material of lesser grades were dumped as waste in the mining area. There were nine such old dumps containing 1,17,800 metric tonnes of waste material, in the leased area, consisting of material extracted prior to 1985 when the mining lease was validly in force.

(c) In view of the gradual appreciation in value of iron ore, the said dumped material became valuable and the first respondent decided to dispose of the said waste. But in spite of repeated requests, necessary clearances/transportation permits, were not issued to the first respondent who was the owner thereof, even though there was no legal impediment for grant of such clearances/permits.

6. The said writ petition came up for consideration before a division bench of the High Court on 24.4.2009 for preliminary hearing. The High Court directed issue of notice to the respondents and also issued an ex parte interim direction to the forest department, to furnish the following details to the court :

(i) What was the actual quantity of dumped material available in the mining yard?

(ii) What would be the royalty, EPF, NPV which the writ petitioner was otherwise liable to pay?

(iii) What was the damage they had caused to the flora and fauna? And

(iv) What was the extent of afforestation, if the writ petitioner was liable to make it?

7. When the matter came up for preliminary hearing on 2.7.2009, the Government Advocate handed over to the court, a copy of the report dated 18.6.2009 submitted by the Deputy Conservator of Forests, Chitradurga Division to the Principal

Chief Conservator of Forests, prepared in compliance with the order dated 24.4.2009. The said report furnished the following information:

Q: *What is the actual quantity of the available material*:

A: There are 9 old dumps in the above ML area. The quantity of the material assessed by the Dept. of Mines & Geology is 1,17,800 M.T.

Q: *Since when it is dumped and the damages caused thereto due to that dumping*:

A: As per this office records in the above ML no mining activities were carried out in the area since 1985. Due to dumping of the material, forest growth and vegetation in the area and surrounding streams are disturbed.

Q: *What is the royalty, damages has to be paid by the petitioner*?

A: The royalty is to be collected by the Dept. of Mines & Geology. Hence, the information is to be provided by the Dept. of Mines & Geology. The surrounding area about 12.00 Ha was damaged. As per the Hon'ble Supreme Court of India order dated 28/03/2008 in I.A. NO.826 in 566 with related I.As in Writ Petition (Civil) No.202/1995 the value of the damaged forest land is estimated at the rate of Rs.8.03 lakhs per Ha. Hence, for 1200 Ha. the damages in mandatory terms amounts to Rs.96.36 lakhs (Rupees Ninety six lakhs thirty six thousand only).

Q: *The amount of Net Present Value, EPF to be paid by the petitioner*

A: As per the Hon'ble Supreme Court of India order dated 28/03/2008 in I.A. NO.826 in 566 with related IAs in Writ Petition (Civil) No.202/1995 the Net Present Value is to

be paid by the petitioner is as follows:

Sl. No.	Particulars	Density Extent (in ha)	Rate of NPV (Rs. In lakhs)	Amount (Rs in lakhs)
1	Eco-Class III	Dense 80.94	8.03	649.9482

The Compensatory afforestation charges at the rate of Rs.84,000/- per ha for 80.94 ha. amounting to Rs.67,98,960/- (Rupees Sixty seven lakhs ninety eight thousand nine hundred and sixty only) if the user agency take action to transfer and mutate the 80.94 ha non-forest land in favour of the Forest Department.

If the compensatory afforestation land is not available and the petitioner fails to identify and transfer non-forest land in favour of the forest department, double the amount i.e. Rs.67,98,960 x 2 times = Rs.1,35,97,920/- (Rupees One crore Thirty five lakhs Ninety seven thousand Nine hundred and twenty only) is to be paid by the petitioner to raise the compensatory afforestation in the forest land.

Environmental loss may be assessed by the Environmental Department, Government of Karnataka."

8. At the said hearing on 2.7.2009, when the matter came up for further orders, the Government advocate appeared for respondents 1, 2, 4 and 5. There was no representation on behalf of the third respondent (MoEF, Government of India). As only a short time had elapsed after service of notice, the State and its forest and mining departments could not file their statement of objections. The Forest department claims that it could not even appoint a Litigation Conducting Officer nor furnish its parawise remarks to the counsel for preparing the counter-affidavit, for want of time. The High Court however allowed the writ petition by the impugned order dated 2.7.2009, with the following directions :

"The petitioner is permitted to remove the dumped Iron ore quantified at 1,17,800 Metric Tonnes lying in the mining yard (M.L.No.593/1993) situate at Hirekandawadi and Tanigehalli Villages of Holalkere taluk, Chitradurga District, subject to the following conditions :

(i) The iron ore which has already been extracted and quantified at 1,17,800 Metric Tonnes lying staked as on date, can be lifted by the petitioner upon proper notice to the Mining Authorities.

(ii) On getting such notice, the Mining Authorities shall depute a competent officer, who shall remain present at the time of such lifting.

(iii) Such lifting will take place in accordance with law and upon payment of required royalty to the State.

(iv) The lifting operation must be completed within a period of six weeks from the date of receipt of this order or production of the certified copy of the order, whichever is earlier.

(v) Petitioner shall make payment of the following amounts before lifting the dumped Iron ore:

a) Royalty : Rs. 11,04,375/-

b) Damage of forest land in monetary terms : Rs. 96,36,000/-

c) Net present value, EPF for the entire area : Rs. 6,49,94,820/-

d) Compensatory Afforestation charges. : Rs. 67,98,960/-

OR

Penalty on compensatory afforestation charges if the land is not available & if the petitioner fails to identify and transfer the non-forest land. :Rs.1,35,97,920/-

e) Any other statutory dues

vi) It is made clear that it is for the forest authorities to decide, whether Net present value as directed to be paid, is adjustable towards the approval under section 2 of the Forest (Conservation) Act."

9. The first respondent thereafter filed an application seeking modifications in the order dated 2.7.2009. The said application was allowed on 27.8.2009, without giving opportunity to the State or Central Government to file their objections. Direction (iii) and onwards in the operative portion of the order dated 2.7.2009 were recast as follows :

"(iii) Such lifting will take place in accordance with law and upon payment of required royalty and amount ordered to be deposited by this court, necessary permission for transport for lifting the iron ore shall be issued within thirty days of depositing the royalty and amount ordered to be deposited by the petitioner by this order.

(iv) The lifting operation must be completed within a period of six months from the date of receipt of this order or production of the certified copy of the order, whichever is earlier.

(v) Petitioner shall make payment of the following amounts before lifting the dumped Iron ore:-

a) Royalty : 11,04,375/-

b) Net present value, EPF for the entire area : 4,69,45,200/-

c) Compenatory Afforestation charges : 67,98,960/-

OR

Penalty on compensatory Afforestation charges if the Land is not available and if the petitioner fails to identify and transfer the non-forest land : 1,35,97,920/-

d) Any other statutory dues.

(vi) The petitioner shall be entitled to adjust the present amount to be paid as per the order towards amount payable as EPF for the purpose of granting permission under section 2 of the Forest (Conservation) Act".

10. The said orders dated 2.7.2009 and 27.8.2009 are challenged by the State Government and its authorities in these appeals by special leave. The appellants contended that the following incorrect factual assumptions were made by the High Court, while disposing of the writ petition, which are not borne out by the record :

(a) That the material on record showed that first respondent was not carrying on any mining activities in Mining Lease Area No.593/993, after coming into force of Forest (Conservation) Act, 1980 in the mining area;

(b) That the nine dumps of iron ore found in the mining lease area quantified at 1,17,800 metric tonnes had been validly extracted by the first respondent when the mining lease was valid and was in force (that is prior to 5.7.1985);

(c) That the respondents in the writ petition (appellants herein) did not dispute the claim of the first respondent that it had stopped the mining operations and only wanted to shift the dumped iron ore excavated prior to 1980. Therefore, the writ petitioner (first respondent herein) was

entitled to permission to remove the 1,17,800 metric tones of dumped iron ore from the mining lease area.

(d) The state Government and the central Government conceded the claim of the first respondent.

11. We find considerable force in the contentions of the appellants. Neither the State Government nor the Central Government filed any counter nor did they have sufficient opportunity to file any counter. Nor did they concede any claim of the first respondent. Apparently, the entire order was passed on the basis of the report dated 18.6.2009 submitted by the Dy. Conservator of Forests, by assuming it to be an admission on behalf of the state government. But the report dated 18.6.2009 is only a report submitted by the Deputy Conservator of Forests to the Principal Chief Conservator of Forests in pursuance of an ex-parte interim order of the High Court. Even the said report does not state that the ore in the nine dumps was mined prior to the Forest (Conservation) Act came into force, but only states that there was no mining activity in the area since 1985. The said report does not say when the said ore was mined. In fact that information was not sought by the High Court. Significantly, apart from the said report of the Deputy Conservator of Forests, there is no other material to conclude that the material was mined legally prior to 1980, when the lease was in force or that the said quantity of dumped ore belongs to the first respondent or that the first respondent is entitled to remove or sell the said material. The first respondent had not placed any material to show that the said quantities of ore had been mined before the lease expired or that the said quantifies of ore were lying at the site prior to 1980. No report was also called for from the Director of Mines & Geology which is the concerned department, or from the central government. The four questions in the order dated 24.4.2009, significantly do not refer to the following important aspects :

(i) When was the said material mined/excavated?

(ii) What is the grade (percentage of ore content) in the dumped ore?

(iii) Whether the first respondent was the owner of the dumped material?

(iv) Whether there was any impediment for removing the dumped material or transporting them?

The above questions can be answered only by the Department of Mines and Geology and not by the forest department. Be that as it may.

12. The correctness and reliability of the report dated 18.6.2009 of the Dy. Conservator of Forests is itself doubtful and far from satisfactory. The inspection and verification was not done by the Dy. Conservator of Forests who had furnished the report. The Principal Chief Conservator of Forests informed the Dy. Conservator of Forests, about the *ex- parte* interim direction of the High Court, by letter dated 30.5.2009. In turn, the Deputy Conservator directed the Assistant Conservator of Forests to give a report. The Assistant Conservator of Forests gave a report dated 16.6.2009 to the Dy. Conservator of Forests which was incorporated in his report dated 18.6.2009. There was not even an affidavit supporting or verifying the said report. The report appears to have been prepared rather casually and in a hurry. Be that as it may.

13. There was unexplained delay and laches in filing the writ petition. The lease period came to an end on 6.7.1985. The writ petition was filed twenty four years later that is in the year 2009, seeking a direction to the State Government and Central Government to permit lifting of the ore by collecting necessary fee/royalty. Except stating that the dumped material had earlier no value, there was no explanation why for 24 years, no action was taken by the first respondent either to claim ownership in respect of the said "material" or remove the same. There was no material to show that the said material was of a grade of

62% to 63% or less. There was no material to show that the first respondent had informed the Mining Authorities or Forest authorities or the state government about the existence of mined ore in the mining area in nine dumps, either by way of returns, reports or otherwise. The first respondent had earlier produced a fake document dated 14.2.2008 wherein it was stated that the waste dumps (of one lakh tones) was not *mined material but consisted of natural eroded soil and wastage thrown from neighbouring mines*. Though first respondent subsequently admitted that the said letter dated 14.2.2008 was a fake, it did not aver that the contents of the document were false and concocted. Thus at one stage before filing the writ petition, the first respondent claimed that what was sought to be removed was not mined mineral, but eroded soil and waste thrown from neighbouring mines. But in the writ petition, the first respondent claimed that the material in question was low grade ore mined by it when the lease was in force. The contradictory stands raise doubts about the claim of the first respondent.

14. The courts should share the legislative concern to conserve the forests and the mineral wealth of the country. Courts should be vigilant in issuing final or interim orders in forest/mining/Environment matters so that unscrupulous operators do not abuse the process of courts to indulge in large scale violations or rob the country of its mineral wealth or secure orders by misrepresentation to circumvent the procedural safeguards under the relevant statutes. The court should also realise that Central Government and the State Government are huge and complex organizations and many a time require considerable time to secure information and provide them to court, in matters requiring enquiry, investigation or probe. Where writ petitions involving disputed questions of fact in regard to forest/mining/environment matters, come up for consideration, courts should give sufficient time and latitude to the concerned ministries/departments to file their objections/ counters after thoroughly verifying the facts. If there is undue hurry, the concerned ministries/departments will not be able to

make proper or thorough verifications and place the correct facts. Instances are not wanting where the public interest will be sabotaged, by the officers of the state/central government who are supposed to safeguard the public interest, by colluding with the unscrupulous operators. A wrong decision in such matters may lead to disastrous results – in regard to public interest – financially and ecologically. Therefore, writ petitions involving mineral wealth, forest conservation or environmental protection should not be disposed of without giving due opportunity to the concerned departments to verify the facts and file their counters/objections in writing.

15. This case is a typical example where a writ petition requiring decision of disputed and unascertained factual allegations filed on 30.3.2009 has been disposed of on 2.7.2009 without giving due opportunity to the mining and forest departments of the State Governments and the MoEF, to file their counter-affidavits. When there was delay of nearly a quarter century on the part of the writ petitioner in approaching the court, the writ petition ought not to have been disposed of in hardly three months, without counter-affidavits from the concerned respondents. Even though there were no counter affidavits, nor any opportunity to the respondents in the writ petition to file counter-affidavits, the High court assumed that the State and the Central Governments had conceded the claims of the first respondent in the writ petition and allowed the writ petition on 2.7.2009. Again, the High Court without calling for objections from MoEF or the state government, on an application by the writ petitioner, amended the final order and reduced the Net Present Value (NPV) from Rs.6,49,94,820/- to Rs.4,69,45,200/-. Anxiety to render speedy justice should not result in sacrifice of the public interest.

16. We are of the considered view that the High Court committed a serious error in hurriedly deciding seriously disputed questions of fact without calling for a counter and without there being any proper verification of the claim of the

first respondent by the authorities concerned. The order of the High Court cannot be sustained.

17. We, accordingly, allow these appeals and set aside the order of the High Court and dismiss the writ petition filed before the High Court. We impose costs of Rs.50,000/- upon the first respondent payable to the state government.

18. The learned counsel for first respondent submitted that this order should not come in the way of the first respondent seeking appropriate remedy in accordance with law. If the first respondent has any remedy in law or cause of action for seeking any remedy, this order will not come in the way of first respondent seeking such remedy in accordance with law.

B.B.B. Appeals allowed.

DEB RATAN BISWAS AND ORS.
v.
MOST. ANAND MOYI DEVI AND ORS.
(Civil Appeal No. 2728 of 2006)

APRIL 15, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908 – s.151 – Appellants filed partition suit against the respondents – Respondents had executed General Power of Attorney in favour of two persons (to manage and collect rent of the immovable property but not conferring any right regarding title to the property) which was registered – Parties to the suit entered into compromise – Trial Court passed decree in terms of the compromise – Subsequently, Respondents filed miscellaneous petition through one of the attorneys ('S'), for recalling the decree on the allegation that the signatures on the compromise were forged – Petition dismissed by trial court – Respondents filed revision before High Court which was allowed – On appeal, held: The finding of fact recorded by the trial court that there was no forgery was based on material on record and could not have been validly interfered with in Civil Revision by the High Court – The trial court rightly held that 'S' was only an attorney and could not claim any independent capacity in the proceedings – The principal (Respondents) signed the compromise for partition of the property, which in law amounts to implied revocation of power of attorney in favour of 'S' – Respondents cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent – The High Court observed that Respondents should have consulted the power of attorney 'S' before signing the compromise petition – This is a strange kind of reasoning – The principal is not bound to consult his attorney before signing a compromise petition – The High Court also held that if 'S' was not willing to sign the compromise petition his

unwillingness should have been mentioned in the compromise petition – This also is a strange reasoning – The impugned judgment of the High Court is set aside and the order of the trial court is restored – Contract Act, 1872 – s.207, Illustration.

Deeds and Documents – Power of Attorney – Execution of – Effect – Held: Even after execution of a power of attorney the principal can act independently and does not have to take the consent of the attorney – The attorney is only an agent of the principal.

The appellants filed title suit against the respondents for partition of certain properties. While the partition suit was pending, the defendants-respondents 'P' and 'A' executed a General Power of Attorney in favour of 'U' and 'S' which was registered. The parties to the suit, including 'P' and 'A' filed a compromise petition which was approved by the trial court and a decree was directed to be passed in terms of the compromise.

Subsequently, a miscellaneous petition purporting to be on behalf of 'P' and 'A' was filed through the attorney 'S' under Section 151 CPC praying for recalling the said decree on the allegation that the signatures on the compromise were forged. The trial court held that Miscellaneous Petition filed at the instance of only one of the attorneys was not maintainable, as according to the terms of the power of attorney both the constituted attorneys were entrusted to act jointly. Hence, the miscellaneous petition filed by 'S' was dismissed. Against that order, the respondents filed a Civil Revision which was allowed by the High Court, and hence the instant appeal.

Allowing the appeal, the Court

HELD:1. The finding of fact recorded by the trial

court after detailed discussion of the evidence was that there was no forgery. This finding is based on material on record and it is a finding of fact. Hence it could not have been validly interfered with in Civil Revision by the High Court. [Para 8] [307-G-H; 308-A]

2. The trial court rightly held that 'S' was only an attorney and he cannot claim any independent capacity in the proceedings. The principal 'P' and 'A' signed the compromise for partition of the property, which in law amounts to implied revocation of power of attorney in favour of 'S' vide Illustration to Section 207 of the Indian Contract Act. 'P' and 'A' cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent. [Para 9] [308-B-D]

3. The trial court went into the evidence in great detail and recorded findings of fact which could not have been interfered with by the High Court in civil revision. It is well settled that in civil revision the jurisdiction of the High Court is limited, and it can only go into the questions of jurisdiction, but there is no error of jurisdiction in the present case. [Para 10] [308-E]

4. The High Court observed that 'P' and 'A' should have consulted the power of attorney 'S' before signing the compromise petition. This is a strange kind of reasoning. The principal is not bound to consult his attorney before signing a compromise petition. The High Court also held that if 'S' was not willing to sign the compromise petition his unwillingness should have been mentioned in the compromise petition. This also is a strange reasoning. It is well-settled that even after execution of a power of attorney the principal can act independently and does not have to take the consent of the attorney. The attorney is after all only an agent of the principal. Even after executing a power of attorney the principal can act on his own. [Paras 11, 12] [308-F-H; 309-A]

5. The impugned judgment and order of the High Court is set aside and the order of the trial court is restored. [Para 13] [309-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2728 of 2006.

From the Judgment & Order dated 21.5.2004 of the High Court of Judicature at Patna in Civil Revision No. 945 of 2002.

S.B. Sanyal, Ranjan Mukherjee for the Appellants.

Respondent-In-Person, P.S. Mishra, Pramod Swarup, Sakha Ram Singh, Pareena Swarup, Tathagat H. Vardhan, Mayur Chaturvedi, Rituraj Choudhary, Akeshey Verma, Praveen Swarup, Varinder Kumar Sharma, Atishi Dipankar for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the impugned judgment and order dated 21.5.2004 passed by learned Single Judge of the Patna High Court in Civil revision No. 945 of 2002.

2. The facts have been stated in the impugned judgment and we are not repeating the same except where necessary.

3. It appears that a Title Suit No. 186 of 1984 by one Nrisingha Prasad Biswas and his four sons (who are the appellants herein) was filed against the respondents herein before the Subordinate Judge-V, Bhagalpur for partition of certain properties. While the aforesaid partition suit was pending, the defendants Smt. Pushpa Biswas and Apurva Kumar Biswas executed a General Power of Attorney on 31.7.1992 in favour of Umesh Chandra and Dr. Sanjeev Kumar Mishra and the same was registered. The terms and conditions giving the powers to the attorneys were specifically set out in

the Power of Attorney itself.

4. On 30.7.1996, the parties to the suit including Pushpa Biswas and Apurva Kumar Biswas filed a compromise petition which was forwarded to the Sheristedar for scrutiny and report. On 31.7.1996, on receiving the report of the Sheristedar dated 30.7.1996, the Subordinate Judge-V, Bhagalpur approved the terms of the compromise and directed that a decree be passed in terms of the compromise.

5. Subsequently, on 29.8.1996, a petition purporting to be on behalf of Pushpa Biswas and Apurva Kumar Biswas was filed through the attorney Dr. Sanjeev Kumar Mishra under Section 151 CPC being Miscellaneous Case No. 13/16 of 1996 praying for recalling the order dated 31.7.1996 passed in terms of the compromise on the allegation that the signatures on the compromise were forged.

6. On 7.6.2002, the learned Subordinate Judge-V, Bhagalpur held that Miscellaneous Petition filed at the instance of only one of the attorneys was not maintainable, as according to the terms of the power of attorney both the constituted attorneys were entrusted to act jointly. Hence, he dismissed the Miscellaneous Case filed by Dr. Sanjeev Kumar Mishra.

7. Against that order dated 7.6.2002, the respondents herein filed a Civil Revision being Civil Revision No. 945 of 2002 which was allowed by the impugned judgment, and hence this appeal.

8. In the order dated 7.6.2002 in Misc. Case No. 13/96, the learned Subordinate Judge-V, Bhagalpur considered the prayer of the applicant in that Miscellaneous Case that the the compromise petition had not been signed by the petitioners and their signatures were forged. The finding of fact recorded by the learned Subordinate Judge-V, Bhagalpur after detailed discussion of the evidence was that there was no forgery. This finding is based on material on record and it is a finding of fact.

Hence it could not have been validly interfered with in Civil Revision by the High Court.

9. In his order dated 7.6.2002, the learned Subordinate Judge-V Bhagalpur has held that Dr. Sanjeev Kumar Mishra was only an attorney and he cannot claim any independent capacity in the proceedings. We agree with this view. The principal Pushpa Biswas and Apurva Kumar Biswas have signed the compromise for partition of the property, which in our opinion in law amounts to implied revocation of power of attorney in favour of Dr. Sanjeev Kumar Mishra vide Illustration to Section 207 of the Indian Contract Act. Pushpa Biswas and Apurva Kumar Biswas cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent.

10. The learned Subordinate Judge-V, Bhagalpur has gone into the evidence in great detail and recorded findings of fact which could not have been interfered with by the High Court in civil revision. It is well settled that in civil revision the jurisdiction of the High Court is limited, and it can only go into the questions of jurisdiction, but there is no error of jurisdiction in the present case.

11. We have carefully perused the impugned judgment of the High Court. The High Court has observed that defendants Nos. 2 and 2a viz., Pushpa Biswas and Apurva Kumar Biswas should have consulted the power of attorney Dr. Sanjeev Kumar Mishra before signing the compromise petition. This is a strange kind of reasoning. The principal is not bound to consult his attorney before signing a compromise petition.

12. The High Court has also held that if Dr. Sanjeev Kumar Mishra was not willing to sign the compromise petition his unwillingness should have been mentioned in the compromise petition. This also is a strange reasoning. It is well-settled that even after execution of a power of attorney the principal can

act independently and does not have to take the consent of the attorney. The attorney is after all only an agent of the principal. Even after executing a power of attorney the principal can act on his own.

13. For the reasons given above this appeal is allowed. The impugned judgment and order of the High Court is set aside and the order dated 7.6.2002 of the learned Subordinate Judge-V, Bhagalpur is restored. There shall be no order as to costs.

B.B.B. Appeal allowed.

BOOZ-ALLEN & HAMILTON INC.
v.
SBI HOME FINANCE LTD. & ORS.
(Civil Appeal No. 5440 of 2002)

APRIL 15, 2011

[R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.]

Arbitration and Conciliation Act, 1996:

s.8 – Application filed by defendant u/s.8 in a pending civil suit praying that the parties to the suit be referred to arbitration – Parties to the suit were parties to an agreement which contained a provision for settlement of disputes by arbitration – Held: Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application u/s.8, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

s.8 – First statement on substance of dispute – Defendant filed detailed affidavit opposing interim injunction application filed by plaintiff in a pending suit – Later the defendant filed application u/s.8 praying that the parties to the suit be referred to arbitration – Whether the counter affidavit filed by the defendant, in regard to the notice of motion for temporary injunction, amounted to submission of first statement on the substance of the dispute, and therefore the defendant lost the right to seek reference to arbitration – Held: Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute', if by filing such statement/application/affidavit, the defendant

shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration – But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him – In the instant case, the counter affidavit filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief – Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.

s.8 – Defendant filed detailed affidavit opposing interim injunction application filed by plaintiff in a pending suit – 20 months thereafter, the defendant filed application u/s.8 praying that the parties to the suit be referred to arbitration – Whether the application u/s.8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit – Held: Though s.8 of the Act does not prescribe any time limit for filing an application under that section, and only states that the application u/s.8 should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest – A party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement – Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit – When plaintiffs file applications for

interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application – Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit – If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration – In the instant case, at the relevant time, the un-amended Rule 1 of Order VIII of CPC was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement – The plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time – Thereafter, talks were in progress for arriving at a settlement out of court – When such talks failed, the defendant filed an application u/s.8 before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute – Mere passage of time between the date of entering appearance and date of filing the application u/s.8, cannot lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute – The High Court was therefore not justified in rejecting the application u/s.8 on the ground of delay – Code of Civil Procedure, 1908 – Order VIII, Rule 1.

ss.8 and 11 – Nature and scope of issues arising for consideration in an application u/s.11 for appointment of arbitrators and those arising in an application u/s.8, seeking reference of the parties to a suit to arbitration – Distinction between – Held: Nature and scope of issues arising for consideration in an application u/s.11 are far narrower than those arising in an application u/s.8 – While considering an application u/s.11, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability'

or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal – If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application u/s.34, relying upon sub-section 2(b)(i) of that section – But where the issue of 'arbitrability' arises in the context of an application u/s.8 in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator.

ss.8, 34(2)(b) and 48(2) – Arbitrable disputes – Term 'arbitrability' – Meaning of – Jurisdiction of the arbitral tribunal – Held: A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal – Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country – Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication – Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy – Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora – Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, u/s.8 of the Act, even if the parties might have agreed upon

arbitration as the forum for settlement of such disputes – Examples of non-arbitrable disputes stated.

s.8 – Arbitrability of dispute – Claim for specific performance – Agreement to sell/agreement to mortgage – Held: An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation – Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable.

s.8 – Arbitrability of dispute – Mortgage suits – Held: A mortgage is a transfer of a right in rem – A suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal – Consequently, the court where the mortgage suit is pending, should not refer the parties to arbitration – Even if some of the issues or questions in a mortgage suit are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided – The suit in question being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal – Code of Civil Procedure, 1908 – Order 34.

Rights – Right in rem and right in personam – Distinction between – Held: A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals – Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself – Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for

private arbitration – This is not however a rigid or inflexible rule – Judgment – Judgment in rem and judgment in personam.

The scope of section 8 of the Arbitration and Conciliation Act, 1996 arose for consideration in the instant appeal.

Capstone Investment Co. Pvt. Ltd. (respondent no.2) and RV Appliances Pvt. Ltd. (respondent No.3) were owners of flat No.9A and 9B respectively situated at "Brighton", Napien Sea Road, Mumbai. They borrowed loans from SBI Home Finance Ltd., (respondent no.1) under two loan agreements by securing the said two flats in favour of SBI. Under two leave and licence agreements, Capstone and RV Appliances permitted the appellant to use their respective flats, for a fixed term. A tripartite deposit agreement was also entered among RV Appliances and Capstone as the first party, appellant as the second party and SBI as the third party. Under the said agreement, the appellant paid a refundable security deposit of Rs.6.5 crores to Capstone and RV Appliances (at the rate of Rs.3.25 crores for each flat). Out of the said deposit of Rs.6.5 crores, a sum of Rs.5.5 crores was directly paid to SBI on the instructions of Capstone and RV Appliances towards repayment of the loan taken by Capstone and Real Value. As a consequence, the loan due by Capstone to SBI in regard to flat No.9A was cleared, but the loan taken by RV Appliances remained due and outstanding. Capstone however became a guarantor for repayment of the amount due by RV Appliances and flat No.9A was secured in favour of SBI and a charge was created in the shares relating to flat No.9A belonging to Capstone in favour of SBI, as security for repayment of the loan by R V Appliances.

Subsequently, RV Appliances made reference to Board of Industrial and Financial Reconstruction (BIFR)

under the Sick Industrial Companies (Special Provisions) Act, 1985 and in pursuance of it, flat 9B was taken over by the official liquidator. The appellant called upon the licensors (Capstone and RV Appliances) to refund the security deposit of Rs.6.5 crores, assuring that it would vacate and deliver up the licensed flats on receipt of the deposit amount. Meanwhile, as the loan amount due by RV Appliances was not repaid, SBI filed a mortgage suit in the High Court against Capstone, appellant and RV Appliances in regard to the mortgaged property (flat No.9A) for various reliefs (viz. enforcement of the mortgage to recover the amounts due to it and delivery of vacant possession of the flats) and thereafter also took out a notice of motion seeking interim relief. The appellant filed detailed counter affidavit in regard to the said notice of motion for temporary injunction, however, did not file its written statement in the suit. About 20 months thereafter, the appellant filed an application under Section 8 of the Act praying that the parties to the suit be referred to arbitration as provided in clause 16 of the deposit agreement and consequently the suit be dismissed. The High Court dismissed the application on ground that (a) Clause 16 of the deposit agreement (arbitration agreement) did not cover the dispute which was the subject matter of the claim by SBI against its borrowers (Capstone and RV Appliances) and therefore, it was not open to the appellant to request the court to refer the parties to arbitration; (b) the detailed counter affidavit filed by the appellant, in regard to the notice of motion for temporary injunction, amounted to submission of the first statement on the substance of the dispute, before filing the application under section 8 of the Act and therefore the appellant lost the right to seek reference to arbitration and c) the application under section 8 of the Act was filed nearly 20 months after the appellant filed the counter affidavit opposing the application for temporary injunction, during which period the appellant had

subjected itself to the jurisdiction of the High Court and that in view of the inordinate delay, the appellant was not entitled to the relief under section 8 of the Act.

The said order of the High Court was challenged in the instant appeal. This court while granting leave stayed the further proceedings in the suit. On the contentions urged the following questions arose for consideration of this Court:

(i) Whether the subject matter of the suit fell within the scope of the arbitration agreement contained in clause 16 of the deposit agreement;

(ii) Whether the appellant had submitted his first statement on the substance of the dispute before filing the application under section 8 of the Act;

(iii) Whether the application under section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit and;

(iv) Whether the subject matter of the suit was 'arbitrable', that is capable of being adjudicated by a private forum (arbitral tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under section 8 of the Act.

Dismissing the appeal, the Court

HELD:

Re : Question No.(i)

1. In this case, there is no dispute that all the parties to the suit are parties to an agreement which contains the provision for settlement of disputes by arbitration. The suit has been filed by SBI to enforce the mortgage to recover the amounts due to it. In that context, SBI has also

sought delivery of vacant possession. The enforcement of the charge/mortgage over the flat, realisation of sale proceeds therefrom and the right of the appellant to stay in possession till the entire deposit is repaid, are all matters which are specifically mentioned in clause 16 as matters to be settled by arbitration. Therefore, the subject matter of the suit falls within the scope of the arbitration agreement. [Paras 14, 15] [337-F-H; 338-A-B]

S.B.P. and Co. vs. Patel Engineering Ltd. **2005 (8) SCC 618: 2005 (4)Suppl.SCR 688 – referred to.**

Re : Question No.(ii)

2.1. The appellant filed a detailed affidavit opposing the application for interim injunction on 15.12.1999. Thereafter the appellant filed the application under section 8 of the Arbitration and Conciliation Act, 1996 on 12.10.2001. On the date of filing of the application under section 8, the appellant had not filed the written statement. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. [Para 16] [338-C-E]

2.2. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute', if by filing such statement/ application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a

statement on the substance of the dispute, as that is done to avoid an interim order being made against him. [Para 17] [338-H; 339-A-B]

2.3. In this case, the counter affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court. [Para 18] [340-B-C]

Rashtriya Ispat Nigam Ltd vs. Verma Transport Company 2006 **(7) SCC 275: 2006 (4) Suppl. SCR 332 – referred to.**

Re : Question No.(iii)

3. Though section 8 of the Act does not prescribe any time limit for filing an application under that section, and only states that the application under section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit. When plaintiffs file applications for

interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under section 8 of the Act, can not lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay. [Para 19] [340-D-H; 341-A-D]

Re : Question No.(iv)

4.1. The nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under section 8 of the Act, seeking reference of the parties to a suit to arbitration.

While considering an application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under section 34 of the Act, relying upon sub-section 2(b)(i) of that section. But where the issue of 'arbitrability' arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal. [Para 20] [341-E-H; 342-A-B]

4.2. The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under: (i) w*hether the disputes are capable of adjudication and settlement by arbitration?* That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts); (ii) *Whether the disputes are covered by the arbitration agreement*? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the

'excepted matters' excluded from the purview of the arbitration agreement; (iii) *Whether the parties have referred the disputes to arbitration*? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal. [Para 21] [342-C-H]

4.3. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial

disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. [Para 22] [342-H; 343-A-E]

4.4. A *right in rem* is a right exercisable against the world at large, as contrasted from a *right in personam* which is an interest protected solely against specific individuals. Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, *judgment in personam* refers to a judgment against a person as distinguished from a judgment against a thing, right or status and *Judgment in rem* refers to a judgment that determines the status or condition of property which operates directly on the property itself. Generally and traditionally all disputes relating to *rights in personam* are considered to be amenable to arbitration; and all disputes relating to *rights in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable. [Para 23] [343-F-H; 344-A-C]

4.5. The Arbitration and Conciliation Act, 1996 does not specifically exclude any category of disputes as

being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force." [Para 24] [344-D]

4.6. An agreement to sell or an agreement to mortgage does not involve any transfer of right *in rem* but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right *in rem*. A mortgage suit for sale of the mortgaged property is an action *in rem,* for enforcement of a right *in rem*. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right *in rem,* will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals). Some of the provisions

which lead to such a conclusion are briefly referred to as follows:-

(i) Rule (1) of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, can not get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with likelihood of divergent results.

(ii) In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction purchasers, persons in possession. An arbitral tribunal will not be able to do so.

(iii) The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to mortgagor/defendant or other persons entitled to receive the same. An arbitral tribunal will not be able to do so.

(iv) Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Form Nos. 9, 10, and 11 of appendix 'D' to the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit *or any other party interested in the mortgage security or the right of redemption,* pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an arbitral tribunal will not be able to do.

(v) The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, changes, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power. [Para 27] [348-F-H; 349-A-H; 350-A-H; 351-A-B]

4.7. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration. [Para 28] [351-E-F]

4.8. The appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum: (i) Whether there is a valid mortgage or charge in favour of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of appellant from the flat, even if it is entitled to enforce the mortgage/charge? If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of

several classes of persons, who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. [Para 29] [351-G-H; 352-A-E]

Conclusion

5. Having regard to the finding on the question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. Therefore, the dismissal of the application under section 8 of the Act is upheld, though for different reasons. [Para 30] [353-B-C]

Sukanya Holdings (P) Ltd. v. Jayesh H.Pandya **2003 (5) SCC 531: 2003 (3) SCR 558 – relied on.**

Haryana Telecom Limited vs. Sterlite Industries India Ltd **1999 (3) SCR 861;** *Olympus Superstructures Pvt Ltd vs. Meena Vijay Khetan and Ors.* **1999 (5) SCC 651: 1999 (3) SCR 490;** *Keventer Agro Ltd vs. Seegram Comp. Ltd (Decision of Calcutta High Court* **in APO 498 of 1997 etc. dated 27.1.1998) and** *Chiranjilal Shrilal Goenka vs. Jasjit Singh and Ors.* **1993 (2) SCC 507: 1993 (2) SCR 454 – referred to.**

Black's Law Dictionary; Russell on Arbitration **[22nd edition, page 28, para 2.007 and 23rd edition, page 470, para 8.043] and** *Law and Practice of Commercial Arbitration in England* **[2nd edition, 1989 edition and 2001 Companion Volume] by Mustill and Boyd – referred to.**

Case Law Reference:

2005 (4) Suppl. SCR 688 Referred to Para 12

2006 (4) Suppl. SCR 332	**Referred to**	**Para 17**
1999 (3) SCR 861	**Referred to**	**Para 26.1**
1999 (3) SCR 490	**Referred to**	**Para 26.2**
1993 (2) SCR 454	**Referred to**	**Para 26.3**
2003 (3) SCR 558	**Relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5440 of 2002.

From the Judgment & Order dated 7.3.2002 of the High Court of Bombay at Bombay in Notice of Motion No. 2476 of 2001 in Suit No. 6397 of 1999.

Indu Malhotra, Shashi M. Kapila, Nupur Kanungo, Vikas Mehta for the Appellant.

Jaideep Gupta, Manu Nair, Kirat S. Nagra, Arun Mohan (for Suresh A. Shroff & Co.) for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. The scope of section 8 of the Arbitration and Conciliation Act, 1996 (Act, for short) arises for consideration in this appeal by special leave.

2. Capstone Investment Co. Pvt. Ltd. (second respondent herein, for short "Capstone") and Real Value Appliances Pvt. Ltd. (respondent No.3 herein, for short "RV Appliances") are the owners of flat No.9A and 9B respectively situated at "Brighton", Napien Sea Road, Mumbai. Capstone and RV Appliances had borrowed loans from SBI Home Finance Ltd., (the first respondent herein, for short "SBI") under two loan agreements dated 3.12.1994 by securing the said two flats in favour of SBI.

3. Under two leave and licence agreements dated 5.4.1996, Capstone and RV Appliances permitted the appellant

to use their respective flats, for the term 1.9.1996 to 31.8.1999. Each licence agreement was signed, in addition to the licensor and licensee, by the other flat owner (that is RV Appliances in respect of agreement relating to 9A and Capstone in respect of agreement relating to 9B) and SBI as confirming parties 1 and 2.

4. On the same day (5.4.1996) a tripartite deposit agreement was entered among RV Appliances and Capstone as the first party, appellant as the second party and SBI as the third party. Under the said agreement, the appellant paid a refundable security deposit of Rs.6.5 crores to Capstone and RV Appliances (at the rate of Rs.3.25 crores for each flat). Clause (E) of the said agreement confirmed that the appellant made the said deposit and Capstone and RV Appliances received the said deposit on the basis of the terms and conditions recorded in the two leave and licence agreements and the deposit agreement; and that the three agreements together formed a single integral transaction, inseparable, co-extensive and co-terminus in character. Out of the said deposit of Rs.6.5 crores, a sum of Rs.5.5 crores was directly paid to SBI on the instructions of Capstone and RV Appliances towards repayment of the loan taken by Capstone and Real Value and the balance of Rs.1 crore accounted in the manner indicated therein. As a consequence, the loan due by Capstone to SBI in regard to flat No.9A was cleared, but the loan taken by RV Appliances remained due and outstanding. Capstone however became a guarantor for repayment of the amount due by RV Appliances and flat No.9A was secured in favour of SBI and a charge was created in the shares relating to flat No.9A belonging to Capstone in favour of SBI, as security for repayment of the loan by R V Appliances. We extract below the relevant portion of para 5A of the agreement :

> "However, notwithstanding the repayment of the dues of Capstone Investment Co.Pvt.Ltd., the share Nos.4001 to 4250 of the Society and Flat No.9A shall continue to be

available to the Party of the Third Part as security of the remaining dues of Real Value Appliances Ltd., and in this connection it is agreed that upon liquidating the dues of Capstone Investment Co.Pvt.Ltd., and in order to make available the said shares Nos.4001 to 4250 and Flat No.9A as security, Capstone Investment Co.Pvt.Ltd. shall become a Guarantor for repayment of dues of Real Value Appliances Pvt.Ltd. The Parties of the Third Part are confirming that it has no objection to the Party of the Second Part, its employee or officer occupying the Flats and that as long as the balance of the principal amount and interest due thereon is paid by the Parties of the First Part (or as per arrangement hereafter recorded) by the Party of the Second Part to Party of the Third Part, the Parties of the Third Part shall not enforce the mortgage and will permit the Party of the Second Part, its employee or officer to occupy the said Flats."

Clause (3) of the Deposit agreement gave an option to the appellant who opted to continue the licence in respect of the two flats for a further period of two years beyond 31.8.1999, by paying an additional deposit of Rs.2 crores (at the rate of Rs.1 crore for each flat). Clause (11) enabled the appellant to continue to use and occupy the flats so long as the amounts paid by it as security deposit remained unpaid.

Clause (8) gave the option to the appellant to pay the amount due to the SBI on behalf of the borrowers to safeguard its interest. Relevant portion of para 8 is extracted below:

"If any default is made by the Parties of the First Part in paying any sum(s) due from time to time by them to the Parties of the Third Part under the loan facility, the Party of the Second Part shall, to safeguard its interest in retaining the right to use and occupy the said Flats, have an option to pay the Parties of the Third Part the sum(s) so becoming due and remaining unpaid by the Parties of the First Part, on their behalf."

Clauses (9) and (10) provide that at the end of the licence period, Capstone and R V Appliances shall jointly and severally be liable to refund the deposit amount along with interest thereon from the date of expiry of the licence to date of actual payment

Clause (16) of the deposit agreement provided for arbitration and is extracted below:

"In case of any dispute with respect to creation and enforcement of charge over the said shares and the said Flats and realization of sales proceeds therefrom, application of sales proceeds towards discharge of liability of the Parties of the First Part to the parties of the Second Part and exercise of the right of the Party of the Second Part to continue to occupy the said Flats until entire dues as recorded in Clause 9 and 10 hereinabove are realized by the party of the Second Part, shall be referred to an Arbitrator who shall be retired Judge of Mumbai High Court and if no such Judge is ready and willing to enter upon the reference, any Senior Counsel practicing in Mumbai High Court shall be appointed as the Sole Arbitrator. The Arbitrator will be required to cite reasons for giving the award. The arbitration proceedings shall be governed by the Arbitration and Conciliation Ordinance 1996 or the enactment, re-enactment or amendment thereof. The arbitration proceedings shall be held at Mumbai."

5. In or about July 1997 a reference was made by RV Appliances to the Board of Industrial and Financial Reconstruction (BIFR for short) under the Sick Industrial Companies (Special Provisions) Act, 1985 and in pursuance of it, flat 9B was taken over by the official liquidator.

6. By letter dated 4.8.1999, appellant informed Capstone and RV Appliances that it was not interested in exercising the option to renew the licences on expiry of the leave and licence

agreements on 31.8.1999 and called upon the licensors to refund the security deposit of Rs.6.5 crores, assuring that it would vacate and deliver up the licensed flats on receipt of the deposit amount. The appellant informed SBI and BIFR about it by endorsing copies of the said letters to them. As there was no confirmation from Capstone and RV Appliances that they would refund the sum of Rs.6.5 crores, the appellant wrote a further letter dated 26.8.1999 stating that it would continue to occupy the flats if the security deposit was not refunded.

7. As the loan amount due by RV Appliances was not repaid, SBI filed a mortgage suit (Suit No.6397/1999) in the High Court of Bombay on 28.10.1999 against Capstone (first defendant), appellant (second defendant), and RV Appliances (defendant No.3) in regard to the mortgaged property (flat No.9A) for the following reliefs:

(a) for a declaration that the 1st defendant as mortgagor was due in a sum of Rs.8,46,10,731/- with further interest on the principal sum at the rate of Rs.16.5% per annum and additional interest for delayed payment at the rate of 2% per month from 1st September, 1999 till payment or realization;

(b) for a declaration that the amount and interest mentioned in prayer (a) above is secured in favour of the plaintiffs by a valid and subsisting mortgage of flat No.9A and three garages (suit premises);

(c) for a direction to the first defendant to pay to the plaintiff the amount and interest in prayer (a) by such date as may be fixed by the Court for redemption of the mortgage and in the event of the first defendant failing to make payment by that date, the suit premises be sold by and under the orders and directions of the Court in enforcement and realization of the mortgage thereon and the net realization thereof be paid over to the plaintiff in or towards satisfaction of its claim herein;

(d) for a personal decree against the first defendant to the extent of any deficiency in sale realization;

(e) that the second defendant be ordered to vacate the suit premises and hand over possession thereof to the plaintiff to enable the plaintiff effectively to enforce and realize its security thereon."

8. On a notice of motion taken out by SBI seeking interim relief, the High Court issued the following order on 25.11.1999 :

"The Defendant No.2 shall continue to occupy Flat No.9A and garages Nos. 45 to 47 situate at Brighton, 68D, Napean Sea Road, Mumbai but shall not create any third party right or interest of any nature whatsoever in the said flat nor shall hand over possession of the said flat to defendant No.1 or 3 till further order.

Mr. Dharmadhikari, learned counsel for first defendant makes a statement that till further orders, the first defendant shall not create any third party interest in the said flat No.9A and garages Nos.45 to 47 nor shall alienate, dispose of or transfer the said property till further orders. Statement of Mr. Dharmadhikari is accepted."

On 15.12.1999 the appellant filed a detailed reply to the said notice of motion. It inter alia contended that SBI had a contractual obligation towards the appellant as it had agreed for the continuance of appellants' occupation till refund of the deposit. Capstone also contested the application, denying the existence of any mortgage or charge over flat No.9A.

9. The appellant however did not file its written statement in the suit. The appellant claims that settlement talks were being held for some time but did not fructify into any settlement.

Therefore, on 10.10.2001, the appellant took out a notice of motion praying that the parties to the suit be referred to arbitration as provided in clause 16 of the deposit agreement dated 5.4.1996 and consequently the suit be dismissed. The said application was resisted by the SBI.

10. A learned single Judge of the High Court by impugned order dated 7.3.2002 dismissed the application holding as follows:

> (a) Clause 16 of the deposit agreement (arbitration agreement) did not cover the dispute which is the subject matter of the claim by SBI against its borrowers (Capstone and RV Appliances) and therefore, it was not open to the appellant to request the court to refer the parties to arbitration.
>
> (b) The detailed counter affidavit dated 15.12.1999 filed by the appellant, in regard to the notice of motion for temporary injunction, amounted to submission of the first statement on the substance of the dispute, before filing the application under section 8 of the Act and therefore the appellant lost the right to seek reference to arbitration.
>
> (c) The suit was filed on 28.10.1999. The appellant filed the counter affidavit opposing the application for temporary injunction on 15.12.1999. The application under section 8 of the Act was filed on 10.10.2001 nearly 20 months thereafter, during which period the appellant had subjected itself to the jurisdiction of the High Court. In view of the inordinate delay, the appellant was not entitled to the relief under section 8 of the Act.

The said order is challenged in this appeal by special leave. This court while granting leave on 28.8.2002 stayed the further proceedings in the suit.

11. The appellant contends that the parties to the suit were

all parties to the deposit agreement containing the arbitration agreement. The claim of the SBI was for enforcement of the charge/mortgage over flat No.9A and realization of the sale proceeds therefrom, which was specifically mentioned as a dispute which was arbitrable. Having regard to the clear mandate under section 8 of the Act, the court ought to have referred the parties to arbitration. SBI supported the order

12. In *S.B.P & Co. vs. Patel Engineering Ltd* – 2005 (8) SCC 618, this Court held thus :

> "When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief disputes the same, *the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause.* It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it and mechanically refer the parties to an arbitration."
>
> (emphasis supplied)

Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii) whether all parties to the suit are parties to the arbitration agreement; (ii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of

the dispute; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.

13. On the contentions urged the following questions arise for our consideration :

(i) Whether the subject matter of the suit fell within the scope of the arbitration agreement contained in clause 16 of the deposit agreement?

(ii) Whether the appellant had submitted his first statement on the substance of the dispute before filing the application under section 8 of the Act?

(iii) Whether the application under section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit?

(iv) Whether the subject matter of the suit is 'arbitrable', that is capable of being adjudicated by a private forum (arbitral tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under section 8 of the Act?

Re : Question No.(i)

14. In this case, there is no dispute that all the parties to the suit are parties to an agreement which contains the provision for settlement of disputes by arbitration. Clause (16) which provides for arbitration provides for settlement of the following disputes by arbitration : (a) disputes with respect to creation of charge over the shares and flats; (b) disputes with respect to enforcement of the charge over the shares and flats and realization of sale proceeds therefrom; (c) application of the sale proceeds towards discharge of liability of Capstone and RV Appliances to the appellant; and (e) disputes relating to exercise of right of the appellant to continue to occupy the flats until the entire dues as stated in clauses 9 and 10 of the deposit agreement are realised by the appellant.

15. The suit has been filed by SBI to enforce the mortgage to recover the amounts due to it. In that context, SBI has also sought delivery of vacant possession. The enforcement of the charge/mortgage over the flat, realisation of sale proceeds therefrom and the right of the appellant to stay in possession till the entire deposit is repaid, are all matters which are specifically mentioned in clause 16 as matters to be settled by arbitration. Therefore, the subject matter of the suit falls within the scope of the arbitration agreement.

Re : Question No.(ii)

16. The appellant filed a detailed affidavit opposing the application for interim injunction on 15.12.1999. Thereafter the appellant filed the application under section 8 of the Act on 12.10.2001. On the date of filing of the application under section 8, the appellant had not filed the written statement. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The High Court has held that filing a detailed counter affidavit by a defendant setting out its case, in reply to an application for temporary injunction, should be considered to be the submission of the first statement on the substance of the dispute; and that the application under section 8 of the Act having been filed subsequent to filing of such first statement on the substance of the dispute, the appellant's prayer for referring the parties to arbitration cannot be accepted. The question therefore is whether filing a counter to an application for temporary injunction can be considered as submitting the first statement on the substance of the dispute.

17. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute', if by filing such statement/application/affidavit, the defendant

shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him. In *Rashtriya Ispat Nigam Ltd vs. Verma Transport Company* – 2006 (7) SCC 275, this Court held that the expression 'first statement on the substance of the dispute' contained in Section 8(1) of the Act is different from the expression 'written statement', and refers to a submission of the party making the application under section 8 of the Act, to the jurisdiction of the judicial authority; and what should be decided by the court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause. This Court then proceeded to consider whether contesting an application for temporary injunction by filing a counter, would amount to subjecting oneself to the jurisdiction of the court. This Court observed :

> "By opposing the prayer for interim injunction, the restriction contained in Sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in *Food Corporation of India* vs. *Yadav Engineer & Contractor* – 1982 (2) SCC 499, the distinction between the main proceeding and supplemental proceeding must be borne in mind. …….. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining

> in each case. In the instant case, the court had already passed an ad interim ex pare injunction. The Appellants were bound to respond to the notice issued by the Court."

18. In this case, the counter affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.

Re : Question No.(iii)

19. Though section 8 does not prescribe any time limit for filing an application under that section, and only states that the application under section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit. When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant

has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under section 8 of the Act, can not lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay.

Re : Question (iv)

20. The nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under section 34 of the Act, relying upon sub-section 2(b)(i) of that section. But where the issue of 'arbitrability' arises in the context of an application under section 8 of the Act in a

pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

21. The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under : (i) w*hether the disputes are capable of adjudication and settlement by arbitration?* That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts). (ii) *Whether the disputes are covered by the arbitration agreement*? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement. (iii) *Whether the parties have referred the disputes to arbitration*? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under

the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

23. It may be noticed that the cases referred to above relate to actions *in rem.* A *right in rem* is a right exercisable against the world at large, as contrasted from a *right in personam* which is an interest protected solely against specific individuals. Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, *judgment in personam* refers to a judgment against a person as

distinguished from a judgment against a thing, right or status and *Judgment in rem* refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary). Generally and traditionally all disputes relating to *rights in personam* are considered to be amenable to arbitration; and all disputes relating to *rights in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable.

24. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

25. Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007] :

> "Not all matter are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give."

The subsequent edition of Russell [23rd Edition, page 470, para 8.043]] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration. *Mustill* and *Boyd* in their Law and Practice of Commercial Arbitration in England [2nd – 1989 Edition], have observed thus :

> "In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration,

but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. …….

Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award *which is binding on third parties or affects the public at large, such as a judgment in rem* against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order…."

[emphasis supplied]

Mustill and *Boyd* in their 2001 Companion Volume to the 2nd Edition of *commercial Arbitration,* observe thus (page 73) :

"Many commentaries treat it as axiomatic that 'real' rights, *that is rights which are valid as against the whole world, cannot be the subject of private arbitration*, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not…..An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless."

(Emphasis supplied)

26. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court.

26.1) In *Haryana Telecom Limited vs. Sterlite Industries India Ltd* – 1999 (5) SCC 688, this Court held :

"Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. *An arbitrator, notwithstanding any agreement between the parties*, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petition herein was relating to winding up of the Company. *That could obviously not be referred to arbitration* and, therefore, the High Court, in our opinion was right in rejecting the application."

(Emphasis supplied)

26.2) A different perspective on the issue is found in *Olympus Superstructures Pvt Ltd vs. Meena Vijay Khetan and others* – 1999 (5) SCC 651, where this Court considered whether an arbitrator has the power and jurisdiction to grant specific performance of contracts relating to immovable property. This Court held :

"We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immoveable property."

Approving the decision of the Calcutta High Court in *Keventer Agro Ltd vs. Seegram Comp. Ltd* – (Apo 498 of 1997 etc. dated 27.1.1998), this Court held that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) will not be attracted. This Court held :

"Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. observed:

> ...merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties should be precluded from referring the dispute to arbitration."

This Court further clarified that while matters like criminal

offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto may be referred to arbitration :

> "Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman) (1846) 9 Q.B, 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter ……."

26.3) In *Chiranjilal Shrilal Goenka vs. Jasjit Singh and Ors.*- 1993 (2) SCC 507 this court held that grant of probate is a judgment *in rem* and is conclusive and binding not only the parties but also the entire world; and therefore, courts alone will have exclusive jurisdiction to grant probate and an arbitral tribunal will not have jurisdiction even if consented concluded to by the parties to adjudicate upon the proof or validity of the will.

27. An agreement to sell or an agreement to mortgage does not involve any transfer of right *in rem* but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right *in rem*. A mortgage suit for sale of the mortgaged property is an action *in rem,* for enforcement of a right *in rem*. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right *in rem,* will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in

Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.

(i) Rule (1) of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, can not get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to

the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with likelihood of divergent results.

(ii) In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/ mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction purchasers, persons in possession. An arbitral tribunal will not be able to do so.

(iii) The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to mortgagor/ defendant or other persons entitled to receive the same. An arbitral tribunal will not be able to do so.

(iv) Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Form Nos. 9, 10, and 11 of appendix 'D' to the

Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit *or any other party interested in the mortgage security or the right of redemption,* pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an arbitral tribunal will not be able to do.

(v) The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, changes, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.

28. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/ petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

29. The appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum: (i) Whether there is a valid mortgage or charge in favour of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of appellant from the flat, even if it is entitled to enforce the mortgage/charge? It was submitted that merely because mortgage suits involve passing of preliminary decrees and final decrees, they do not get excluded from

arbitrable disputes. It is pointed out that the arbitral tribunals can also make interim awards deciding certain aspects of the disputes finally which can be equated to preliminary decrees granted by courts, and the final award made by the arbitrator, after detailed accounting etc. could be compared to the final decree by courts. It is therefore contended that there is no impediment for the parties to mortgage suits being referred to arbitration under section 8 of the Act. If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 27 (ii) above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. The following observations of this court in a somewhat different context, in *Sukanya Holdings (P) Ltd. v. Jayesh H.Pandya* – 2003 (5) SCC 531 are relevant:

> "The next question which requires consideration is—even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in

the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

Conclusion

30. Having regard to our finding on question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. Therefore we uphold the dismissal of the application under section 8 of the Act, though for different reasons. The appeal is accordingly dismissed. We however make it clear that we have not recorded any finding, nor expressed any opinion, on the merits of the claims and disputes in the suit.

B.B.B. Appeal dismissed.

INSPECTOR OF POLICE, TAMIL NADU

v.

JOHN DAVID

(Criminal Appeal No. 384 of 2002)

APRIL 20, 2011

[DALVEER BHANDARI AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – ss. 302, 201, 364 and 342 – Gruesome murder – Dead body cut into different pieces – PW1's son was studying for a medical degree and staying in the college hostel – He was allegedly killed by respondent, a senior student in the same college – Allegation that respondent caused head injury to the deceased and when deceased was lying on the ground unconscious, the respondent severed his head and limbs and removed his gold ring, watch and gold chain – Further allegation that thereafter, respondent put the head and the gold articles of deceased in a zip bag and threw it into canal water near the hostel and burnt the bloodstained clothes of the deceased in the open terrace of the hostel building and took the torso in a suitcase along with the limbs in a train and threw the limbs in a river while the train was in transit and put the torso in a bus – Trial court convicted respondent under ss. 302, 201, 364 and 342 IPC and sentenced him to life imprisonment – High Court acquitted the respondent – Justification of – Held: Not justified – All the witnesses were independent and respectable eye-witnesses – From the evidence of the witnesses, it was clear that the respondent nurtured ill feeling against the deceased as the deceased refused to write the record note for respondent; that the deceased was last seen with the respondent and that the conduct of respondent was very weird and strange and the bags/suitcases kept by him also produced stinking smell – Skull of deceased was recovered

from canal water, and material objects, like, note books of deceased, gold chain, blood stained bags, knifes etc. were also recovered – Also, evidence of three specialist doctors who categorically stated that the skull, torso and limbs recovered were of the deceased only – Strong and cogent circumstantial evidences deduced from the investigation logically and rationally point towards the guilt of the respondent – No other possible or plausible view favouring the respondent – Conviction of respondent restored.

Appeal – Appeal against acquittal – Power of the appellate court – Held: While dealing with an appeal against acquittal, the appellate Court has no restriction to review and relook the entire evidence on which the order of acquittal is founded – On such review, the appellate Court would consider the manner in which the evidence was dealt with by the lower Court – At the same time, if the lower Court's decision is based on erroneous views and against the settled position of law, then such an order of acquittal should be set aside – Further, if the trial Court has ignored material and relevant facts or misread such evidence or has ignored scientific documents, then in such a scenario the appellate court is competent to reverse the decision of the trial court.

Evidence – Circumstantial evidence – Appreciation of – Held: Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible – In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof – The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused – There

is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

Investigation/Inquiry – Held: Minor loopholes and irregularities in the investigation process cannot form the crux of the case on which an accused can rely upon to prove his innocence when there are strong circumstantial evidences deduced from the investigation which logically and rationally point towards the guilt of the accused.

PW1's son was a first year junior student in a Medical College and was staying in the college hostel. Respondent was a senior student in the same medical college and he too was staying in the hostel.

According to the prosecution, respondent took away PW-1's son (deceased) and subjected him to severe ragging in the college Hostel and when the latter did not subjugate himself to the respondent, he caused head injury to the deceased and when deceased was lying on the ground unconscious, the respondent severed his head and limbs with the help of stainless steel knives and removed his gold ring, watch and gold chain. It was the further case of the prosecution that after doing such gruesome act and with the intention of hiding the evidence and also to show his alibi, the respondent put the head and the gold articles of deceased in a zip bag and threw it into canal water near the hostel and burnt the bloodstained clothes of the deceased in the open terrace of the hostel building and took the torso in a suitcase along with the limbs in a train to Madras and threw the limbs in a river when the train crossed Cuddalore and put the torso in a bus.

A torso was recovered by PW-55, Inspector of Police from the Bus Depot based on the information given by PW-53, a bus conductor. The respondent gave a confessional statement in police custody and pursuant

thereto the severed head of the deceased was recovered. Three human bones femur, tibia and fibula were also recovered from the sea-shore based on the information given by the PW-43, the concerned Village Administrative Officer. Post mortem of the limbs were conducted by PW-45 and later limbs were sent to PW-66. PW-66 after examining the severed head, the torso and three human bones above mentioned, found that they belonged to a single individual and also the fact that they belong to deceased. PW-1 and his nephew PW-60 also identified and confirmed that the head and torso were of the deceased. For confirming the said fact, the sample blood of PW-1 and his wife [mother of deceased] was examined by Dr. [PW-77] by DNA test. PW-77 compared the tissues taken from the severed head, torso and limbs and on scientific analysis he found that the same gene found in the blood of PW-1 and his wife were found in the recovered parts of the body and that therefore they should belong to the son of PW-1.

The trial court held that there were enough circumstantial evidence and motive on the part of the respondent-accused and held him guilty under Sections 302, 201, 364 and 342 IPC alongwith life imprisonment. On appeal, the High Court acquitted the respondent. Hence the present appeal.

Allowing the appeal, the Court

HELD:

APPEAL AGAINST ACQUITTAL:

1.1. While dealing with an appeal against acquittal, the appellate Court has no restriction to review and relook the entire evidence on which the order of acquittal is founded. On such review, the appellate Court would consider the manner in which the evidence was dealt

with by the lower Court. At the same time, if the lower Court's decision is based on erroneous views and against the settled position of law, then such an order of acquittal should be set aside. [Para 16] [379-B-C]

1.2. Further, if the trial Court has ignored material and relevant facts or misread such evidence or has ignored scientific documents, then in such a scenario the appellate court is competent to reverse the decision of the trial court. [Para 17] [379-D]

State of U.P. v. Ram Sajivan & Ors. **(2010) 1 SCC 529: 2009 (16) SCR 154;** *Sannaia Subba Rao & Ors. vs. State of A.P.* **2008 (17) SCC 225: 2008 (11) SCR 243;** *Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)* **(2010) 6 SCC 1: 2010 (4) SCR 103 – relied on.**

CASE ON CIRCUMSTANTIAL EVIDENCE:

2. The law is well-settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. Also when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. The Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof. There is a long

mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. [Para 19] [379-G-H; 380-A-C]

State of U.P. v. Ram Balak & Anr., **(2008) 15 SCC 551 – relied on.**

MOTIVE:

3. In the present case, the prosecution has alleged that accused was in the habit of ragging the junior students and accustomed in getting his home work done by the junior students and that is why when the deceased did not subjugate himself to the accused, the accused gathered ill-will against the deceased and therefore, that was the motive for which the accused killed him. For the purpose of proving the aforesaid motive of the accused, the prosecution placed reliance upon the evidence of PW-3, PW-4, PW-5, PW-6, PW-19 and PW-20. PW-3 was the Head of the Department of Radiology, Annamalai University as also part-time Warden of Malligai Hostel of the University, whereas PW-4, PW-5, PW-6, PW-19 and PW-20 were the 1st year students of the college. From the evidence of the above witnesses and other documents on records it becomes quite evident that the record books of the accused were written by other juniors and that accused was in the habit of ragging junior students. The evidence of PWs 19 & 20 also go to prove that the accused was looking for deceased frantically in the morning, which was definitely not for the benefit of the deceased looking at the background behaviour of the accused towards deceased, for there is enough evidence on record to support the case of the prosecution that the accused was having malice and ill-will against with the deceased as he had refused to succumb to the ragging demands of the accused. [Para 23] [383-F-H; 384-A-H; 385-A]

4. LAST SEEN ALIVE:

From the evidence of the witnesses it is also clear that the deceased was last seen alive in the company of the accused on 06.11.1996 between 12.45 to 2.00 p.m. and thereafter no one had seen the deceased alive and this fact also supports the case of the prosecution. Moreover accused admitted in his statement filed during question U/s 313, Cr.P.C. that he was sitting in the corridor of Dean's office in the afternoon of 06.11.1996, which further corroborates the case of prosecution. [Para 24] [385-G-H; 386-A]

SUSPICIOUS CONDUCT OF THE ACCUSED:

5. The conduct of the accused is the next chain of circumstance which is heavily relied upon by the prosecution for proving the guilt of the accused and for this it placed reliance on the evidence of Subba @ Vankatesan [PW-28], Vijayarangam [PW-29], Murali [PW-35], Senthilkumar [PW-40], Joe Bulgani [PW-41] and Rajmohan [PW-42]. In the facts and circumstances of the case, the unusual and eccentric conduct of the accused which is unequivocally told by the witnesses makes the conduct of the accused highly suspicious and leads to corroborate the case of the prosecution. [Para 25] [386-B-C; 387-E-F]

CONFESSIONAL STATEMENT OF ACCUSED AND CONSEQUENTIAL RECOVERIES:

6.1 The accused after surrendering before the Court of Judicial Magistrate on 14.11.1996 also gave his confessional statement [Exhibit-50] on 19.11.1996 in the presence of [PW-58], Village Administrative Officer, wherein in very clear terms he admitted his crime as is presented by the prosecution. Also it has been admitted by the Trial Court as also by the High Court that at no

stage of trial there is any allegation of torture of the accused in the hands of the police, which clearly proves that the statement made by the accused on 19.11.1996 was given voluntarily and is an admissible piece of evidence. The High Court merely on an assumed basis held that the confessional statement could not have been voluntarily given by the accused without referring to any particular evidence in support of the said conclusion. The confession was given by the accused in presence of [PW-58] and his assistant, who are totally independent persons. [Para 26] [387-G-H; 388-A-E]

6.2. Only such information which is found proximate to the cause of discovery of material objects, alone is taken as admissible in law and in the present case there are lot of materials which were recovered at the instance of such confessional statement made by the accused only. [Para 28] [388-H; 389-A]

6.3. At the instance and in pursuance of the said confessional statement given by the accused, PW-78, Police Inspector, PW-58, Village Administrative Officer and his assistant alongwith other witnesses went to the south canal of the KRM Hostel at about 7.30 a.m. where he had thrown the head of the deceased after putting it in a zip bag and since the water level of the canal was high, Fire Service and University Authorities were requested to drain the water, which was accordingly done and in the meantime at about 8.45 a.m. at the instance of accused only MO-3, a rexine bag, was recovered which contained two notebooks belonging to the deceased [MOs 4 & 5]. Thereafter, after producing the accused before the Doctors of Govt. Hospital at 10.00 a.m. as per the directions of the court, the accused took PW-78 along with other witnesses to Room No. 319 (of KRM hostel) and from there material objects from 9 to 15 and 29 were recovered which included three knifes, one blue

colour small brief case, among others and from Room No. 323 and 325 material objects from 30 to 33 were recovered which included blood stained cement mortar. At about 4.00 p.m. when the search party returned to the boat canal, the zip bag [MO-22] containing a severed human head was recovered at 4.30 p.m. The severed head of the deceased was recovered from the specific place which was indicated and identified by the accused. The recovery of other material objects at the indication/ instance of the accused creates/generates enough incriminating evidence against him and makes such part of the confessional statement clearly admissible in evidence. The fact that the skull found in the water canal of the university belonged to deceased is proved from the evidence of PW-66, PW-52 and PW-77. PW-66 in his evidence stated that the deceased appear to have died because of decapitation of injuries and that the injury is ante-mortem. The Doctor also opined that a sharp cutting weapon would have been used for causing injuries. He further stated in his evidence that severing of head and removal of the muscles and nerves of limbs could have been done by MOs 9 to 11. PW-66 also opined that both the torso and head belongs to one and the same person. Also from the evidence of PW-52 (dentist) it is found that he had given silver filling on the right upper first molar of the deceased and that he had removed the left upper milk tooth and removed the root thereof and the said fact was also clearly and rightly found in the post mortem conducted by PW-66 on the head recovered from the boat-canal. The said fact was also proved from the DNA test conducted by PW-77. PW-77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of PW-1 and his wife were found in the recovered parts of the body and that therefore they should belong to the only missing son of PW-1. The Trial Court relied upon the super-imposition process/test

made by Dr. [PW-65], Assistant Director, Forensic Science Department, Madras, who stated in his evidence that the skull recovered was of PW1's son. Therefore, from the evidence of PWs 65 & 66 it becomes amply clear that the skull recovered from the boat canal is of PW-1's son only. [Paras 29, 30] [389-B-H; 390-A-F]

6.4. On 7.11.1996 at about 6.00 p.m., PW-53, the conductor of Bus [bearing no. T.B.01-2366] having route No. 21G [from Thambaram suburban of Chennai City to Paris Corner] found a male torso under the last seat of the bus packed in white blood stained polythene bag with red letters [marked as MO-16] and thereafter case was registered and investigation was started by PW-55, Inspector of Police. PW-66 conducted autopsy/post-mortem at 10.00 a.m. on 8.11.1996 and having found that the deceased had died of decapitation of injuries, he opined that the injuries found on the torso and skull were anti-mortem and the deceased would appear to have died of decapitation and he further stated that the respective surface of the fifth cervical vertebra of the head were reciprocally fitting into the corresponding surface of the sixth cervical vertebra of the torso and this articulation was exact in nature and hence he opined that the head and torso belonged to one and the same person. The other limbs of the deceased were recovered by [PW-44], Sub-Inspector on 21.11.1996 in a pale-coloured with yellow, red and green checks in a lungi-like bed-sheet and along with it was torn polythene bag and a pale cloth thread. [Paras 32, 33] [390-H; 391-A-E]

6.5. In the present case there is no direct evidence to prove that the accused had himself taken the torso and limbs of the deceased to Madras and threw the limbs somewhere (while transit to Madras) and also that accused carried the parcel of torso to Madras and dropped it in the bus but, there is only circumstantial evidence. [Para 34] [391-E-F]

6.6. One of the clinching evidence against the accused is the two suitcases [MOs 13 & 14]. PW-37, the room mate of the accused, stated in his evidence that the two suitcases in which the blood of the deceased was found belong to the accused. He also stated that MO-22, which is a bag in which the head of the deceased was recovered, also belong to the accused. PW-38 also corroborated the said fact in his evidence. Blood found in the suitcases matched with the blood of the deceased which is blood group 'A'. It is also proved from the evidence of the students adduced in the case that foul smell was emanating from the said two suitcases and that when accused was asked about the said smell, he only replied that it is because of Biryani, which his mother had given him. PW-28, auto driver, affirmatively stated that the accused had taken out those two suitcases with him in his auto rickshaw on 06.11.1996 when he dropped him at Chidambaram Railway Station. The hostel chowkidar examined as PW-29 corroborated the said fact. The students of the hostel, PW-40, PW-41, not only spoke about the foul smell emanating from the room where those suitcases were kept but also of the fact that the accused had brought those two suitcases with him when he came back to the hostel on 08.11.1996 morning. These are indeed circumstantial evidence but all leading to one conclusion that the accused is guilty of the offence of killing the deceased. [Para 35] [391-G-H; 392-A-D]

6.7. There are enough circumstantial evidence to hold that it is none else but the accused who could have caused the concealment of torso and limbs because it was the accused who had severed the head of deceased as found earlier and, therefore, he must have been in possession of the torso and limbs, which were also subsequently recovered and were also proved to be that of deceased. [Para 36] [392-G-H]

AmitsinghBhikamsingh Thakur v. State of Maharashtra **(2007) 2 SCC 310: 2008 (14) SCR 219 – referred to.**

7. The prosecution has succeeded in proving its case on circumstantial evidence. In the present case all the witnesses are independent and respectable eye-witnesses and they have not been shown to have any axe to grind against the accused. And from the evidence of the several witnesses, it is clear that the accused nurtured ill feeling against the deceased as the deceased refused to write the record note for accused; that the deceased was last seen with the accused in the afternoon of 06.11.1996 and he was searching for him very eagerly; that the conduct of the deceased was very weird and strange and the bags/suitcases kept by him also produced stinking smell; the recovery of skull from canal water, material objects, like, note books of deceased, gold chain, blood stained bags, knifes etc.,; and also the evidence of PW-66, PW-65 and PW-77 who have categorically stated that the skull, torso and limbs recovered were of the deceased only. [Para 37] [393-A-D]

8. It is well-settled proposition of law that the recovery of crime objects on the basis of information given by the accused provides a link in the chain of circumstances. Also failure to explain one of the circumstances would not be fatal for the prosecution case and cumulative effect of all the circumstances is to be seen in such cases. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it. Hence, minor loopholes and irregularities in the investigation process cannot form the crux of the case on which the respondent can rely upon to prove his innocence when there are strong circumstantial evidences deduced from the said

investigation which logically and rationally point towards the guilt of the accused. [Paras 38, 39] [393-E-H; 394-A]

State of Karnataka v. K. Yarappa Reddy **(1999) 8 SCC 715: 1999 (3) Suppl. SCR 359 – relied on.**

9. In the considered opinion of this Court, the prosecution established its case on the basis of strong and cogent circumstantial evidence and that on the basis of the circumstances proved, there cannot be any other possible or plausible view favouring the accused. The view taken by the High Court is totally erroneous and outcome of misreading and misinterpreting the evidence on record. The High Court erred in reversing the order of conviction recorded by the trial Court as the prosecution has established its case. Accordingly, the judgment of the High Court is set aside and the judgment and decision of the trial Court is restored but only with one rider that the sentence awarded shall run concurrently and not consecutively as ordered by the trial court. While doing so reliance is placed upon sub-section (2) of section 31 of the Code of Criminal Procedure, 1973. [Paras 40, 41] [394-B-D]

Case Law Reference:

2009 (16) SCR 154	**relied on**	**Para 13**
2008 (11) SCR 243	**relied on**	**Para 14**
2010 (4) SCR 103	**relied on**	**Para 15**
2008 (14) SCR 219	**relied on**	**Para 20**
2007 (1) SCR 191	**referred to**	**Para 27**
1999 (3) Suppl. SCR 359	**relied on**	**Para 38**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 384 of 2002.

From the Judgment & Order dated 5.10.2001 of the High Court of Judicature at Madras in Criminal Appeal No. 267 of 1998.

S. Thananjayan for the Appellant.

Sushil Kumar, V. Mohana and Aditya for the Respondent

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J.1. This appeal is directed against the judgment and order dated 05.10.2001 passed by the High Court of Madras whereby the High Court has allowed the appeal filed by the respondent herein. The High Court acquitted the respondent under Sections 302, 364, 201 and 342 of the Indian Penal Code, 1860 (for short "IPC") by reversing the Judgment and order dated 11.03.1988 rendered by the Court of Principal Sessions Judge, Cuddalore in Sessions Case No. 63 of 1997.

2. The facts of this case are very shocking and very distressing. Murder is committed of a young boy, the only son of his parents, who at the relevant time was studying for a medical degree. The manner in which he was killed and his dead body was disposed of after cutting it into different pieces was very gruesome and ghastly. The person in the dock and who was accused of the crime was another senior student in the same campus.

3. Brief relevant facts leading to the registration of the first information report and giving rise to the present appeal are being set out hereunder.

4. In the academic year of 1995-96 the respondent-accused was studying in the senior first year course of MBBS and the deceased-Navarasu, son of Dr. P.K. Ponnusamy [PW-1], a retired Vice-Chancellor of Madras University, was studying in the junior first year course of MBBS in Raja Muthiah Medical College, Annamalai University, Annamalai Nagar. The

respondent was staying in room no. 319 of KRM hostel and the deceased was staying in room no. 95 in E.1 Malligai Hostel belonging to the same medical college campus. PW-1 returned from his foreign trip on 07.11.1996 and was waiting for the arrival of his son-Navarasu from college to celebrate Diwali which in that relevant year fell on 10.11.96. When Navarasu did not return home till 09.11.1996, PW-1 started enquiring from the friends of his son, available at Madras but no information of his whereabouts could be gathered by the father. PW-1 then on 09.11.1996 rang up the university authorities to find out and ascertain the whereabouts of his son. When he was informed that the college authority found his hostel room locked and when it was broken upon, it was found that his belongings along with a small box were lying in the room but he was not available in the room. The college authorities and the father were of the opinion that Navarasu had not left for Diwali to Madras. PW-1 thereafter rushed to the University on 10.11.96 and made a complaint of missing of his son at about 11.30 p.m. on 10.11.96 which was registered as Crime No. 509 of 1996 [Exhibit-P1].

5. While this process was going on and without the knowledge of Annamalai Nagar Police, a torso was recovered at about 8.30 a.m. on 07.11.1996 by G. Boopahty, Inspector of Police, E.5 Pattinapakkam [PW-55], from the PTC Bus Depot at Mandaiveli, Madras based on the information given by Prakash [PW-53], conductor of the bus route NO. 21G. The said recovered torso was sent for post-mortem after inquest. The Annamalai Nagar Police after registering the missing report started investigation and during the course of such investigation gathered materials and also received information from various persons including students of the college pointing the guilt towards the accused, who was also found absconding from the college premises from 12-14.11.1996. On 14.11.1996 the accused surrendered himself before the Judicial Magistrate, Mannargudi. The message of his surrender was conveyed to the Annamalai Nagar PS, which got the police custody for five days of the accused from 18.11.1996. On 19.11.1996 at about

1.30 a.m. the accused gave a confessional statement stating that he has put the severed head of the deceased in the boat-canal within the University campus. Pursuant to the said confession, the head was also recovered. Annamalai Nagar PS on 20.11.1996 asked E5. Pattinapakkam PS for sending the records connected with the torso recovered at Madras on the suspicion that it may belong to the severed head of the deceased-Navarasu, which was recovered at the instance of the accused. Dr. K. Ravindran [PW-66] conducted autopsy/post-mortem of the head at 10.00 am on 21.11.1996. On 22.11.1996 a message was received from Villupuram Control Room which was forwarded to Annamalai Nagar PS which mentioned that three human bones femur, tibia and fibula have been recovered at 1.30 a.m. on 21.11.1996 from the sea-shore of Konimedu of Merkanam based on the information given by the concerned Village Administrative Officer-Nagarajan [PW-43]. Post mortem of the limbs were conducted by Dr. Srinivasan [PW-45] and later limbs were sent to PW-66. PW-66 after examining the severed head, the torso and three human bones above mentioned, found that there are scientific materials to hold that they belong to a single individual and also the fact that they belong to deceased-Navasaru. The father of the deceased PW-1 and Thandeeswaran [PW-60], nephew of PW-1, also identified and confirmed that the head and torso are of the deceased. For confirming the said fact, the sample blood of PW-1 and his wife Baby Ponnusamy [mother of Navasaru] was examined by Dr. G.V. Rao [PW-77] at Hyderabad by DNA test. PW-77 compared the tissues taken from the severed head, torso and limbs and on scientific analysis he found that the same gene found in the blood of PW-1 and Baby Ponnusamy were found in the recovered parts of the body and that therefore they should belong to the only missing son of PW-1.

6. The prosecution's version of facts leading to the present case are that on 06.11.1996 at about 2.00 p.m. the accused-John David [first year senior medical student of Muthiah Medical College, Annamalai Nagar] took away Navarasu-deceased [first year junior medical student of Muthiah Medical

College, Annamalai Nagar] and subjected him to severe ragging in Room No. 319 of KRM Hostel of the college and when the latter did not subjugate himself to the accused, accused caused head injury to the deceased and when Navarasu-deceased was lying on the ground unconscious, the accused severed his head and limbs with the help of stainless steel knives and removed his gold ring, watch and gold chain and caused his death. After doing such gruesome act and with the intention of hiding the evidence and also to show his alibi he put the head and the gold articles of Navarasu-deceased in a zip bag and threw it into canal water near the hostel and burnt the bloodstained clothes of the deceased in the open terrace of the hostel building and took the torso in a suitcase along with the limbs in a train to Madras and threw the limbs in a river when the train crossed Cuddalore and put the torso in a bus at Tambaram.

7. On completion of investigation, the police submitted a charge sheet against the respondent. On the basis of the aforesaid charge sheet, charges were framed against the accused-respondent. The prosecution in order to establish the guilt of the accused examined several witnesses and exhibited a number of documents including scientific reports. Thereafter, the accused was examined under Section 313 Cr.P.C. for the purpose of enabling him to explain the circumstances existing against him. After hearing arguments advanced by the parties, the Principal Sessions Judge, Cuddalore by its judgment dated 11.03.1998 convicted the accused. Principal Sessions Judge, Cuddalore found that there are enough circumstantial evidence and motive on the part of the accused for committing such a crime and held the accused/respondent guilty under Sections 302, 201, 364 and 342 IPC and convicted and sentenced him to undergo imprisonment for life under sections 302 and 364 IPC, rigorous imprisonment for one year under Section 342 IPC, and rigorous imprisonment for seven years and to pay a fine of rupees one lakh and in default to undergo rigorous imprisonment for twenty one months under Section 201 IPC. It was also ordered that the sentences would run consecutively.

8. Aggrieved by the aforesaid judgment and order of conviction passed by the trial Court, the respondent herein preferred an appeal before the High Court. The High Court entertained the said appeal and heard the counsel appearing for the parties. On conclusion of the arguments, the High Court held that the prosecution has failed to prove the guilt of the accused and accordingly the High Court acquitted the respondent of all the charges vide its judgment and order dated 05.10.2001 by reversing and setting aside the order of conviction passed against the respondent under Sections 302, 201, 364 and 342 IPC.

9. We may now at this stage refer to the arguments of the counsel of the parties in order to understand the scope and ambit of the appeal and also to appreciate the contentions so as to enable us to arrive at a well-considered findings and conclusions.

10. Mr. S. Thananjayan, learned counsel appearing on behalf of the State emphatically argued before us that the decision of the High Court of acquitting the accused person is totally erroneous and suffers from serious infirmities. He also submitted that the prosecution has proved the case to the hilt and that a compete and well-connected chain of circumstantial evidences have been established to prove the guilt of the accused. He also submitted that the prosecution has established the case against the accused beyond reasonable doubt. It was also submitted that the motive of the accused to cause bodily injury to the deceased has also been proved and that the evidence on record clearly establish that on 06.11.1996 the deceased was in the company of the accused and that thereafter, deceased could not be found and that the confessional statement of the accused leading to the discovery of head of the deceased in the canal is a clinching circumstance to connect the accused with the offence. He also contended and relied upon the fact that the accused absconded from the hostel for several days and thereafter surrendered

before the Court which would serve as an additional link in the chain of circumstances to prove the charges levelled against him. He also submitted that the High Court was not justified in setting aside the order of conviction, for what the High Court had found proved was only a plausible or possible view and version, which did not find favour with the trial Court. He also submitted that the High Court was not justified in disbelieving the recording of confession merely because of the omission to mention the same in the case diary. It was also submitted that the High Court was not justified in disbelieving the recovery merely because there was contradiction with regard to timing of recovery. He further submitted that the High Court erroneously disbelieved the case of the prosecution that the torso could be carried in MO-13 – Suit Case which is 21 inches as according to Exhibit P52 mahazar – the length of MO-13 is 21 inches and diameter is 24 inches and therefore, the torso could not have been parceled in the suit case MO-13. He also took us through the evidence on record in support of his contention that the High Court committed an error in acquitting the respondent solely on the ground that it is hazardous to convict the accused on the basis of the evidence placed by the prosecution. He submitted that in the present case all the witnesses produced are of respectable status and are independent witnesses and they do not have any axe to grind against the accused and, therefore, the High Court committed an error in disbelieving the evidence on record.

11. On the other hand, Mr. Sushil Kumar, learned senior counsel appearing on behalf of the respondent-accused very painstakingly drew our attention to various aspects of the case, which according to him demolish the very substratum of the prosecution case. He also heavily relied upon the fact, by making submission, that there are no eye-witnesses and no direct evidence regarding commission of the crime by the respondent. He submitted that there are no materials to show that the respondent took the deceased to room No. 319 [room of the accused] and killed him there. He further submitted that

as no blood was recovered from the room No. 319 and that the two roommates of the respondent, viz., Raja Chidambaram [PW-37] & Shagir Thabris [PW-38] have not stated that they smelled any blood or saw any blood stains in the room, it definitely belies prosecution case that murder was committed in the said room of the hostel. Further submission was that PWs 37 & 38 admitted that the three knives [i.e., MOSs 9 to 11] were used for cutting fruits and that PW 37 further admitted that during the time of interrogation police neither showed the articles seized from the room of accused nor asked him to identify the said articles. The counsel for the respondent further submitted that there is no evidence to prove that the accused proceeded to Madras on 06.11.1996 at 9.00 p.m. from Chidambaram railway station, albeit he submitted that accused took train at Chidambaram on 06.11.1996 at 9.00 p.m. bound for Tiruchirapalli to go to his native place, Karur and returned from Karur on 8th morning. Counsel stated that accused took his briefcase [MO-13] along with him and that MO-14 belongs to Raja Chidambaram [PW-37] and after meeting his parents on 7.11.96, the accused returned to Chidambaram hostel on the morning of 8.11.96 and he was in the hostel from 9-11.11.96. On the night of 10.11.96 his mother and his cousin brother had arrived at Chidambaram and stayed in Saradha Ram Hotel and they left on 11.11.96 Noon. Counsel for the respondent further submitted that the non-examination of the Vice-Chancellor and the Dean of the university though they have been cited in the charge sheet as witnesses is fatal to the prosecution case. Next submission was that the chain of events to prove the guilt of the accused has many loopholes in it. Learned senior counsel for the respondent also submitted that the High Court has rightly acquitted the accused as circumstances alleged by the prosecution have not been proved. It was also his submission that this being an appeal against acquittal, it is to be ascertained very carefully whether the view taken by the High Court is a plausible or possible view and that if the order of acquittal is one of the possible view, the same deserves deference rather than interference by the

appellate court. He also submitted that the trial court was wrong in holding the respondent guilty for evidence adduced by the prosecution to prove that the deceased was last seen with the accused replete with inherent improbabilities and inconsistencies.

LEGAL POSITION:-

APPEAL AGAINST ACQUITTAL

12. Before we enter into the merit of the case, we are required to deal with the contention of the counsel appearing on behalf of the respondent regarding the scope and ambit of an APPEAL AGAINST ACQUITTAL. Various decisions of this Court have dealt with the issue very extensively. Therefore, it would be suffice, if we extract few decisions of this Court laying down the law in this regard.

13. In the case of *State of U.P. v. Ram Sajivan & Ors.* reported at (2010) 1 SCC 529, one of us (Bhandari, J.) detailed the law in this regard as follows: -

> "46. ..... This Court would ordinarily be slow in interfering in order of acquittal. The scope of the powers of the appellate court in an appeal is well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction.
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> In *Chandrappa v. State of Karnataka* this Court held: (SCC p. 432, para 42)
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> "(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail 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 acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

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In *Ghurey Lal v. State of U.P.,* one of us (Bhandari, J.) summarised the legal position as follows in paras 69 and 70: (SCC p. 477)

"69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

In a recently delivered judgment of this Court in State of U.P. v. Banne, one of us (Bhandari, J.) summarised the entire legal position and observed that this Court would be justified in interfering in the judgment of the High Court in the following circumstances which are illustrative and not exhaustive: (SCC p. 286, para 28)

"(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

This Court would be justified in interfering with the judgment of acquittal of the High Court only when there are very substantial and compelling reasons to discard the High Court decision. When we apply the test laid down by this Court repeatedly in a large number of cases, the irresistible conclusion is that the High Court in the impugned judgment has not correctly followed the legal position."

14. In another decision of this Court in the case of *Sannaia Subba Rao & Ors. Vs. State of A.P.* reported at 2008 (17) SCC 225, one of us, has referred to and quoted with approval the general principles while dealing with an appeal against acquittal, wherein, it was clearly mentioned that; the appellate court has full power to review, relook and re-appreciate the entire evidence based on which the order of acquittal is founded; further it was also accepted that the Code of Criminal Procedure puts no limitation or restriction on the appellate court to reach its own conclusion based on the evidence before it.

15. In the case of *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* reported at (2010) 6 SCC 1 this court held as follows: -

"27. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded.

(ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts,

etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

16. Therefore, one of the settled position of law as to how the Court should deal with an appeal against acquittal is that, while dealing with such an appeal, the appellate Court has no restriction to review and relook the entire evidence on which the order of acquittal is founded. On such review, the appellate Court would consider the manner in which the evidence was dealt with by the lower Court. At the same time, if the lower Court's decision is based on erroneous views and against the settled position of law, then such an order of acquittal should be set aside.

17. Another settled position is that, if the trial Court has ignored material and relevant facts or misread such evidence or has ignored scientific documents, then in such a scenario the appellate court is competent to reverse the decision of the trial court.

18. Therefore keeping in mind the aforesaid broad principles of the settled position of law, we would proceed to analyse the evidence that is adduced and come to the conclusion whether the decision of the High Court should be upheld or reversed.

CASE ON CIRCUMSTANTIAL EVIDENCE

19. The principle for basing a conviction on the edifice of circumstantial evidence has also been indicated in a number of decisions of this Court and the law is well-settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible. This Court has clearly sounded a note of

caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

20. This Court in the case of *State of U.P. v. Ram Balak & Anr.,* reported at (2008) 15 SCC 551 had dealt with the whole law relating to circumstantial evidence in the following terms: -

"11. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan, Eradu v. State of Hyderabad, Earabhadrappa v. State of Karnataka, State of U.P. v. Sukhbasi, Balwinder Singh v. State of Punjab and Ashok Kumar Chatterjee v. State of M.P.) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to

negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. wherein it has been observed thus: (SCC pp. 206-07, para 21)

'21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'

11. In Padala Veera Reddy v. State of A.P. it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

'(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'

'10. … It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

16. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra.* Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

These aspects were highlighted in State of Rajasthan v. Raja Ram, at SCC pp. 187-90, paras 9-16 and State of Haryana v. Jagbir Singh."

21. In the light of the above principle we proceed to ascertain whether the prosecution has been able to establish a chain of circumstances so as not to leave any reasonable ground for the conclusion that the allegations brought against the respondent are sufficiently proved and established.

MOTIVE

22. In the present case, in the chain of events, the first point which arises for our consideration is the MOTIVE behind the alleged crime done by the accused-John David. The prosecution has alleged that accused was in the habit of ragging the junior students and accustomed in getting his home work done by the junior students and that is why when the deceased did not subjugate himself to the accused, the accused gathered ill-will against the deceased and therefore, that was the motive for which the accused killed him.

23. For the purpose of proving the aforesaid motive of the accused the prosecution has placed reliance upon the evidence of Dr. R. Sampath [PW-3], Karthikeyan [PW-4], Praveen Kumar [PW-5] and Subhash [PW-6], V. Balaji [PW-19] and Ramaswamy [PW-20]. Dr. R. Sampath [PW-3], who is the Head of the Department of Radiology, Annamalai University as also part-time Warden of Malligai Hostel of the University, who in his deposition has stated that on 19.11.1996 at about 8.30 p.m. he had witnessed the junior students standing in front of the Hostel in a row in front of the seniors, including the accused-

John David. Thereafter PW-3 made enquiries on the incident and submitted a report about the incident of ragging to the higher officials which is marked as Exhibit P-3. Karthikeyan [PW-4], 1st year junior student of the college, stated that on 06.11.1996 accused-John David along with one Kumaran came to Hostel and forced him to purchase the tickets of Engineering Cultural Programme, which they purchased with hesitation and this fact was also witnessed by the Warden and Deputy Warden. Along with PW-4, Praveen Kumar [PW-5] and Subhash [PW-6], both 1st year students of the college, stated in their evidence that they have written record work for the accused-John David under compulsion and with the fear of being ragged. V. Balaji [PW-19], 1st year student of college, stated in his evidence that the accused-John David along with Kumaran forced them to purchase the tickets for the Cultural Programme and also made them to stand and that Warden, Dean and Deputy Warden got the students released from such ragging. Ramaswamy [PW-20], 1st year student of the college, stated in his evidence that accused-John David used to come to hostel for ragging and to get the record work completed after ragging. PW-19 further stated that on 06.11.1996, after finishing his viva-voce test at about 11.30 a.m. when he returned, the accused came to his room between 11.30 a.m. to 12 Noon and asked him about the deceased-Navarasu. PW-20 also stated that when he was returning after finishing his viva-voce test, the accused on 06.11.1996 at about 12 Noon asked him about the completion of the test of Navarasu. From the evidence of the above witnesses and other documents on records it becomes quite evident that the record books of the accused were written by other juniors and that accused was in the habit of ragging junior students. The evidence of PWs 19 & 20 also go to prove that the accused was looking for Navarasu frantically in the morning, which was definitely not for the benefit of the deceased looking at the background behaviour of the accused towards deceased, for there is enough evidence on record to support the case of the prosecution that the accused was having malice

and ill-will against with the deceased as he had refused to succumb to the ragging demands of the accused.

LAST SEEN ALIVE

24. In the chain of events, the second point which arises for our consideration is the LAST SEEN evidence of deceased with the accused. For proving the said fact that the deceased was last seen alive in the company of the deceased, the prosecution has placed reliance upon the evidence of V. Balaji [PW-19] and Ramaswamy [PW-20], G.M. Nandhakumar [PW-21], R. Mohamed Shakir [PW-22], R. Saravanan [PW-23] and T. Arun Kumar [PW-25]. PWs 21 and 22, 1st year students of the college, stated in their evidence that when they were returning from the college at about 12.45 p.m. on 06.11.1996 they saw the deceased and accused together and accused stopped Navarasu and asked them to leave from there and thereafter they had not seen Navarasu alive. PW-23, Laboratory Attendant of the college, stated in his evidence that he saw both accused and deceased in conversation with each other on 06.11.1996 at about 12.45 or 1.00 p.m. in front of Dean's office. PW-25, 2nd year college student, stated that he also saw both accused and deceased together at about 2.00 p.m. on 06.11.1996. From the evidence of Dr. Sethupathy [PW-7], Mrs. Alphonsa [PW-8], Prof. Gunasekaran [PW-10] and V. Balaji [PW-19] it also comes out that till the afternoon of 06.11.1996 deceased attended the lectures but after meeting with the accused he did not appear in the lecture/test on the same day and was also absent thereafter from lectures/tests. Ramaswamy [PW-20] also categorically stated that after the viva-voce test held on 06.11.1996, he did not see the deceased alive. From the evidence of all the abovesaid witnesses it is also clear that the deceased was last seen alive in the company of the accused on 06.11.1996 between 12.45 to 2.00 p.m. and thereafter no one had seen the deceased alive and this fact also supports the case of the prosecution. Moreover accused admitted in his statement filed during question U/s 313, Cr.P.C.

that he was sitting in the corridor of Dean's office in the afternoon of 06.11.1996, which further corroborates the case of prosecution.

SUSPICIOUS CONDUCT OF THE ACCUSED

25. The conduct of the accused is the next chain of circumstance which is heavily relied upon by the prosecution for proving the guilt of the accused and for this it placed reliance on the evidence of Subba @ Vankatesan [PW-28], Vijayarangam [PW-29], Murali [PW-35], Senthilkumar [PW-40], Joe Bulgani [PW-41] and Rajmohan [PW-42]. PW-28, auto driver, stated in his evidence that on 06.11.1996 at about 8.00 p.m. accused took his auto to the hostel from where the accused went to Chidambaram railway station along with two suitcases. PW-29, Watchman of KRM Hostel, stated in his evidence that on 06.11.1996 at 8.15 p.m. accused came to hostel in an auto and brought two bags inside the hostel and left in auto immediately thereafter and that the accused returned with the two suitcases at 4.00 a.m. on 8.11.1996. PW-40, student of the college stated that on 08.11.1996 at 4.30 a.m. he saw the accused sleeping in the varanda of Room No. 319 with two suitcases nearby because the accused did not have the room keys, as the accused's roommate took away the keys and, when PW-40 offered the accused to come and stay in his room, at about 5.30 a.m. the accused came to his room and kept a suitcase, i.e., MO-14 and went to sleep in the room of PW-41 along with MO-13. When PWs 40 & 41 came from mess at about 8.30 a.m. PW-41 complaint about foul smell coming from his room [Room No. 325]. Thereafter, accused took the MO-13 from the room at about 12.30 p.m. This statement of PW-40 was also supported by the statement of PW-41. PW-42, student of the college, stated that on 8.11.1996 at 12.30 p.m. accused was sleeping in Room No. 325 and that on 9.11.1996 accused along with one other student went to 'B' Mess for lunch but accused did not take the lunch on the ground that his stomach is not alright and on return he saw accused

keeping his hand on the wall with sad look on his face. He further stated that when he entered in the room of the accused [Room No. 319] he smelt foul smell and on asking about the same from the accused, the accused replied that it is of the Biriyani which was given to him by his mother. Later at 4.30 p.m. the accused asked PW-42 to drop him at the Chidambaram Railway Station as he wanted to go to his native place and thereafter he dropped the accused along with a briefcase at the Railway Station on the bike of one Rangarajan. PW-42 also purchased a train ticket for Tanjavur for the accused. PW-42 also stated that on 10.11.1996 he saw accused standing before Room No. 319 and on asking the accused told that he went upto Trichy and returned back. PW-35, Receptionist of Hotel Saradharam, Chidambaram stated that on 10.11.1996 at about 8.10 p.m. accused stayed in the hotel along with one Dr. Esthar and they vacated the room at 3.15 a.m. on 12.11.1996. The accused on 14.11.1996 surrendered in the Court of Judicial Magistrate, Mannarkudi and was remanded to judicial custody till 18.11.1996. On 18.11.1996 the Court ordered for five days police custody of the accused on the condition that the accused should be produced before a Doctor in the Government Hospital, Chidambaram at 10.00 a.m. daily for medical check up. The above said unusual and eccentric conduct of the accused which is unequivocally told by the witnesses makes the conduct of the accused highly suspicious and leads to corroborate the case of the prosecution.

CONFESSIONAL STATEMENT OF ACCUSED AND CONSEQUENTIAL RECOVERIES.

26. In the present case, as stated supra, PW-1, father of the deceased, filed a report with the police for missing of his son on 10.11.1996 which was registered as Crime No. 509 of 1996 [Exhibit-P1]. In the present case the accused after surrendering before the Court of Judicial Magistrate, Mannarkudi on 14.11.1996 also gave his confessional

statement [Exhibit-50] on 19.11.1996 in the presence of Rajaraman [PW-58], Village Administrative Officer for the non-municipal area of Chidambaram, wherein in very clear terms he admitted his crime as is presented by the prosecution. After the surrender of the accused on 14.11.1996 he was lodged in the Central Prison at Tiruchi. Prosecuting agency in Crime No. 509/96 filed a petition before the Judicial Magistrate, Chidambaram for the police custody of the accused U/s 167 of Cr. P.C., which was allowed by the Court for five days from 18.11.1996 on the condition that the accused should be produced before a Doctor in the Government Hospital, Chidambaram at 10.00 a.m. daily for medical check up and at 1.30 a.m. On 19.11.1996 the accused made a voluntary confession as stated hereinabove. Also it has been admitted by the Trial Court as also by the High Court that at no stage of trial there is any allegation of torture of the accused in the hands of the police, which clearly proves that the statement made by the accused on 19.11.1996 was given voluntarily and is an admissible piece of evidence. The High Court merely on an assumed basis held that the confessional statement could not have been voluntarily given by the accused without referring to any particular evidence in support of the said conclusion. The confession was given by the accused in presence of Rajaraman [PW-58], Village Administrative Officer; Mr. Subramanian [assistant of PW-58], who are totally independent persons.

27. In the case of *Amitsingh Bhikamsingh Thakur v. State of Maharashtra* reported in (2007) 2 SCC 310 this Court had said that, when on the basis of information given by the accused there is a recovery of an object of crime which provides a link in the chain of circumstances, then such information leading to the discovery of object is admissible.

28. We may at this stage, would like to state the proposition of law that only such information which is found proximate to the cause of discovery of material objects, alone is taken as admissible in law and in the present case there are lot of

materials which were recovered at the instance of such confessional statement made by the accused only. We may detail out such material findings in this case.

29. At the instance and in pursuance of the said confessional statement given by the accused PW-78, Police Inspector, Annamalai Nagar; Rajaraman [PW-58], Village Administrative Officer; Mr. Subramanian [assistant of PW-58] along with other witnesses went to the south canal of the KRM Hostel at about 7.30 a.m. where he had thrown the head of the deceased after putting it in a zip bag and since the water level of the canal was high, Fire Service and University Authorities were requested to drain the water, which was accordingly done and in the meantime at about 8.45 a.m. at the instance of accused only MO-3, a rexine bag, was recovered which contained two notebooks belonging to the deceased [MOs 4 & 5]. Thereafter, after producing the accused before the Doctors of Govt. Hospital at 10.00 a.m. as per the directions of the court, the accused, took PW-78 along with other witnesses to Room No. 319 and from there material objects from 9 to 15 and 29 were recovered which included three knifes, one blue colour small brief case, among others and from Room No. 323 and 325 material objects from 30 to 33 were recovered which included blood stained cement mortar. At about 4.00 p.m. when the search party returned to the boat canal, the zip bag [MO-22] containing a severed human head was recovered at 4.30 p.m. In the instant case the fact that the severed head of the deceased-Navarasu was recovered from the specific place which was indicated and identified by the accused. The recovery of other material objects at the indication/instance of the accused creates/generates enough incriminating evidence against him and makes such part of the confessional statement clearly admissible in evidence. The fact that the skull found in the water canal of the university belonged to Navarasu-deceased is proved from the evidence of Dr. Ravindran [PW-66], Dr. Venkataraman, [PW-52] and G.V. Rao [PW-77]. PW-66 in his evidence has stated that the deceased

appear to have died because of decapitation of injuries and that the injury is ante-mortem. The Doctor also opined that a sharp cutting weapon would have been used for causing injuries. He further stated in his evidence that severing of head and removal of the muscles and nerves of limbs could have been done by MOs 9 to 11. PW-66 also opined that both the torso and head belongs to one and the same person. Also from the evidence of Dr. Venkataraman, [PW-52] Parasu Dental Clinic, Adyar, Madras it is found that he had given silver filling on the right upper first molar of the deceased and that he had removed the left upper milk tooth and removed the root thereof and the said fact was also clearly and rightly found in the post mortem conducted by PW-66 on the head recovered from the boat-canal. The said fact was also proved from the DNA test conducted by PW-77. PW-77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of PW-1 and Baby Ponnusamy were found in the recovered parts of the body and that therefore they should belong to the only missing son of PW-1.

30. In the present case Trial Court relied upon the super-imposition process/test made by Dr. Jayaprakash [PW-65], Assistant Director, Forensic Science Department, Madras, who stated in his evidence that the skull recovered was of Navarasu. Therefore, from the evidence of PWs 65 & 66 it becomes amply clear that the skull recovered from the boat canal is of Navarasu only.

31. Now, so far as the recovery of limbs and torso of the deceased-Navarasu is concerned, we would like to detail the recovery of the same, their identification and also their relation insofar as the confessional statement made by accused is concerned.

32. On 7.11.1996 at about 6.00 p.m. Prakash [PW-53] the conductor of Bus [bearing no. T.B.01-2366] having route No. 21G [from Thambaram suburban of Chennai City to Paris

Corner] found a male torso under the last seat of the bus packed in white blood stained polythene bag with red letters [marked as MO-16] and thereafter Crime No. 1544 of 1996 case was registered and investigation was started by G. Boopathy [PW-55], Inspector of Police, E.5, Pattinapakkam PS, Chennai. Dr. Ravindran [PW-66] conducted autopsy/post-mortem at 10.00 a.m. on 8.11.1996 and he found that the deceased have died of decapitation of injuries, he opined that the injuries found on the torso and skull were anti-mortem and the deceased would appear to have died of decapitation and he further stated that the respective surface of the fifth cervical vertebra of the head are reciprocally fitting into the corresponding surface of the sixth cervical vertebra of the torso and this articulation was exact in nature and hence he opined that the head and torso belonged to one and the same person.

33. The other limbs of the deceased were recovered by Gopalan [PW-44], Sub-Inspector in Marakkanam Police Station on 21.11.1996 in a pale-coloured with yellow, red and green checks in a lungi-like bed-sheet and along with it was torn polythene bag and a pale cloth thread.

34. In the present case there is no direct evidence to prove that the accused had himself taken the torso and limbs of the deceased to Madras and threw the limbs somewhere (while transit to Madras) and also that accused carried the parcel of torso to Madras and dropped it in the bus No. 21G at Tambaram but, there is only circumstantial evidence.

35. One of the clinching evidence against the accused is the two suitcases [MOs 13 & 14]. Raja Chidambaram [PW-37], the room mate of the accused, stated in his evidence that the two suitcases in which the blood of the deceased was found belong to the accused. He also stated that MO-22, which is a bag in which the head of the deceased was recovered, also belong to the accused. Shagir Thabris [PW-38] also corroborated the said fact in his evidence. Blood found in the suitcases matched with the blood of the deceased which is

blood group 'A'. It is also proved from the evidence of the students adduced in the case that foul smell was emanating from the said two suitcases and that when accused was asked about the said smell, he only replied that it is because of Biryani, which his mother had given him. Subba @ Vankatesan [PW-28], auto driver, has affirmatively stated that the accused had taken out those two suitcases with him in his auto rickshaw on 06.11.1996 when he dropped him at Chidambaram Railway Station. The hostel chowkidar examined as PW-29 [Vijayarangam] corroborated the said fact. The students of the hostel, Senthilkumar [PW-40], Joe Bulgani [PW-41], not only spoke about the foul smell emanating from the room where those suitcases were kept but also of the fact that the accused had brought those two suitcases with him when he came back to the hostel on 08.11.1996 morning. These are indeed circumstantial evidence but all leading to one conclusion that the accused is guilty of the offence of killing the deceased. There is however some doubt with regard to the place of occurrence but there is also strong and cogent evidence to indicate that the room mates of the accused, i.e., PWs 37 and 38, were watching a cricket match during the entire afternoon, evening and till late night on 06.11.1996 in the TV room, and the accused had the room (Room No. 319) all to himself in the afternoon and evening upto 11.00 p.m. The accused left the said room with two suitcases at 8.30 p.m. which is proved by way of evidence of the watchman and auto driver. The room mate of the accused, viz., PW-38, came back to Room No. 319 at about 11.00 p.m. and slept and on the next day went home.

36. There are enough circumstantial evidence, as discussed above, to hold that it is none else but the accused who could have caused the concealment of torso and limbs because it was the accused who had severed the head of deceased-Navarasu as found earlier and, therefore, he must have been in possession to the torso and limbs, which were also subsequently recovered and were also proved to be that of deceased-Navarasu.

37. Therefore, if we look at the case, we find that the prosecution has succeeded in proving its case on circumstantial evidence. In the present case all the witnesses are independent and respectable eye-witnesses and they have not been shown to have any axe to grind against the accused. And from the evidence of the several witnesses, as mentioned above, it is clear that the accused nurtured ill feeling against the deceased as the deceased refused to write the record note for accused; that the deceased was last seen with the accused in the afternoon of 06.11.1996 and he was searching for him very eagerly; that the conduct of the deceased was very weird and strange and the bags/suitcases kept by him also produced stinking smell; the recovery of skull from canal water, material objects, like, note books of deceased, gold chain, blood stained bags, knifes etc.,; and also the evidence of PW-66, PW-65 and PW-77 who have categorically stated that the skull, torso and limbs recovered were of the deceased only.

38. It is well-settled proposition of law that the recovery of crime objects on the basis of information given by the accused provides a link in the chain of circumstances. Also failure to explain one of the circumstances would not be fatal for the prosecution case and cumulative effect of all the circumstances is to be seen in such cases. At this juncture we feel it is apposite to mention that in the case of *State of Karnataka v. K. Yarappa Reddy* reported in (1999) 8 SCC 715 this Court has held that; the court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it.

39. Hence, minor loopholes and irregularities in the investigation process cannot form the crux of the case on which the respondent can rely upon to prove his innocence when there are strong circumstantial evidences deduced from the said

investigation which logically and rationally point towards the guilt of the accused.

40. Therefore in our considered opinion prosecution has established its case on the basis of strong and cogent circumstantial evidence and that on the basis of the circumstances proved, there cannot be any other possible or plausible view favouring the accused. The view taken by the High Court is totally erroneous and outcome of misreading and misinterpreting the evidence on record.

41. In view of the aforesaid discussion, facts and circumstances of the case, we are of the considered view that the High Court erred in reversing the order of conviction recorded by the trial Court as the prosecution has established its case. Accordingly, we set aside the judgment and order of the High Court and restore the judgment and decision of the trial Court but only with one rider that the sentence awarded shall run concurrently and not consecutively as ordered by the trial court. While doing so we rely upon sub-section (2) of section 31 of the Code of Criminal Procedure, 1973.

42. In the result, the appeal is allowed, bail bond of the respondent is cancelled and the respondent is directed to surrender before the jail authorities immediately, failing which the concerned authorities are directed to proceed in accordance with law.

B.B.B. Appeal allowed.

STATE OF TAMIL NADU AND ANR.
v.
INDIA CEMENTS LTD. AND ANR.
(Civil Appeal No. 4233 of 2007)

APRIL 21, 2011

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

Sales Tax – Tamil Nadu General Sales Tax Act, 1959 – ss.17A and 28A –Interest free sales tax deferral scheme introduced by the State of Tamil Nadu under G.O.Ms.No.119 dated 13th April, 1994 for manufacturing units undertaking expansion/diversification – Scheme providing for deferral of sales tax based on increased volume of production/sales – Interpretation of the scheme – Held: The benchmark for availing the benefit of the sales tax deferral scheme having been fixed both with reference to the production as also to the sales, it was immaterial whether the unit concerned reached base production volume (BPV) or the base sales volume (BSV) earlier – Any other interpretation of the said GOM would frustrate the object of the scheme – Benefit of sales tax deferral scheme would be available to a dealer from the date of reaching of BPV or BSV, whichever is earlier – Interpretation of Statutes.

Circulars /Notifications – Revenue Circulars – Binding effect of – Held: Circulars issued by the revenue are binding on the departmental authorities and they cannot be permitted to repudiate the same on the plea that it is inconsistent with the statutory provisions or it mitigates the rigour of the law.

The State of Tamil Nadu vide G.O.Ms.No.119 dated 13th April, 1994 introduced interest free sales tax deferral scheme for manufacturing units undertaking expansion/ diversification. The said G.O.M. provided that deferral of sales tax will only be on the increased volume of

production/sales and for the purpose of determining such increased volume, the base figure would be the highest of the volume of production/sale in any year during the last three years prior to expansion.

The first respondent, which was engaged in the manufacture and marketing of cement in the State of Tamil Nadu and Andhra Pradesh, claimed entitlement to the benefit of deferral of sales tax. The Taxation Special Tribunal held that before the first respondent could claim deferral of sales tax, it was required to reach both the base production volume (BPV) and base sales volume (BSV); in other words, if the BSV had been reached earlier but BPV had not been reached, the first respondent will not be entitled to get the deferral facility, till it achieved BPV. Being aggrieved, the first respondent preferred Writ Petitions before the High Court which allowed the petitions and set aside the order passed by the Tribunal.

In the instant appeal, the question which arose for consideration was whether the first respondent would be eligible for sales tax deferral in any financial year for the sales made in that year in excess of the base sales volume (BSV) as soon as they exceed the BSV or only when their production also exceeds the base production volume (BPV) in that year.

Dismissing the appeal, the Court

HELD: 1. The source of the sales tax deferral scheme is traceable to Section 17A of the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act) which enables the Government to notify deferred payment of tax for new industries, etc. subject to such restrictions and conditions as may be deemed fit. Therefore, the scheme in question has a statutory flavour. From a comparative reading of G.O.P.No.92 dated 22nd February, 1991 and

G.O.Ms.No.376 dated 27th October, 1992 on the one hand and G.O.Ms.No.119 dated 13th April, 1994, the eligibility certificate issued thereunder to the first respondent as also the consequential agreement entered between the parties on the other hand, it is evident that G.O.P.No.92 and G.O.Ms.No.376 is the source of power to grant exemption and G.O.Ms.No.119 lays down the methodology and the machinery to implement the scheme. These are complementary to each other. Therefore, the terms and conditions stipulated in the schemes; the eligibility certificate as also the consequential agreement, between the first respondent and the revenue, having the statutory force, undoubtedly violation of any one of the terms and conditions thereof would disentitle the beneficiary of the benefit of the sales tax deferral scheme. [Para 15] [410-C-F]

Commissioner of Customs (Preventive), Mumbai Vs. M. Ambalal &Company **(2011) 2 SCC 74: 2010 (15) SCR 937 – referred to.**

2. A conjoint reading of clauses 3(i) and (ii) of G.O.Ms.No.119 dated 13th April, 1994, and paragraph 5.3 of the eligibility certificate dated 13th February, 1998 issued to the first respondent would show that the object of the conditions with reference to reaching of BPV is to ensure that the concerned unit achieves the highest production and sale of the existing unit in the last three years prior to the commencement of the commercial production in the expansion unit, resulting in higher revenue on higher sales. The benchmark for availing the benefit of the sales tax deferral scheme having been fixed both with reference to the production as also to the sales, it is immaterial whether the unit concerned reaches BPV or the BSV earlier. The word "when" employed in clause 3(ii) of G.O.Ms.No.119, whether read as "if" or "after" only signifies that in order to avail of the benefit of sales tax deferral for sales made in the year in excess of the BSV,

the industry must achieve in that year the BPV, which is the highest production of the last three years prior to the expansion, for every assessment year of the total number of years, viz., 12 years, besides reaching BSV in that particular year. It is obvious that by insisting that the BSV should also be reached, the revenue of the State gets protected in every assessment year during the entire period of deferral and, in fact, the industry gets the benefit of deferral only on sales which are in excess of the BSV. It is pertinent to note that if for any reason the beneficiary ultimately fails to achieve the BPV during the financial year, the benefit of deferral of sales tax availed of by it on achieving BSV becomes refundable forthwith along with interest thereon. In light of the intention behind the schemes, clause 3(ii) of the G.O.Ms.No.119 cannot be construed to mean that the benefit would flow only from the date of reaching the BPV and not from the date of reaching the BSV, particularly when the main object of the schemes is to increase the productivity without compromising with the revenue of the State. Any other interpretation of the said GOM would frustrate the object of the scheme. It is now well established principle of law that if a plain meaning given to the provision for the purpose of considering as to whether the applicant had fulfilled the eligibility criteria as laid down in the notification or not is found to be clear, purpose and object the notification seeks to achieve must be given effect to. [Para 16] [411-B-H; 412-A-C]

G.P. Ceramics Private Limited v. Commissioner, Trade Tax, Uttar Pradesh **(2009) 2SCC 90: 2008 (16) SCR 315 – relied on.**

3. In any event, the decision of the High Court cannot be flawed with in, light of the circular dated 1st May, 2000 issued by the office of the Principal Commissioner and Commissioner of Commercial Taxes, Chennai, in exercise

of power conferred on him under Section 28A of the TNGST Act. It is manifest from the circular that as per the clarification issued by the Commissioner of Commercial Taxes, in exercise of the power conferred on him under Section 28A of the TNGST Act, the benefit of sales tax deferral scheme would be available to a dealer from the date of reaching of BPV or BSV, whichever is earlier, as is pleaded on behalf of the first respondent. It is trite law that circulars issued by the revenue are binding on the departmental authorities and they cannot be permitted to repudiate the same on the plea that it is inconsistent with the statutory provisions or it mitigates the rigour of the law. In the present case, it is not the case of the revenue that circular dated 1st May, 2000 is in conflict with either any statutory provision or the deferral schemes announced under the afore-mentioned government orders. The said circular is binding in law on the adjudicating authority under the TNGST Act. [Paras 17, 18, 23] [412-D; 413-D-E; 415-E-F]

Paper Products Ltd. v. Commissioner of Central Excise **(1999) 7 SCC 84;** *Collector of Central Excise, Vadodara v. Dhiren Chemical Industries* **(2002) 2 SCC 127: 2001 (5) Suppl. SCR 607;** *Commissioner of Customs, Calcutta & Ors. v. Indian Oil Corpn. Ltd. & Anr.* **(2004) 3 SCC 488: 2004 (2) SCR 511 and** *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* **(2008) 13 SCC 1: 2008 (14) SCR 653 – referred to.**

Case Law Reference:

2010 (15) SCR 937	**referred to**	**Para 13**
2008 (16) SCR 315	**relied on**	**Para 16**
(1999) 7 SCC 84	**referred to**	**Para 19**
2001 (5) Suppl. SCR 607	**referred to**	**Para 20, 21, 22**
2008 (14) SCR 653	**referred to**	**Para 21**
2004 (2) SCR 511	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4233 of 2007.

From the Judgment & Order dated 22.12.2006 of the High Court of Madras in W.P. Nos. 13697 & 13698 of 2002

Rajiv Dutta, M. Chandrasekharan, S.K. Bagaria, R. Nedumaran, Dushyant Kumar Singh, C. Thiruppathi, Hari Shankar K., Vikas Singh Jangra, Kavin Gulati, Praveen Kumar, Kumar Rajesh Singh, Ruby Singh Ahuja, Ruchikra Gupta, Deepti Sarin, Siddhanth Kochhar, Manu Agarwal for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal is directed against the final judgment and order dated 22nd December, 2006 rendered by the High Court of Judicature at Madras in W.P.Nos.13697 and 13698 of 2002. By the impugned judgment, while setting aside the order dated 19th April, 2002 passed by the Taxation Special Tribunal (for short "the Tribunal") in O.P. Nos. 322 and 351 of 2002, the High Court has held that the first respondent viz. M/s India Cements Ltd. is entitled to the benefit of deferral of sales tax as claimed by them under the interest free sales tax deferral scheme, introduced by the State of Tamil Nadu under G.O.Ms.No.119 dated 13th April, 1994 issued by the Commercial Taxes & Religious Endowments Department of the State.

2. Before we traverse the facts, which have given rise to the present appeal, in order to appreciate the issue involved, it would be expedient to refer to the relevant State Government orders/memorandum notified from time to time, in exercise of powers conferred under Section 17A of the Tamil Nadu General Sales Tax Act, 1959 (for short "the TNGST Act") and

Section 9(2) of the Central Sales Tax Act, 1956 (for short "the CST Act").

2.1 With a view to promote industrialisation, the Government of Tamil Nadu had declared 105 taluks of the State as industrially backward for the purpose of grant of interest free sales tax loan, interest free sales tax deferral, state capital subsidy etc. In furtherance thereof and to correct regional imbalances in industrialisation, vide G.O.Ms. No.500 dated 14th May, 1990, the Government declared 30 taluks from amongst the 105 industrially backward taluks to be industrially most backward taluks, offering them further incentives. It was directed that the new industries to be set up in these 30 most backward taluks as also in the three industrial complexes of State Industries Promotion Corporation of Tamil Nadu (for short "the SIPCOT") at three named places, in addition to the existing concessions, would be entitled to full waiver of sales-tax dues for a period of five years upto a ceiling of the total investment made in the fixed assets. It was also stipulated that existing units in these areas/complexes undertaking expansion/ diversification shall also be entitled to deferral of sales tax for nine years, limited to 80% of the additional investment made in fixed assets. However, the benefit of sales tax deferral to the new units was to the full extent of the total investment made in the fixed assets. The scheme was subject to the sales tax payable on products manufactured by the capacity created by expansion/diversification units only.

2.2 Subsequently, certain clarifications were issued vide G.O.P.No.92 CT dated 22nd February, 1991 and G.O.P.No.396 dated 10th September, 1991 whereby benefit of deferral of payment of sales-tax payable was extended to all industries to be set up anywhere in Tamil Nadu having an investment of '100 crores and above on sale of the products manufactured by the industry for a period of twelve years from the date of commencement of production on or after 18th July, 1991 upto a ceiling of 100% of the value of fixed assets, after

deducting the quantum of tax under the CST Act for the same period and subject to production of eligibility certificate to be issued by SIPCOT. By G.O.Ms.No.376, dated 27th October, 1992, in exercise of powers conferred by clause (a) of sub-section 5 of Section 8 and sub-section 2 of Section 9 of the CST Act, the Government extended the benefit of remission/ deferral of tax payable under the CST Act, as similar to G.O.P.No.92 dated 22nd February 1991, to the new industries as well as to the existing industries, on the same conditions prescribed under G.O.P.No.92. These government orders were followed by another G.O.M.No.43, Industries (MIG-II) Department, dated 13th December, 1992 whereby special incentives were introduced for mega industries, subject to fulfilment of the prescribed conditions.

2.3 It appears that with a view to protect the revenue and also to increase the production level of industries which were interested in availing concessions of deferral of sales tax, the State Government vide G.O.Ms.No.119, dated 13th April, 1994, imposed certain conditions and issued directions that were required to be complied with by the expansion/diversification units for availing sales tax benefits. For the sake of ready reference, the relevant portion of the said G.O. is extracted below:

> "3. The Government after careful examination, have decided to accept the suggestions of the special Commissioner and Commissioner of Commercial Taxes as they protect the Revenue and also help to increase the production level of the industries availing the concession. Accordingly, the Government direct that –
>
> (i) The industry will be eligible for sales tax deferral only if in a financial year production exceeds the base production volume which is the highest annual production in the 3 years prior to expansion.
>
> (ii) When the actual production in the industry in any

financial year exceeds the base production volume, the industry would be eligible for deferral of sales tax for sales made in that year in excess of the base sales volume under Tamil Nadu General Sales Tax, which is the highest of the actual annual sales in the last 3 years prior to expansion.

(iii) The above conditions are applicable in cases where expansion unit is a separate unit located elsewhere or a part of the existing plant.

(iv) The specifications of base production/sales volumes are applicable even in the case of allegedly new unit having been started by the same management or ownership or where the substantial controlling capital is put in by the same group of companies.

(v) The base production volume and the base sales volume will have to be worked out and incorporated in the eligibility certificates at the time of issue by SIPCOT and District Industries Centres."

3. The first respondent, engaged in the manufacture and marketing of cement in the States of Tamil Nadu and Andhra Pradesh was having manufacturing units at Sankari and Sankar Nagar. By their letters dated 13th March, 1996, 4th March, 1997 and 24th September, 1997 they proposed to set up an expanded unit at Dalavoi village, Sendurai taluk to avail the benefit of sales tax deferral scheme under G.O.Ms.No.119, dated 13th April 1994. On being approached, on 13th February, 1998, SIPCOT issued the requisite eligibility certificate to the first respondent, *inter-alia,* mentioning that: (i) the first respondent will be eligible for deferral of sales tax not exceeding '205.13 crores (later on revised to '270.21 crores), interest free for a period of twelve years from the month in which the first respondent's unit commenced its commercial production i.e. from 1st July, 1997 to 31st May, 2009 (cl.3); (ii) deferral of

sales tax will only be on the increased volume of production/sales; (iii) for the purpose of determining the increased volume of production, the base figure would be the highest of the volume of production/sale in the company in any one of the year during the last three years; (iv) till reaching the volume of production/sale specified earlier, the company would continue to pay tax and any liability in excess of the production/sale specified therein alone will be eligible for deferment (cl.5.3); (v) the deferral scheme will be applicable to the unit/company only as long as it manufactures products for which the essentiality certificate had been issued (cl.6) and (vi) violation of any of the conditions as stipulated in the eligibility certificate and the connected government orders will result in withdrawal of deferral facility in entirety (cl.7). In compliance of clause 5.2 of the eligibility certificate, on 12th April, 2000, the first respondent entered into an agreement with the Zonal Assistant Commissioner, Commercial Taxes, undertaking to comply with the Base Production Volume and Base Sales Volume (hereinafter referred to as "BPV" and "BSV" respectively) as indicated in the essentiality certificate.

4. The first respondent continued to remit the sales tax until they reached the level of BSV, viz. the highest of the actual annual sales in the last three years prior to the expansion, stating that they had also reached, in the financial year, BPV, viz. the highest production in the last three years prior to the expansion and submitted its return claiming the deferral of tax on the sale in excess of BSV.

5. The Assistant Commissioner of Commercial Taxes, issued a notice dated 19th March, 2002, *inter alia,* informing the first respondent that once the BSV is reached, then the eligibility for availment of deferral under the eligibility certificate dated 13th February, 1998 would be available only for the unit at Dalavoi and the deferral could not be stretched to include the production of other units and accordingly, directed the respondent to pay a sum of '5322.14 lakhs which had been availed, in excess, as deferral of sales tax. The respondent was

also informed that they could avail of deferral of sales tax after reaching the BSV/BPV for all the units whichever is earlier and then they could avail deferral for expansion unit at Dalavoi only. On 21st March, 2002 the Assistant Commissioner issued an erratum to the earlier notice dated 19th March, 2002 to the effect that the words 'units whichever is earlier and then they can avail deferral for expansion unit' should be read as 'units whichever is later and then they can avail deferral for expansion unit'.

6. In its reply to the notice dated 19th March, 2002, as quoted in the impugned judgment, the first respondent submitted that:- (i) G.O.Ms.No.119 dated 13th April, 1994 cannot be read as completely nullifying the purpose, purport and effect of G.O.P.No.92 dated 22nd February, 1991; (ii) the aim of G.O.Ms.No.119 was to ensure that the entrepreneur maintains the tax payment obligation prior to the new industry so that only incremental sale volume is entitled to deferral and (iii) the new industry which is a separate industrial undertaking, with the sole investment infrastructure utilities, management and work force already determined, had suffered by treating this as an expansion and even if it were an expansion, logically tax can only be collected on the base sale volume and further sale volume beyond the base volume should be treated as a result of the expansion investment.

7. In the meanwhile, consequent to the erratum issued in notice dated 21st March, 2002, the Assistant Commissioner issued a revised notice dated 22nd March, 2002, informing the first respondent that they had availed deferral before they had reached the BPV, which is violative of the conditions laid down in the eligibility certificate. The respondent was thus, informed that they were liable to pay an amount of '5873.51 lakhs as excess availment of deferral of sales tax for the period from 1998-1999 to 2001-2002.

8. Aggrieved by the said demand notice, the first respondent filed O.P. No.322 of 2002 before the Tribunal

seeking quashing of the said notice. Subsequently, they filed another O.P.No.351 of 2002 to declare clause 5.3 of the eligibility certificate dated 13th February, 1998 as *ultra vires* the Notification No.II(1)/CTRE/158/91 in G.O.P.No.396 dated 10th September 1991 and Notification No.II(1)/CTRE/213/92 in G.O.Ms.No.376 dated 27th October, 1992. In both the said petitions, it was contended that clauses 3(i) and (ii) of G.O.Ms.No.119 dated 13th April, 1994 as well as the consequential qualification prescribed in the eligibility certificate dated 13th February, 1998 in paragraph 5.3 would offend the spirit and object of the sales-tax deferral scheme, if the conditions in agreement dated 12th April, 2000 are construed to mean that the holder of the eligibility certificate would be eligible for the benefit of deferral scheme only when they achieve both the BPV/BSV levels together and not otherwise.

9. Relying on an earlier decision of the High Court dated 5th December, 2001, in the case of Madras Cement Limited, wherein it was held that the Government Order makes it clear that even if the sales of the unit had reached the BSV, they would be eligible for deferral of sales tax on sales made in that year only when they reached the BPV, the Tribunal dismissed both the original petitions. Thus, the Tribunal held that before the first respondent could claim deferral of sales tax, both the BPV and BSV shall have to be reached. In other words, if the BSV had been reached earlier but BPV had not been reached, the said respondent will not be entitled to get the deferral facility, till they achieve BPV.

10. Being aggrieved, the first respondent preferred Writ Petitions No.13697 and 13698 of 2002 before the High Court. As afore-stated, the High Court has allowed the writ petitions. Reversing the decision of the Tribunal, the High Court observed thus:

> "21.5 A combined reading of clauses 3(i) and (ii) of G.O.Ms.No.119, Commercial Taxes and Religious Endowments Department, dated 13-4-1994 and

paragraph 5.3 of Eligibility Certificate dated 13-2-1998 in the case of M/s. India Cements Ltd., and para 10 of the Eligibility Certificate dated 22-12-1998 in the case of M/s. Hindustan Motors Limited and the terms and conditions incorporated in the consequential agreements in both the cases, would go to show that the word "when" mentioned in clause 3(ii) of G.O.Ms.No.119, Commercial Taxes and Religious Endowments Department dated 13-4-1994, if read as "if" or "after" whatever the case may be, the BPV which is the highest production of the last three years prior to the expansion should be achieved by the holder of the eligibility certificate for every assessment year of the total number of years, viz., 12 years in the case of deferral and 5 years in the case of waiver, besides reaching BSV in that particular year. By insisting that the BSV should also be reached, the Revenue of the State gets protected in every assessment year during the entire period of deferral or waiver.

21.6. To determine the date from which such benefit of deferral or waiver would follow, viz., from the date of reaching BPV or from the date of reaching BSV, or whichever is earlier or whichever is later, in the light of the intention behind the schemes, clause 3(ii) of G.O.Ms.No.119, Commercial Taxes and Religious Endowments Department, dated 13-4-1994 cannot be construed to mean that the benefit would flow only from the date of reaching the BPV, not from the date of reaching the BSV, as the object of the schemes is to increase the productivity, but without compromising with the revenue of the State.

21.7. As per the rules of interpretation applicable to the case of fiscal laws, the words must say what they mean and nothing should be presumed or implied. Applying the said plain interpretation and reading the word "when" even plainly as "when", the blending of two clauses 3(i) and 3(ii) as suggested by us above, by way of harmonized and

reasonable construction, is inevitable, as the same cannot be ruled out keeping in mind the intention behind the schemes and the goal to achieve the same in the public interest, viz. to improve the production in the most Backward and backward Areas, certainly without compromising with the revenue of the State, in whatever manner, the word "when" found in clause 3(ii) is read whether as "when" of "if" or "after" as the case may be. The above interpretation is, in our considered opinion, unavoidable because any other construction would lead to absurdity frustrating the object behind the scheme."

11. Hence the instant appeal by the State of Tamil Nadu, in which SIPCOT has been arrayed as proforma respondent No.2.

12. Mr. Rajiv Dutta, learned senior counsel appearing for the State strenuously urged that the only interpretation that could be given to clause 3(ii) of G.O.Ms.No.119 dated 13th April, 1994, which is also reflected in the eligibility certificate and the agreement entered into by the first respondent, is that both the base production volume (BPV) and base sales volume (BSV) had to be reached before the first respondent could claim deferral of sales tax. According to the learned counsel, it was only after the BPV was reached that the right of deferral accrued and therefore, if the BSV had been reached earlier, even then the first respondent was not entitled to get the deferral facility till the BPV had been reached. In other words, whichever condition is reached later it is at that stage that industry concerned will get the right to defer the payment of sales tax, pleaded the learned counsel. Referring to para 5.3 of the Eligibility Certificate, which provides that "the company is eligible for deferral of sales tax only on the increased volume of production/sale", learned counsel submitted that the *SLASH* in between the words production and sale shows that till both the BPV and BSV were achieved, the first respondent could not claim the benefit of deferral of sales tax scheme. It was submitted that the word "when" employed in clause 3(ii) of

G.O.Ms.119 also shows that only in the year where the industry reaches both the BPV and BSV, that it would be eligible for the benefit of sales tax deferral.

13. *Per contra*, Mr. M. Chandrasekharan, learned senior counsel appearing for the first respondent submitted that clause 3(i) of G.O.Ms.No.119 prescribes the qualification for availing the sales tax deferral and clause 3(ii) of the said G.O. enables the expansion/diversified unit, of the existing industry to avail the benefit of sales tax deferral either from the date of achieving the BSV or BPV, whichever is earlier, in that financial year. It was contended that if BSV is achieved earlier and BPV is reached later in the financial year, the benefit of sales tax deferral should date back to the earlier date of achieving BSV and similarly if the BPV is achieved earlier and BSV is achieved later, it should date back to the earlier date of achieving BPV and only then the object of deferral scheme can be achieved. According to the learned counsel, any other interpretation would frustrate the object of the scheme. Learned counsel also urged that even if the word "when" as appearing in clause 3(ii) is read as "after" even then the first respondent would be eligible for deferral of sales tax on the sales in excess of BSV after the actual production of the unit in the financial year exceeds the BPV and the benefit should date back to the date of reaching the BSV. Learned counsel also argued that in light of the Circular dated 1st May, 2000 issued under Section 28A of the TNGST Act, clarifying the position as to when the benefit of deferral of sales tax scheme would follow, the revenue cannot be permitted to contend that in order to avail of the benefit of sales tax deferral the industry must reach both BPV and BSV and not when either of the two is reached earlier, as contemplated in the circular. In support of the proposition that a beneficial and promotional exemption should be liberally construed, reliance was placed on a decision of this Court in *Commissioner of Customs (Preventive), Mumbai Vs. M. Ambalal & Company*[1].

1. (2011) 2 SCC 74.

14. Thus, the short question which falls for consideration is whether the first respondent would be eligible for sales tax deferral in any financial year for the sales made in that year in excess of the base sales volume (BSV) as soon as they exceed the BSV or only when their production also exceeds the base production volume (BPV) in that year?

15. The source of the sales tax deferral scheme is traceable to Section 17A of the TNGST Act which enables the Government to notify deferred payment of tax for new industries, etc. subject to such restrictions and conditions as may be deemed fit. Therefore, the scheme in question has a statutory flavour. From a comparative reading of G.O.P.No.92 dated 22nd February, 1991 and G.O.Ms.No.376 dated 27th October, 1992 on the one hand and G.O.Ms.No.119 dated 13th April, 1994, the eligibility certificate issued thereunder as also the consequential agreement entered between the parties on the other hand, it is evident that G.O.P.No.92 and G.O.Ms.No.376 is the source of power to grant exemption and G.O.Ms.No.119 lays down the methodology and the machinery to implement the scheme. These are complementary to each other. Therefore, the terms and conditions stipulated in the schemes; the eligibility certificate as also the consequential agreement, between the first respondent and the revenue, having the statutory force, undoubtedly violation of any one of the terms and conditions thereof would disentitle the beneficiary of the benefit of the sales tax deferral scheme. With this background, we may now advert to the core issue viz. the interpretation of clauses 3(i) and 3(ii) of G.O.Ms.No.119 dated 13th April, 1994, extracted above. At this juncture, it will also be expedient to refer to paragraph 5.3 of the eligibility certificate issued to the first respondent, to which reference was made by learned counsel for the State. It reads as follows :

> "5.3. The company is eligible for deferral of sales tax only on the increased volume of production/sale. For the purpose of determining the increased volume of production, the base figure would be the highest of the

volume of production/sale in the company in any one of the year during the last 3 years. Till reaching the volume of production/sale specified earlier the company would continue to pay tax and any liability in excess of the production/sale specified above alone will be eligible for deferment."

16. A conjoint reading of clauses 3(i) and (ii) of G.O.Ms.No.119 dated 13th April, 1994, and paragraph 5.3 of eligibility certificate dated 13th February, 1998 would show that the object of the conditions with reference to reaching of BPV is to ensure that the concerned unit achieves the highest production and sale of the existing unit in the last three years prior to the commencement of the commercial production in the expansion unit, resulting in higher revenue on higher sales. The benchmark for availing the benefit of the sales tax deferral scheme having been fixed both with reference to the production as also to the sales, in our opinion, it is immaterial whether the unit concerned reaches BPV or the BSV earlier. In our view, the word "when" employed in clause 3(ii) of G.O.Ms.No.119, whether read as "if" or "after" only signifies that in order to avail of the benefit of sales tax deferral for sales made in the year in excess of the BSV, the industry must achieve in that year the BPV, which is the highest production of the last three years prior to the expansion, for every assessment year of the total number of years, viz., 12 years, besides reaching BSV in that particular year. It is obvious that by insisting that the BSV should also be reached, the revenue of the State gets protected in every assessment year during the entire period of deferral and, in fact, the industry gets the benefit of deferral only on sales which are in excess of the BSV. It is pertinent to note that if for any reason the beneficiary ultimately fails to achieve the BPV during the financial year, the benefit of deferral of sales tax availed of by it on achieving BSV becomes refundable forthwith along with interest thereon. In our opinion, in light of the intention behind the schemes, clause 3(ii) of the G.O.Ms.No.119 cannot be construed to mean that the benefit would flow only from the date

of reaching the BPV and not from the date of reaching the BSV, particularly when the main object of the schemes is to increase the productivity without compromising with the revenue of the State. Any other interpretation of the said GOM would frustrate the object of the scheme. It is now well established principle of law that if a plain meaning given to the provision for the purpose of considering as to whether the applicant had fulfilled the eligibility criteria as laid down in the notification or not is found to be clear, purpose and object the notification seeks to achieve must be given effect to. (See: *G.P. Ceramics Private Limited Vs. Commissioner, Trade Tax, Uttar Pradesh.*[2])

17. In any event, we feel that the decision of the High Court cannot be flawed with in light of the circular dated 1st May, 2000 issued by the office of the Principal Commissioner and Commissioner of Commercial Taxes, Chennai, in exercise of power conferred on him under Section 28A of the TNGST Act. For the sake of ready reference, the relevant portion of the circular is extracted below:

> "As per GOMs No.119, CT & RE/13.4.1994 as regards expansion cases it was decided that the past revenue shall be protected obtained prior to expansion. The BPV/BSV is fixed on the basis of highest annual production/sales in the 3 years prior to expansion. Thus the industries will have to pay the taxes due upon the turnover and until the Base Production Volume/Base Sales volume mentioned in the Eligibility Certificate is achieved. The BPV/BSV shall have to be worked out and incorporated in the Eligibility Certificate by SIPCOT and other district centres as per above Government order. Hence if the details are not available the particulars of production/sales for prior three years shall be ascertained from the books of the dealers and Eligibility Certificate got amended to incorporate the particulars to avoid any dispute. As per decision of Tamil Nadu Taxation Special Tribunal in O.P.1229/1230/1231/98 dated 23.11.1998. Mercury Fittings (P) *Ltd. It was held that*

2. (2009) 2 SCC 90.

GOM No.119/CTRE/13.4.1994 (sic) contemplate the liability to pay tax with reference to Base Production Volume or Base Sales Volume whichever is reached earlier and the liability for deferral is only with reference to volume of Sales and not with reference to taxes paid on sales for the base year. Thus all Deputy Commissioners and Assistant Commissioners shall thoroughly verify all expansion cases and satisfy themselves that taxes have been paid until the BPV/BSV has been achieved."

(Emphasis supplied by us)

18. It is manifest from the highlighted portion of the circular that as per the clarification issued by the Commissioner of Commercial Taxes, in exercise of the power conferred on him under Section 28A of the TNGST Act, the benefit of sales tax deferral scheme would be available to a dealer from the date of reaching of BPV or BSV, whichever is earlier, as is pleaded on behalf of the first respondent. It is trite law that circulars issued by the revenue are binding on the departmental authorities and they cannot be permitted to repudiate the same on the plea that it is inconsistent with the statutory provisions or it mitigates the rigour of the law.

19. In *Paper Products Ltd. Vs. Commissioner of Central Excise,*[3] while interpreting Section 37-B of the Central Excise Act, 1944, which is in *pari materia* with Section 28A of the TNGST Act, this Court had held that the circulars issued by the Central Board of Excise & Customs are binding on the department and the department is precluded from challenging the correctness of the said circulars, even on the ground of the same being inconsistent with the statutory provision. It was further held that the department is precluded from the right to file an appeal against the correctness of the binding nature of the circulars and the department's action has to be consistent with the circular which is in force at the relevant point of time.

3. (1999) 7 SCC 84.

20. In *Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries,*[4] a Constitution Bench of this Court had held that if there are circulars issued by the Central Board of Excise & Customs which place a different interpretation upon a phrase in the statute, the interpretation suggested in the circular would be binding upon the revenue even regardless of the interpretation placed by this Court.

21. Similarly, in *Commissioner of Customs, Calcutta & Ors. Vs. Indian Oil Corpn. Ltd. & Anr.,*[5] dealing with the circular issued by the Board under Section 151-A of the Customs Act, 1962, which is again in pari materia with Section 28A of the TNGST Act, Ruma Pal, J., had opined that the circular will be binding primarily on the basis of the language of the statutory provisions buttressed by the need of the adjudicating officers to maintain uniformity in the levy of tax/duty throughout the country. Although in the same judgement, while concurring with the view expressed by Ruma Pal, J., on the facts of that case, P. Venkatarama Reddi, J., entertaining certain doubts as to the correctness of the proposition laid down by the Constitution Bench in *Dhiren Chemical Industries* (supra), had observed that there was a need to redefine succinctly the extent and parameters of the binding character of the circulars of the Central Board of Direct Taxes or Central Excise etc., by another Constitution Bench, yet the learned Judge did not disagree with the proposition that it is not open to the revenue to file an appeal against the order passed by an appellate authority which is in conformity with a departmental circular. In fact, His Lordship went on to observe that when there is a statutory mandate to observe and follow the orders and instructions of CBEC in regard to specified matters, that mandate has to be complied with. It is not open to the adjudicating authority to deviate from those orders or instructions which the statute enjoins that it should follow. If any order is passed contrary to those instructions, the order is liable to be struck down on that very ground.

4. (2002) 2 SCC 127.

5. (2004) 3 SCC 488.

22. In *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries,*[6] a Constitution Bench of this Court has clarified the confusion created on account of the view expressed in para 11 of *Dhiren Chemical Industries* (supra), on the question of binding effect of judgment of this Court *vis-a-vis* State and Central Government circulars thus:

> "**7.** Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

23. In the present case, it is not the case of the revenue that circular dated 1st May, 2000 is in conflict with either any statutory provision or the deferral schemes announced under the afore-mentioned government orders. We, therefore, hold that the said circular is binding in law on the adjudicating authority under the TNGST Act.

24. For the reasons afore-mentioned, we do not find any merit in this appeal and the same is dismissed accordingly.

25. However, in the facts and circumstances of the case, the parties are left to bear their own costs.

B.B.B. Appeal dismissed.

6. (2008) 13 SCC 1.

M/S. BANSAL WIRE INDUSTRIES LTD. AND ANR.
v.
STATE OF U.P. AND ORS.
(Civil Appeal No.3605 of 2011)

APRIL 26, 2011

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

Central Sales Tax Act, 1956:

s.14(iv) – Restrictions on power of States to tax "declared goods" – Items mentioned in clause (iv) of s.14 – Categories falling under "iron and steel" – Tax on sales of "stainless steel wire" – Held:"Stainless steel wire" is not covered under the entry of "tools, alloys and special steels" in entry no. (ix) of clause (iv) and, therefore, does not fall under "Iron and Steel" as defined under s.14(iv) – "Stainless steel wire" also cannot be read into item no. (xv) which reads as "wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper" – Expression "Wire rods and wires" which is mentioned in item no.(xv) would not and cannot cover the expression "tools, alloy and special steels" of entry no. (ix) nor it would refer to the expression "Iron and Steel" as each item used in entry nos. (ix) and (xv) are independent items not depending on each other at all – Hence, "stainless steel wire" cannot be treated as a declared commodity under s.14.

Transformation of commercial commodity – Effect of – Held: When one commercial commodity is, by manufacturing process etc., transformed into another, it becomes a separate commodity for sales tax purposes.

Interpretation of Statutes:

Plain interpretation – Held: When the language of the

statute is plain and unambiguous, the court must give effect to the words used in the statute.

Taxing statute – Held: In a taxing Act one has to look merely at what is clearly said and there is no room for any intendment – In a taxing statute nothing is to be read in, nothing is to be implied, one can only look fairly at the language used.

Words and Phrases – Expression "that is to say" as in s.14(iv) of the Central Sales Tax Act – Meaning of.

The appellant is a Public Limited Company engaged in the business of manufacture and sales of "stainless steel wires". According to it, "stainless steel wire", being a form of "Iron and Steel" is a declared commodity under clause(iv) of Section 14 of the Central Sales Tax Act, 1956, and consequently in view of Section 15 thereof, no tax can be imposed on "stainless steel wire" in excess of 4%.

In the instant appeals, the question which arose for consideration was whether in view of Section 14 of the Central Sales Tax Act along with the qualifying words 'that is to say' as used in clause (iv) of Section 14, "stainless steel wire" would fall under the category "tools, alloy and special steels of any of the above categories" as enumerated in entry no.(ix) of clause (iv) or under the category "wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper" as enumerated in entry no.(xv) of the same clause (iv).

Dismissing the appeals, the Court

HELD:1. The Parliament can restrict powers of State Government to tax "declared goods". Section 2(c) of the Central Sales Tax Act, 1956 defines "declared goods" as those declared under Section 14 of Central Sales Tax Act as 'goods of special importance in Inter State Trade or Commerce. Section 14 of the Central Sales Tax Act gives

a list of such goods and Section 15 specifies restrictions on power of States to tax such goods. [Para 31] [432-D]

2.1. In an earlier Supreme Court decision, the word "that is to say", as per Section 14 of the Central Sales Tax Act was considered and it was held that originally the expression "that is to say" was employed to make clear and fix the meaning of what is to be explained or defined and that such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In the context of Section 14 of the Central Act, this Court in the said decision held that the expression "that is to say" is used in Section 14 apparently to mean to exhaustively enumerate the kinds of goods in a given list. It was also held in the said decision that the purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. Therefore, in view of the position settled by this Court, it is clearly established that so far the items as mentioned in clause (iv) of Section 14 of the Central Act is concerned, each of the categories falling under "iron and steel" constitutes a new species and each one of them is separate commodity for the purposes of sales tax. [Paras 26, 27] [429-G-H; 430-A-E]

2.2. The expression "of any of the above categories" appearing in entry Nos. (ix) and (xvi) of clause (iv) of Section 14 of the Central Act would indicate that they would each be items referred in the preceding items. Therefore, even the expression "of any of the above categories" in entry No. (ix) of clause (iv) would only relate to steel and alloy produced for any of the materials mentioned in item nos. (i) to (viii). Thus "stainless steel wire" produced by the appellant cannot be read into item

no. (xv) which reads as "wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper". [Para 28] [430-F-H]

2.3. If the object of newly substituted clause (iv) of Section 14 of the Central Act was to make iron and steel taxable as one substance, the item could have been "Goods of iron and steel" or, to be more clear, "Iron and steel irrespective of change of form or shape or character of goods made out of them". The more natural meaning, therefore is that each item specified in Section 14(iv) forms a separate species for each series of sales. When one commercial commodity is, by manufacturing process etc., transformed into another, it becomes a separate commodity for sales tax purposes. If iron bars were drawn into "wire", such wire shall be a different taxable commodity. [Para 30] [432-A-C]

2.4. The language used in entry no. (ix) is plain and unambiguous and that the items which are mentioned there are "tools, alloy and special steel". By using the words "of any of the above categories" in entry Nos. (ix) would refer to entries (i) to (viii) and it cannot and does not refer to entry no (xv). The stainless steel wire is not covered within entry (ix) of clause (iv) of Section 14 of Central Sales Tax Act. [Para 33] [433-D-F]

State of Tamil Nadu vs. M/s. Pyare Lal Mehrotra, **(1976) 1 SCC 834: 1976 (2) SCR 168 and** *Rajasthan Roller Flour Mills Assn. vs. State of Rajasthan,* **1994 Supp (1) SCC 413: 1993 (3) Suppl. SCR 979 – relied on.**

3. It is a settled principle of law that the words used in the section, rule or notification should not be rendered redundant and should be given effect to. It is also one of the cardinal principles of interpretation of any statute that some meaning must be given to the words used in the

section. Expression "Wire rods and wires" which is mentioned in item no. (xv) would not and cannot cover the expression "tools, alloy and special steels" of entry no. (ix) nor it would refer to the expression "Iron and Steel" as each item used in entry nos. (ix) and (xv) are independent items not depending on each other at all. [Para 34] [433-G-H; 434-A-B]

4. It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, the court must give effect to the words used in the statute. Besides, in a taxing Act one has to look merely at what is clearly said and there is no room for any intendment. In a taxing statute nothing is to be read in, nothing is to be implied, one can only look fairly at the language used. [Paras 35, 36] [434-B-D]

Union of India vs. Hansoli Devi **(2002) 7 SCC 273: 2002 (2) Suppl. SCR 324 – relied on.**

5. The findings and the decision arrived at by the High Court that stainless steel wire is not covered under the entry of "tools, alloys and special steels" in entry no. (ix) and, therefore, does not fall under "Iron and Steel" as defined under Section 14(iv) of the Central Act have to be upheld. Hence, the said commodity cannot be treated as a declared commodity under Section 14 of the Act and provision of Section 15 of the Act does not apply to the facts of the instant appeals. [Para 37] [434-E]

Case Law Reference:

1976 (2) SCR 168	**relied on**	**Para 24, 26,29,34**
1993 (3) Suppl. SCR 979	**relied on**	**Para 31**
2002 (2) Suppl. SCR 324	**relied on**	**Para 35**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3605 of 2011.

From the Judgment & Order dated 21.5.2010 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 778 (Tax) of 2006.

WITH

C.A. Nos. 3606, 3607, 3608, 3609 & 3610 of 2011.

Dhruv Agarwal, Praveen Kumar for the Appellants.

Sunil Gupta, S.K. Dwivedi, Aarohi Bhalla, Gunnam Venkateswara Rao, Vandana Mishra, Tanmay Agarwal, Ashutosh S., Aviral Shukla for the Respondents.

The Judgment of the Court was delivered by

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

2. The issue that falls for consideration in these appeals is, as to whether the 'stainless steel wire' falls under the category, "tools, alloys and special steels of any of the above categories" enumerated in entry no. (ix) of clause (iv) of Section 14 of the Central Sales Tax Act, 1956 (for short the "Central Act") and therefore the following question emerges for our consideration:-

> "Whether stainless steel wire, a product of the appellant, on a proper reading of Section 14 of the Central Sales Tax Act along with the qualifying words 'that is to say' would fall under the category "tools, alloy and special steels of any of the above categories" enumerated in entry no. (ix) of clause (iv) or under entry no. (xv) of same clause (iv)"

3. In all these appeals identical issues are involved. We therefore, proceed to dispose of all these appeals by this common Judgment and Order. In order to arrive at a finding on

the issue raised, it will be necessary to set out certain facts leading to filing of the present appeals.

4. The appellant is a Public Limited Company incorporated under the Indian Companies Act, 1956 and is engaged in the business of manufacture and sales of "stainless steel wires". An assessment order was passed under Rule 41(8) of the UP Trade Tax Rules for the assessment year 1999-2000 under the UP Trade Tax Act, 1948 (for short "the UP Act") as well as under the Central Act. As per the said assessment order, the tax on sales of "stainless steel wire" was levied @ 4% and sales covered by Form 3-kh were taxed @ 2%.

5. The respondent, however, thereafter held that the sales of "stainless steel wire" has wrongly been taxed @ 4% treating the same as a "declared commodity" and that in fact "stainless steel wire" is not a declared commodity because it is outside the ambit of "Iron and Steel", which is a declared commodity under Section 14 of the Central Act.

6. In view of the satisfaction arrived at by the respondent, a proposal was sent to the Additional Commissioner, Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad requesting him for permission to re-open the case of the appellant for the assessment year 1999-2000.

7. The Additional Commissioner, Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad issued a notice dated 22.03.2006 directing the appellant to show cause as to why the permission should not be granted to the assessing authority for re-opening of the case under Section 21(2) of the UP Act.

8. Respondent No. 3 on 24.3.2006 issued a notice under Section 10-B of the U.P. Act for revising the assessment order passed for the assessment year 2000-01. The appellant states that similar notices for the assessment years 2001-02 and 2002-03 were also issued to the appellant by Respondent No. 3.

9. The appellant filed its reply dated 27.3.2006 to the notice dated 24.3.2006 and, inter alia, stated that "stainless steel wire" is a declared commodity under clause (iv) of Section 14 of the Central Act, hence in view of Section 15 thereof, no tax can be imposed on the declared commodities in excess of 4%. The appellant had also submitted identical replies to the notices relating to assessment years 2001-02 and 2002-03 respectively.

10. After considering the reply as furnished by the appellant, the Additional Commissioner, Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad by its order dated 27.03.2006 granted permission to the assessing authority to re-open the case under Section 21(2) of the UP Act for the assessment year 1999-2000.

11. Being aggrieved by the issuance of the aforesaid notice, the appellant herein filed a Writ Petition before the Allahabad High Court, which was registered as Writ Petition No. 770 of 2006, wherein, the respondent filed a counter affidavit. The Allahabad High Court, thereafter heard the counsel appearing for the parties and by its judgment and order dated 21.05.2010 dismissed the Writ Petition holding that the "stainless steel wire" is not covered under the item "tools, alloys and special steel" on entry no. (ix) and, therefore, does not fall under "Iron and Steel" as defined under clause (iv) of Section 14 of the Central Act and therefore the provision of Section 15 of the Central Act does not apply.

12. Being aggrieved by the judgment and order dated 21.05.2010 passed by the Allahabad High Court, the present appeals were filed by the appellants on which we heard the learned counsel appearing for the parties.

13. The learned counsel appearing for the parties during the course of their submissions relied upon various notifications, some of which are required to be extracted at this stage.

14. The first reference that was made was to the notification dated 26.10.1991. The aforesaid notification was issued by respondent No. 1 in exercise of powers under clause (d) of sub-section (1) of section 3-A of the U.P. Act, whereby under Item 7, Sheets and Circles made wholly or principally of stainless steel and all remaining articles (excluding wares and surgical instruments) made wholly or principally of stainless steel were taxable @ 12%.

The relevant part of the said notification is extracted herein below:

"S.No.	Description of goods	Point of tax	Rate of tax
(a)	Sheets and circles made wholly or principally of stainless steel.	M or I	12%
(b)	All remaining articles (excluding wares and surgical instruments) made wholly or principally of stainless steel."	M or I	12%

15. Subsequently another notification dated 23.11.1998 was issued by Respondent No. 1 by exercising power under clause (d) of sub-section (1) of section 3-A of the U.P. Act, whereby under Item 7, Sheets and Circles made wholly or principally of stainless steel and all remaining articles (excluding wares and surgical instruments) made wholly or principally of stainless steel were taxable @ 15% and steel wires were sought to be taxed @ 15% presuming to be an article made of stainless steel.

The relevant part of the said notification is extracted herein below:

"S.No.	Description of goods	Point of tax	Rate of tax percentage
(i)	Sheets and circles made wholly or principally of stainless steel.	M or I	15%
(ii)	All remain articles (excluding wares and surgical instruments made wholly or principally of stainless steel."	M or I	15%

16. Later, on 15.01.2000, Respondent No. 1 issued a notification superseding the notifications dated 26.10.1991 and 23.11.1998 respectively, and Item No. 8 of the said notification provided for levy of tax @ 15% on sheets and circles made wholly or principally of stainless steel and also all remaining articles excluding ware and surgical instruments made wholly or principally of stainless steel @ 15 %.

The relevant part of the said notification is extracted herein below:

"S.No.	Description of goods	Point of tax	Rate of tax percentage
8.			
(i)	Sheets and circles made wholly or principally of stainless steel.	M or I	15%
(ii)	All remain articles (excluding wares and surgical instruments) made wholly or principally of stainless steel."	M or I	15%

17. Section 14 (iv) of the Central Act is the relevant provision in the present appeals and we therefore extract the relevant portion of Section 14 (iv) of the Central Act and the same is as under: -

"14. *Certain goods to be of special importance in inter-State trade or commerce.* - It is hereby declared that the following goods are of special importance in inter-State trade or commerce, -

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(iv) iron and steel, that is to say, -

(i) pig iron and caste iron including ingot moulds, bottom, plates, iron scrap, caste iron scrap, runner scrap and iron skull scrap;

(ii) steel semis (ingots, slabs, blooms and billets of all qualities, shapes and sizes);

(iii) skull bars, tin bars, sheet bars, hoe-bars and sleeper bars;

(iv) steel bars (rounds, rods, squares, flats, octagons and hexagons, plain and ribbed or twisted, in coil form as well as straight lengths);

(v) Steel structurals (angels, joists, channels, tees, sheet piling sections, Z sections or any other rolled sections);

(vi) sheets, hoops, stripe and skelp, both black and galvanized, hot and cold rolled, plain and corrugated, in all qualities, in straight lengths and in coil form, as rolled and in riveted condition;

(vii) plates both plain and chequered in all qualities;

(viii) discs, rings, forgings, and steel castings;

(ix) tool, alloy and special steels of any of the above categories;

(x) steel melting scrap in all forms including steel skull, turnings and borings;

(xi) steel tubes, both welded and seamless, of all diameters and lengths, including tube fittings;

(xii) tin-plates, both hot dipped and electrolytic and tin free plates;

(xiii) fish plates bars, beaming plate barn, crossing sleeper bars, fish plates, bearing plates, crossing sleepers and pressed steel sleepers, railsheavy and light crane rails;

(xiv) wheels, tyres, axles and wheel sets;

(xv) wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper;

(xvi) defectives, rejects, cuttings or end pieces of any of the above categories."

18. Section 15 of the Central Act is also a relevant provision and the same is extracted hereunder :-

"15. *Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State* – Every sales tax law of a State shall, insofar as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:-

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed four per cent, of the sale or purchase price thereof,;

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19. The Commissioner of Commercial Taxes issued a circular on 25.11.2005 to the Joint Commissioner Trade Tax, Ghaziabad directing that sale of stainless steel pipe, tubes, sheets shall not be taxable as declared goods under Section 14 (iv) of the Central Act since stainless steel is an alloy which consists of nickel etc. In view of the said circular the Commissioner issued direction to the authorities under him for proceeding under Sections 21 and 10(b) of the U.P. Act for initiating the re-assessment proceedings for different years.

20. The learned counsel appearing for the appellant submitted before us that the "stainless steel wire" is one of the species of "Iron and Steel" and therefore would fall within the aforesaid "declared commodity" and consequently rate of tax that is leviable on the goods of the appellant is 4% as originally assessed by the Department itself.

21. He also submitted that the expression "Iron and Steel" mentioned in clause (iv) of Section 14 of the Central Act is a genus and "stainless steel wire" being a form of "Iron and Steel" is a specie thereof and therefore such "stainless steel wire" which the appellant produces would come within the expression of entry no. (xv) stating words "wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper" of any kind of "Iron and Steel" referring to the main expression of clause (iv) and that the Department had committed an error of law in restricting the expression of "stainless steel wire" through entry no. (ix), namely, "tools, alloy and special steels of any of the above categories".

22. He also submitted that the Government of India in its Reference No. F No. 24/20/76 ST Department of Revenue and Banking dated 17.11.1976 has clarified that stainless steel is a type of alloy steel and is, therefore, covered within the definition of the term "iron and steel" for the purposes of entry no. (ix) of Section 14(iv) of the Central Act. He further submitted that once the Central Government has taken a stand, it is not open to the authorities of the State Government to take a

different view. He has also referred to the object and reason for the amendment which is referred at page 1338 of Chaturvedi's Central Sales Tax Act, 1956 Vol. I.

23. The aforesaid submissions of the counsel appearing for the appellants were however refuted by the learned counsel appearing for the respondent who relied upon the expression "that is to say" as used in clause (iv) of Section 14 of the Central Act to contend that the word 'user' makes the expression "Iron and Steel" exhaustive and restrictive and not an expansive or extensive.

24. He also referred to the expression "of any of the above categories" occurring in entry no. (ix) of clause (iv) of Section 14 of the Central Act contending *inter alia* that the said expression plays an instrumental role in determining the scope and ambit of the aforesaid item. Relying on the same, he submitted that any product of stainless steel is confined within entry nos. (i) to (ix) of clause (iv) of Section 14 of the Central Act and it cannot be given a wider meaning to include "stainless steel wire" in entry No. (xv) of clause (iv) of Section 14 of the Central Act. He specifically relied upon the decision of this Court in *State of Tamil Nadu vs. M/s. Pyare Lal Mehrotra,* reported in (1976) 1 SCC 834.

25. In the light of aforesaid submissions made by the counsel appearing for the parties, we proceed to answer the issue which arises for our consideration by recording our reasons therefor.

26. In the aforesaid decision in *Pyare Lal Mehrotra* (supra) the very word "that is to say", as per Section 14 of the Central Act was considered and it was held that originally expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined and that such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In the context of Section 14 of the Central

Act, this Court in the said decision held that the expression "that is to say" is used in Section 14 apparently to mean to exhaustively enumerate the kinds of goods in a given list. It was also held in the said decision that the purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. In paragraph 15 of the said Judgment, this Court observed as under:

> "15. It appears to us that the position has been simplified by the amendment of the law, as indicated above, so that each of the categories falling under "iron and steel" constitutes a new species of commercial commodity more clearly now. It follows that when one commercial commodity is transformed into another, it becomes a separate commodity for purposes of sales tax."

27. Therefore, in view of the position settled by this Court, it is clearly established that so far the items as mentioned in clause (iv) of Section 14 of the Central Act is concerned, each of the categories falling under "iron and steel" constitutes a new species and each one of them is separate commodity for the purposes of sales tax.

28. The expression "of any of the above categories" appearing in entry Nos. (ix) and (xvi) of clause (iv) of Section 14 of the Central Act would indicate that they would each be items referred in the preceding items. Therefore, even the expression "of any of the above categories" in entry No. (ix) of clause (iv) would only relate to steel and alloy produced for any of the materials mentioned in item nos. (i) to (viii). Thus "stainless steel wire" produced by the appellant cannot be read into item no. (xv) which reads as "wire rods and wires-rolled, drawn, galvanized, aluminized, tinned or coated such as by copper".

29. This Court in the case of *Pyare Lal Mehrotra* (supra), in paragraph 5, observed as under:-

> "5. It will be seen that "iron and steel" is now divided into 16 categories which clearly embrace widely different commercial commodities, from mere scrap iron and leftovers of processes of manufacturing to "wires" and "wheels, tyres, axles, and wheel sets". Some of the enumerated items like "melting scrap" or "tool alloys" and "special steels" could serve as raw material out of which other goods are made and others are definitely varieties of manufactured goods. If the subsequent amendment only clarifies the original intentions of Parliament, it would appear that Heading (*iv*) in Section 14, as originally worded, was also meant to enumerate separately taxable goods and not just to illustrate what is just one taxable substance: "iron and steel". The reason given, in the Statement of Objects and Reasons of the 1972 Act, for an elucidation of the "definition" of iron and steel, was that the "definition" had led to varying interpretations by assessing authorities and the courts so that a comprehensive list of specified declared iron and steel goods would remove ambiguity. The Select Committee, which recommended the amendment, called each specified category "a item no." falling under "iron and steel". *Apparently, the intention was to consider each "item no." as a separate taxable commodity for purpose of sales tax.* Perhaps some items could overlap, but no difficulty arises in cases before us due to this feature. As we have pointed out, the statement of reasons for amendment spoke of Section 14(*iv*) as a '"definition" of "iron and steel". A definition is expected to be exhaustive. Its very terms may, however, show that it is not meant to be exhaustive. For example, a purported definition may say that the term sought to be defined "includes" what it specifies, but, in that case, the definition itself is not complete."

30. It is thus clear, that if the object of newly substituted clause (iv) of Section 14 of the Central Act was to make iron and steel taxable as one substance, the item could have been "Goods of iron and steel" or, to be more clear, "Iron and steel irrespective of change of form or shape or character of goods made out of them". The more natural meaning, therefore is that each item specified in Section 14(iv) forms a separate species for each series of sales. When one commercial commodity is, by manufacturing process etc., transformed into another, it becomes a separate commodity for sales tax purposes. If iron bars were drawn into "wire", such wire shall be a different taxable commodity.

31. Parliament can restrict powers of State Government to tax "declared goods". Section 2(c) of the Central Act defines "declared goods" as those declared under Section 14 of Central Act as 'goods of special importance in Inter State Trade or Commerce. Section 14 of the Central Act gives a list of such goods and Section 15 specifies restrictions on power of States to tax such goods.

32. This Court in the case of *Rajasthan Roller Flour Mills Assn. vs. State of Rajasthan,* reported in 1994 Supp (1) SCC 413, observed as under:-

> **16.** ..... "that is to say" assigned in *Stroud's Judicial Dictionary* (Fourth Edn.) Vol. 5 at page 2753 to the following effect:
>
> *"That is to say.*— (1) 'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it:....."
>
> **17. .....**
>
> "The quotation, given above, from *Stroud's Judicial*

Dictionary shows that, ordinarily, the expression, 'that is to say' is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word 'includes' is generally employed ... but, in the context of single point sales tax, subject to special conditions when imposed on separate categories of specified goods, the expression was apparently meant to exhaustively enumerate the kinds of goods in a given list. The purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. Otherwise, the listing itself loses all meaning and would be without any purpose behind it."

33. It is thus clear, that the language used in entry no. (ix) is plain and unambiguous and that the items which are mentioned there are "tools, alloy and special steel". By using the words "of any of the above categories" in entry Nos. (ix) would refer to entries (i) to (viii) and it cannot and does not refer to entry no (xv). However, entry (xvi) of Clause (iv) would be included in entry (xvi) particularly within the expression now therein any of the aforesaid categories. Therefore, the specific entry "tool, alloy and special steel" being not applicable to entry (xv), the contention of the counsel for the appellant has to be rejected. It is, therefore, held that the stainless steel wire is not covered within entry (ix) of clause (iv) of Section 14 of Central Sales Tax Act.

34. It is a settled principle of law that the words used in the section, rule or notification should not be rendered redundant and should be given effect to. It is also one of the cardinal principles of interpretation of any statue that some meaning must be given to the words used in the section. Expression "Wire rods and wires" which is mentioned in item no. (xv) would not and cannot cover the expression "tools, alloy

and special steels" of entry no. (ix) nor it would refer to the expression "Iron and Steel" as each item used in entry nos. (ix) and (xv) are independent items not depending on each other at all as has been held in the case of *Pyare Lal Mehrotra* (supra).

35. In arriving at the aforesaid conclusion, we find support from the decision of this Court in *Union of India vs. Hansoli Devi* reported in (2002) 7 SCC 273 wherein this Court held that it is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, the court must give effect to the words used in the statute.

36. Besides, in a taxing Act one has to look merely at what is clearly said and there is no room for any intendment. In a taxing statute nothing is to be read in, nothing is to be implied, one can only look fairly at the language used.

37. Therefore, the findings and the decision arrived at by the High Court that stainless steel wire is not covered under the entry of "tools, alloys and special steels" in entry no. (ix) and, therefore, does not fall under "Iron and Steel" as defined under Section 14(iv) of the Central Act have to be upheld. Hence, the said commodity cannot be treated as a declared commodity under Section 14 of the Central Act and provision of Section 15 of the Central Act does not apply to the facts of the present appeals.

38. In our considered opinion, the findings arrived at by the High Court does not suffer from any infirmity. Consequently, we find no merit in these appeals and the same are dismissed without any order as to costs.

B.B.B. Appeals dismissed.

BANDA DEVELOPMENT AUTHORITY, BANDA
v.
MOTI LAL AGARWAL AND OTHERS
(Civil Appeal No. 3604 of 2011)

APRIL 26, 2011

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

Land Acquisition Act, 1894 – ss.4(1), 6(1), 11A, 17(1) and 17(4):

Writ petition filed by respondent no.1 challenging acquisition of land by the State Government on the ground that the award was not passed within two years from the date of last publication of the declaration issued under s.6(1) – Allowed by High Court – On appeal, held: In matters involving challenge to the acquisition of land for public purpose, delay in filing the writ petition should be viewed seriously and relief denied to the petitioner if he fails to offer plausible explanation for the delay – Delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilised for the public purpose – On facts, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under s.6(1) and filing of the writ petition and decline relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing a residential scheme and third party rights had been created – The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition – Also the action of the concerned State authorities to go to the spot and prepare panchnama showing delivery of possession was sufficient for recording a finding that actual possession of the entire acquired land had been taken and handed over to the development authority concerned i.e. BDA – Once it is held

that possession of the acquired land was handed over to the BDA, the view taken by the High Court that the acquisition proceedings had lapsed due to non-compliance of s.11A cannot be sustained.

Mode of taking possession of the acquired land – Principles culled out from earlier judgments – Held: No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land – If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession – If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession – Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama – Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken – If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document – If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of s.17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

Constitution of India, 1950 – Article 226 – Effect of delay in filing writ petition – Discussed – Held: Though no limitation

has been prescribed for filing a petition under Art.226 of the Constitution, the High Court ought not to entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties – If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits.

In the writ petition filed by him on 24.3.2008, respondent No.1 challenged acquisition of land by the State Government for implementing a residential scheme by challenging notification dated 8.9.1998 issued under Section 4(1) read with Section 17(1) and 17(4) of the Land Acquisition Act, 1894 and declaration dated 7.9.1999 issued under Section 6(1) read with Section 17(1) of the Act mainly on the ground that the acquisition proceedings were deemed to have lapsed because the award was not passed within two years from the date of last publication of the declaration issued under Section 6(1). The High Court allowed the writ petition on the ground that the acquired land did not vest in the State Government because physical possession of the land belonging to respondent no.1 was not taken till 31-7-2002 and the award was not passed within two years as per the mandate of Section 11A.

The appellant contended before this Court that the High Court was not justified in entertaining and allowing the writ petition filed after nine years of publication of the declaration issued under Section 6(1) and six years of the passing of award by the Special Land Acquisition Officer and that too by ignoring that during the intervening period the development authority concerned (BDA) carried out development, carved out plots and allotted the same to the eligible applicants and also constructed some flats. The appellant contended that Section 11A is

not applicable to the cases in which the land is acquired by invoking the emergency provisions contained in Section 17(1) and 17(4) and further that the exercise undertaken for taking possession of the acquired land by the concerned authorities of the State and delivery thereof to the BDA could not have been brushed aside by the High Court by describing it as symbolic/paper possession.

The question which thus arose for consideration in the instant appeal was whether the High Court was justified in entertaining and allowing the writ petition filed by respondent No.1 for nullifying the acquisition of his land by the State Government on the ground of non passing of award within the time prescribed under Section 11A.

Allowing the appeal, the Court

HELD:1.1. Even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created. The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition. [Para 15] [453-G-H; 454-A-B]

1.2. It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time

because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits. [Para 16] [454-C-D]

1.3. In matters involving challenge to the acquisition of land for public purpose, delay in filing the writ petition should be viewed seriously and relief denied to the petitioner if he fails to offer plausible explanation for the delay. Delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilised for the public purpose. [Para 17] [455-D]

State of Madhya Pradesh v. Bhailal Bhai **AIR 1964 SC 1006: 1964 SCR 261;** *Ajodhya Bhagat v. State of Bihar* **(1974) 2 SCC 501;** *State of Rajasthan v. D.R. Laxmi* **(1996) 6 SCC 445: 1996 (6) Suppl. SCR 221;** *Girdharan Prasad Missir v. State of Bihar* **(1980) 2 SCC 83;** *Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd.* **(1996) 11 SCC 501: 1996 (5) Suppl. SCR 551;** *Urban Improvement Trust, Udaipur v. Bheru Lal* **(2002) 7 SCC 712: 2002 (2) Suppl. SCR 512;** *Ganpatibai v. State of M.P* **(2006) 7 SCC 508: 2006 (5) Suppl. SCR 215;** *Sawaran Lata v. State of Haryana* **(2010) 4 SCC 532: 2010 (4) SCR 40 – relied on.**

Vyalikaval Housebuilding Cooperative Society v. V. Chandrappa **(2007) 9 SCC 304: 2007 (2) SCR 277;** *Babu Ram v. State of Haryana* **(2009)10 SCC 115: 2009 (14) SCR 1111;** *State of Bihar v. Dhirendra Kumar* **(1995) 4 SCC 229: 1995 (3) SCR 857;** *Anil Kumar v. State of U.P.* **(2008) 2 AWC 1832 (Allahabad High Court) and** *Sushil Kumar v. State of U.P.* **(1999) 1 AWC 764 (Allahabad High Court) – referred to.**

Administrative Law by H.W.R. Wade **(7th edition) at pages 342-343 – referred to.**

2. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years from the date of passing of award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1. [Para 25] [458-F-H; 459-A]

3. The premise on which the High Court declared that the acquisition proceedings will be deemed to have lapsed because the award was not passed within two years is *ex facie* erroneous. Admittedly, the State Government had acquired the land by issuing notification under Section 4 read with Section 17(1) and (4), which was followed by a declaration issued under Section 6(1) read with Section 17(1). By notification dated 7.9.1999, the Governor had directed Collector, Banda to take possession of the acquired land on the expiration of 15 days from the issue of notice under Section 9(1). In furtherance of the direction given by the Collector, the concerned revenue authorities took possession of the acquired land, which, has already been utilized for implementing Tulsi Nagar Residential Scheme. Though, respondent No.1 succeeded in convincing the High Court that physical possession of his land had not been taken till 31.7.2002, after carefully perusing the record, the finding recorded on this issue is unsustainable. The respondent No.1 had virtually admitted that possession

of the acquired land was with the BDA. If this was not so, there was no occasion for him to make a grievance that the land had been demarcated by putting stones and the BDA was in the process of raising construction. That apart, respondent No. 1 did not deny the statements contained in the affidavits filed before the High Court that the revenue authorities visited the spot and made entries in the Field Book regarding delivery of possession. The photographs produced by the parties before this Court show that after taking possession of the acquired land, the BDA constructed roads,buildings etc., laid sewer lines and erected poles for electric lines. The photographs also reveal that by taking advantage of the impugned order, respondent No.1 took possession of a portion of the land on which the BDA had already carried out development. All this is sufficient to discard the claim of respondent No.1 that actual possession of the acquired land had not been delivered to the BDA till July, 2002. [Para 27] [460-B-H; 461-A]

4. The principles culled out from earlier judgments as regards what should be the mode of taking possession of the land acquired under the Act are as follows: i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land; ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession; iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the

owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken; iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document and v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken. [Para 34] [465-B-H; 466-A]

Nahar Singh v. State of U.P. **(1996) 1 SCC 434:1995 (5) Suppl. SCR 754 – distinguished.**

Balwant Narayan Bhagde v. M.D. Bhagwat **(1976) 1 SCC 700;** *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* **(1996) 4 SCC 212: 1996 (4) SCC 212;** *P.K. Kalburqi v. State of Karnataka* **(2005) 12 SCC 489;** *NTPC v. Mahesh Dutta* **(2009) 8 SCC 339: 2009 (10) SCR 1084;** *Sita Ram Bhandar Society v. Govt. of NCT, Delhi* **(2009) 10 SCC 501: 2009 (14) SCR 507;** *Omprakash Verma v. State of Andhra Pradesh* **(2010) 13 SCC 158: 2010 (15) SCR 302;** *Brij Pal Bhargava v. State of UP* **2011(2) SCALE 692 – relied on.**

5. In the instant case, the action of the concerned State authorities to go to the spot and prepare panchnama showing delivery of possession was sufficient for recording a finding that actual possession of the entire acquired land had been taken and handed over to the BDA. The utilization of the major portion of the acquired land for the public purpose for which it was

acquired is clearly indicative of the fact that actual possession of the acquired land had been taken by the BDA. Once it is held that possession of the acquired land was handed over to the BDA on 30.6.2001, the view taken by the High Court that the acquisition proceedings had lapsed due to non-compliance of Section 11A cannot be sustained. In *Satendra Prasad Jain's* case, this Court considered the applicability of Section 11A in cases involving acquisition of land under Section 4 read with Section 17 and held that Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner. The same view has been reiterated in a number of other cases. The writ petition filed by respondent No.1 is dismissed with cost quantified at Rs.1,00,000/-. Respondent No.1 shall deposit the amount of cost with the appellant [Paras 35 to 38] [466-B-H; 467-C-E]

Satendra Prasad Jain v. State of U.P. **(1993) 4 SCC 369: 1993 (2) Suppl. SCR 336;** *Awadh Bihari Yadav v. State of Bihar* **(1995) 6 SCC 31: 1995 (3) Suppl. SCR 197;** *Pratap v. State of Rajasthan* **(1996) 3 SCC 1: 1996(2) SCR 1088;** *Parsinni v. Sukhi* **(1993) 4 SCC 375: 1993 (2) Suppl. SCR 315;** *Allahabad Development Authority v. Nasiruzzaman* **(1996) 6 SCC 424: 1996 (5) Suppl. SCR 435;** *Government of A.P. v. Kollutla Obi Reddy* **(2005) 6 SCC 493: 2005 (2) Suppl. SCR 513 – relied on.**

Case Law Reference:

1993 (2) Suppl. SCR 336	**relied on**	**Para 10,11,36**
1995 (3) Suppl. SCR 197	**relied on**	**Para 10,37**
1996(2) SCR 1088	**relied on**	**Para 10,37**

1996 (5) Suppl. SCR 435	**relied on**	**Para 10,37**
2005 (2) Suppl. SCR 513	**relied on**	**Para 10,37**
1995 (5) Suppl. SCR 754	**distinguished**	**Para 12, 33**
(2008) 2 AWC 1832	**referred to**	**Para 12**
(1999) 1 AWC 764	**referred to**	**Para 12**
1964 SCR 261	**relied on**	**Para 16**
(1974) 2 SCC 501	**relied on**	**Para18**
1996 (6) Suppl. SCR 221	**relied on**	**Para 19**
(1980) 2 SCC 83	**relied on**	**Para 20**
1996 (5) Suppl. SCR 551	**relied on**	**Para 21**
2002 (2) Suppl. SCR 512	**relied on**	**Para 22**
2006 (5) Suppl. SCR 215	**relied on**	**Para 23**
1995 (3) SCR 857	**referred to**	**Para 23**
2010 (4) SCR 40	**relied on**	**Para 24**
2007 (2) SCR 277	**referred to**	**Para 26**
2009 (14) SCR 1111	**referred to**	**Para 26**
(1976) 1 SCC 700	**relied on**	**Para 28,30**
1996 (4) SCC 212	**relied on**	**Para 29**
(2005) 12 SCC 489	**relied on**	**Para 30**
2009 (10) SCR 1084	**relied on**	**Para 31**
2009 (14) SCR 507	**relied on**	**Para 32**
2010 (15) SCR 302	**relied on**	**Para 32**
2011(2) SCALE 692	**relied on**	**Para 32**

1993 (2) Suppl. SCR 315 relied on Para 37

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3604 of 2011.

From the Judgment & Order dated 27.8.2010 of the High Court of Judicature at Allahabad in Writ Petition No. 16109 of 2008.

P.S. Patwalia, Reena Singh for the Appellant.

W.H. Khan, Mukesh Verma, Prawar Khan for the Respondents.

The Judgment of the Court was delivered by

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

2. The question which arises for consideration in this appeal is whether the Division Bench of the Allahabad High Court was justified in entertaining and allowing the writ petition filed by respondent No.1-Moti Lal Agarwal in 2008 for nullifying the acquisition of his land by the State Government vide notification dated 8.9.1998 issued under Section 4(1) read with Section 17(1) and 17(4) of the Land Acquisition Act, 1894 (for short, "the Act") which was followed by declaration dated 7.9.1999 issued under Section 6(1) read with Section 17(1) on the ground of non passing of award within the time prescribed under Section 11A.

3. By the notifications referred in the preceding paragraph, the State Government acquired 103 bighas land situated in Ladakapurwa and Bhawanipur villages, Pargana and District Banda for Tulsi Nagar Residential Scheme of the Banda Development Authority (for short, "the BDA"). Both the notifications were published in the manner prescribed under Sections 4(1) and 6(2) respectively.

4. On 5.6.2000, the Secretary of the BDA deposited

Rs.63,47,855.07 towards 80% of the compensation payable in lieu of the acquisition of 103 bighas land. This was in compliance of the mandate of Section 17(3A). The concerned authorities of the State delivered possession of the acquired land to the BDA on 30.6.2001. The officers of the Revenue Department visited the site on 4.9.2001 and prepared the Field Book, copy of which has been produced before this Court along with affidavit dated 19.1.2011 of Shri Biri Singh, Executive Engineer, BDA. The Special Land Acquisition Officer passed award dated 14.6.2002 for the acquired land including plot No.795 of which 5 bighas 5 biswas was purchased by respondent No.1 vide registered sale deed dated 4.10.1982.

5. In the meanwhile, the BDA prepared lay out for the acquired land which was sanctioned by its Board on 8.5.2002. Thereafter, the land was developed in a phased manner and plots were carved out for economically weaker sections and LIG, MIG and HIG categories. The BDA also constructed flats for economically weaker sections and those belonging to lower income group. The plots and flats were allotted to the eligible persons who had applied in response to different advertisements issued by the BDA between 2.11.2002 and 26.4.2006.

6. After more than three years of publication of the declaration issued under Section 6(1), respondent No.1 filed suit being O.S. No.52 of 2003 in the Court of Civil Judge (Senior Division), Banda, and prayed that the defendants be directed to start the acquisition proceedings afresh and disburse compensation after sub-dividing and numbering plot No.795 in accordance with paragraph 63 of the Land Record Manual. The suit was dismissed on 1.9.2007 in view of the bar contained in the Uttar Pradesh Zamindari Abolition and Land Reforms Act and the Land Acquisition Act. Respondent No.1 challenged the order of the trial Court in First Appeal No.364 of 2007 but withdrew the same by stating that the writ petition filed by him was pending.

7. In the writ petition filed by him on 24.3.2008, respondent No.1 challenged notifications dated 8.9.1998 and 7.9.1999 mainly on the ground that the acquisition proceedings will be deemed to have lapsed because the award was not passed within two years from the date of last publication of the declaration issued under Section 6(1). Respondent No.1 pleaded that though plot No.795 had not been sub-divided and demarcated and physical possession thereof was not taken, the concerned authorities prepared Kabja Hastantaran Praman Patra dated 30.6.2001 and thereby took paper possession of his land. He also claimed that plot No. 795/3 owned by him had not been notified, but the concerned authorities colluded with Smt. Shashi Devi and other interested persons and reflected him as tenure holder of that plot.

8. The thrust of the affidavits filed by Shri Mam Chand, Executive Engineer and Shri Har Govind Swarnkar, Assistant Engineer on behalf of the BDA was that after taking possession of the acquired land, the BDA constructed roads and nalis, laid pipelines for supply of water and also erected poles for electric lines and plots carved out from the acquired land were allotted to people belonging to different categories. In paragraphs 2, 3 and 4 of his affidavit, Shri Har Govind Swarnkar, Assistant Engineer, averred as under:

> "2. That present supplementary counter affidavit has been necessitated as the petitioner through rejoinder affidavit to the counter affidavit filed on behalf of respondents no.1, 2 and 3 has brought on record the copies of Khasra for the year 1407-1411 fasli.
>
> 3. That 1407 fasli is from 1st July, 1999 to 30th June, 2000 to 30th June, 2001. Similarly 1409 fasli is for the year 2001-02, 1410 fasli is for the year 2002-03, 1411 & 1412 fasli is for the year 2003-04 and 2004-05.
>
> 4. The perusal of these Khasras shows that there is no entry of sowing any crop in 1410-1412 fasli, namely no

> crop was shown and they were, admittedly, not in possession from July, 2002 towards. Possession has been taken from petitioner on 30.6.2001. 30.6.2001 corresponds to end of 1408 fasli. It is thus clear that petitioner was not in possession after 30.6.2001. Entry of sowing any crop in Khasra 1409 is patently erroneous since in 1409 fasli i.e. from 1st July, 2001 petitioner was not in possession. This entry is incorrect and no crop has been sown after possession was taken on 30.6.2001."

9. In a separate affidavit, Shri Girish Kumar Sharma, Tehsildar (J), Banda, supported the stand taken by the BDA. He categorically averred that possession of the acquired land was handed over to BDA on 30.6.2001 for the purpose of implementation of the residential scheme. Along with his affidavit, Shri Girish Kumar Sharma annexed photostat copy of report dated 14.7.2001 prepared by Naib Tehsildar, Banda, who had visited the spot and inspected the site.

10. Although, respondent No.1 did not question the acquisition proceedings on the ground of non compliance of Section 7 of the Act, the Division Bench of the High Court suo moto observed that the acquisition proceedings can be quashed on the ground of non compliance of that section. The Division Bench then referred to the entries made in the revenue records and held that the acquisition proceedings will be deemed to have lapsed because neither physical possession of the land was taken nor the award was passed within two years as per the mandate of Section 11A. The High Court distinguished the judgment of this Court in *Satendra Prasad Jain v. State of U.P.* (1993) 4 SCC 369 by observing that physical possession of the acquired land had not been taken for more than two years after publication of the declaration issued under Section 6(1).

11. Shri P.S. Patwalia, learned senior counsel for the appellant argued that the High Court was not at all justified in entertaining and allowing the writ petition filed after nine years

of publication of the declaration issued under Section 6(1) and six years of the passing of award by the Special Land Acquisition Officer and that too by ignoring that during the intervening period the BDA carried out development, carved out plots and allotted the same to the eligible applicants including the members of economically weaker sections and also constructed flats for the economically weaker sections and lower income groups. Shri Patwalia submitted that respondent No.1 cannot justify belated filing of the writ petition on the ground that he was prosecuting the case in the civil Court because in the suit he had not prayed for quashing the notifications issued under Sections 4(1) and 6(1). Learned senior counsel relied upon the judgments of this Court in *Satendra Prasad Jain v. State of U.P.* (supra), *Awadh Bihari Yadav v. State of Bihar* (1995) 6 SCC 31, *Pratap v. State of Rajasthan* (1996) 3 SCC 1, *Allahabad Development Authority v. Nasiruzzaman* (1996) 6 SCC 424, *Government of A.P. v. Kollutla Obi Reddy* (2005) 6 SCC 493 and argued that Section 11A is not applicable to the cases in which the land is acquired by invoking the emergency provisions contained in Section 17(1) and 17(4). He submitted that the High Court committed serious error by quashing the acquisition proceedings on the premise that physical possession of the acquired land had not been taken on 30.6.2001 Learned counsel referred to letter dated 5.6.2000 vide which the BDA deposited a sum of Rs.63,47,855.07 towards the compensation payable to the land owners and submitted that the exercise undertaken for taking possession of the acquired land by the concerned authorities of the State and delivery thereof to the BDA could not have been brushed aside by the High Court by describing it as symbolic/paper possession.

12. Shri W.H. Khan, learned senior counsel appearing for respondent No.1 supported the order under challenge and argued that the High Court rightly annulled the acquisition proceedings because physical possession of the land was taken only on 30.7.2002 and the award was passed after more

than two years of publication of the declaration issued under Section 6(1). Learned senior counsel relied upon Khasra Land Records of Fasli years 1407, 1408 and 1409, which have been filed with I.A. No.3 of 2011 to show that physical possession of the acquired land continued with respondent No.1 till July 2002 and argued that the document prepared by the State authorities showing delivery of possession to the BDA cannot be made basis for recording a finding that physical possession of the acquired land was taken on 30.6.2001. Learned senior counsel relied upon the judgments of this Court in *Nahar Singh v. State of U.P.* (1996) 1 SCC 434, *NTPC Ltd. v. Mahesh Dutta* (2009) 8 SCC 339 as also the judgments of the Allahabad High Court in *Anil Kumar v. State of U.P.* (2008) 2 AWC 1832 and *Sushil Kumar v. State of U.P.* (1999) 1 AWC 764 and submitted that symbolic/paper possession taken by the State authorities on 30.6.2001 was not sufficient for relieving the Land Acquisition Officer of the obligation to pass award within two years of the last publication of the declaration issued under Section 6(1). Shri Khan then referred to the judgments of this Court in *Vyalikaval Housebuilding Cooperative Society v. V. Chandrappa* (2007) 9 SCC 304 and *Babu Ram v. State of Haryana* (2009) 10 SCC 115 and argued that respondent No.1 should not be non-suited on the ground of delay because no such objection was raised before the High Court.

13. We have considered the respective submissions. In the suit filed by him, respondent No.1 had unequivocally declared that he did not have any objection to the acquisition of land or the plots which were subject matter of the acquisition. The only grievance made by respondent No.1 was that the notification had been issued without sub-dividing plot No. 795. He also claimed that defendant No.3 had delivered possession to defendant No.4 on papers and they were trying to start construction after taking possession of his land. This is evident from paragraphs 5, 6, 8, 10 and 11 of the plaint, which are extracted below:

"5. That description of the disputed plot which has acquired by the Gazette Notification is given as plot no.795 Rakba 12 Bigha and 795/2 Rakba 5 Bigha 5 Biswa. At the time of acquisition proceedings this fact came to liaht that olot no. 795 has not been sub-divided. Without sub-division of the plot it was not possible to acquire and give its compensation. Defendant No. 3 called for a report from Tehsildar, Banda regarding plot no.795 on the basis of possession and sub-division. After due inspection on the spot Tehsildar sent its detailed report dated 30.3.2001 to the defendant no. *3* stating clearly the sub-divided shares as follows:-

Sr.No.	Plot no.	Rakba	Farmer Name
1.	795/1	06-16-10	Nathu, Shakhawat and Srikrishna
2.	795/2	09-08-05	Smt. Shashi Devi
3.	795/3	05-05-00	Motilal
4.	795/4	04-03-05	Shiv Devi
5.	795/*5*	12-00-00	Nathu, Sakhawat and Srikrishna

6. That according to Land Record Manual the provision to enter numbers in an account is to start numbering vis 1,2,3,4 from north-west to south east. In accordance t*o* this provision only the above said sub-division was done which is also *lawful.* The plaintiff has no objection with the sub-division.

8. *That it is important to clarify here that the plaintiff does not have any objection to the acquisition proceedings or the plot no.s which are subject to the acquisition.* The plaintiff only states that acquisition be done only after sub-division of 795 according to the rules. The proceedings were initiated on the basis of the report of Tehsildar dated 30.3.2001 and the compensation for 795/2 was prepared in the name of ShashiDevi and she was only shown as the

Kastkaar in the said land and accordingly Akar part 11 was prepared and the notice under Section 14 was given to Shashi Devi. After wards at any subsequent stage records were manipulated and the plaintiff was shown as the Kastkaa*r* of 795/2. The plaintiff had filed several objections, personally met with the officials of the defendants and given applications. *Inspite of some decisions of inquiries in favour of the plaintiff has not been given any relief and due to the fact that defendant no.3 has delivered possession to defendant no. 4 on papers, the defendants are trying to start construction after taking possession of the land of the plaintiff and are shying away from their legal duty.*

10. That in the interest of justice it is necessary that the defendants be ordered that the acquisition and disbursement of compensation be done only after due inspection of plot no.795 and thereafter numbering it in accordance with law on the basis of possession. Because the defendants are not paying any heed to the justified claim of the plaintiff so this suit is being filed.

11. *That the defendants are going to start construction on the site very soon and they have demarcated the land by embedding stones from which it is clear that they are going to possess the disputed land.* In all these circumstances the notice u/s 80 CPC cannot be served upon the defendants and with the permission of the Hon'ble Court, this suit is being filed without the notice."

(underlining is ours)

The main and substantive prayer made in the plaint, which is extracted below, also shows that respondent No.1 had not questioned the acquisition proceedings:

"That the defendants be directed by order of Mandatory

Injunction to start afresh the proceedings of acquisition and disbursement of compensation after sub-dividing and numbering plot no. 795 in accordance with para no. 63 of the Land Record Manual. In the alternative acquire the land from all the account holders and thereby proportionally pay them respective compensation."

14. The above extracted portions of the plaint unmistakably show that respondent No.1 had no complaint against the acquisition of land or taking of possession by the State Government and delivery thereof to the BDA and the only prayer made by him was that the defendants be directed to undertake fresh acquisition proceedings after sub-dividing plot No. 795 so that he may get his share of compensation. He filed writ petition questioning the acquisition proceedings after almost 9 years of publication of the declaration issued under Section 6(1) and about six years of the pronouncement of award by the Special Land Acquisition Officer. During this interregnum, the BDA took possession of the acquired land after depositing 80% of the compensation in terms of Section 17(3A), prepared the layout, developed the acquired land, carved out plots, constructed flats for economically weaker sections of the society, invited applications and allotted plots and flats to the eligible persons belonging to economically weaker sections as also LIG, MIG and HIG categories.

Unfortunately, the High Court ignored all this and allowed the writ petition on the specious ground that the acquired land did not vest in the State Government because physical possession of the land belonging to respondent No.1 was not taken till 31.7.2002 and the award was not passed within two years as per the mandate of Section 11A.

15. In our view, even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ

petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created. The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition.

16. It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/ crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits. In *State of Madhya Pradesh v. Bhailal Bhai* AIR 1964 SC 1006, the Constitution Bench considered the effect of delay in filing writ petition under Article 226 of the Constitution and held:

"……It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it……It is not easy nor is it desirable to lay down any Rule for universal application. It may however be stated as a general Rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus.

……Learned counsel is right in his

submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Art 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable."

17. In matters involving challenge to the acquisition of land for public purpose, this Court has consistently held that delay in filing the writ petition should be viewed seriously and relief denied to the petitioner if he fails to offer plausible explanation for the delay. The Court has also held that the delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilised for the public purpose.

18. In *Ajodhya Bhagat v. State of Bihar* (1974) 2 SCC 501, this Court approved dismissal by the High Court of the writ petition filed by the appellant for quashing the acquisition of his land and observed:

"The High Court held that the appellants were guilty of delay and laches. The High Court relied on two important facts. First, that there was delivery of possession. The appellants alleged that it was a paper transaction. The High Court rightly rejected that contention. *Secondly, the High Court said that the Trust invested several lakhs of rupees for the construction of roads and material for development purposes. The appellants were in full knowledge of the same. The appellants did not take any steps. The High Court rightly said that to allow this type of challenge to an acquisition of large block of land*

piecemeal by the owners of some of the plots in succession would not be proper. If this type of challenge is encouraged the various owners of small plots will come up with writ petitions and hold up the acquisition proceedings for more than a generation. The High Court rightly exercised discretion against the appellants. We do not see any reason to take a contrary view to the discretion exercised by the High Court."

(emphasis supplied)

19. In *State of Rajasthan v. D.R. Laxmi* (1996) 6 SCC 445, this Court referred to Administrative Law H.W.R. Wade (7th Ed.) at pages 342-43 and observed:

"The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances……."

20. In *Girdharan Prasad Missir v. State of Bihar* (1980) 2 SCC 83, the delay of 17 months was considered as a good ground for declining relief to the petitioner.

21. In *Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd.* (1996) 11 SCC 501, this Court held:

"It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court

should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

22. In *Urban Improvement Trust, Udaipur v. Bheru Lal* (2002) 7 SCC 712, this Court reversed the order of the Rajasthan High Court and held that the writ petition filed for quashing of acquisition of land for a residential scheme framed by the appellant-Urban Improvement Trust was liable to be dismissed on the ground that the same was filed after two years.

23. In *Ganpatibai v. State of M.P* (2006) 7 SCC 508, the delay of 5 years was considered unreasonable and the order passed by the High Court refusing to entertain the writ petition was confirmed. In that case also the petitioner had initially filed suit challenging the acquisition of land. The suit was dismissed in 2001. Thereafter, the writ petition was filed. This Court referred to an earlier judgment in *State of Bihar v. Dhirendra Kumar* (1995) 4 SCC 229 and observed:

"In *State of Bihar v. Dhirendra Kumar* this Court had observed that civil suit was not maintainable and the remedy to question notification under Section 4 and the declaration under Section 6 of the Act was by filing a writ petition. Even thereafter the appellant, as noted above, pursued the suit in the civil court. The stand that five years

after the filing of the suit, the decision was rendered does not in any way help the appellant. Even after the decision of this Court, the appellant continued to prosecute the suit till 2001, when the decision of this Court in 1995 had held that suit was not maintainable."

24. In *Sawaran Lata v. State of Haryana* (2010) 4 SCC 532, the dismissal of writ petition filed after seven years of the publication of declaration and five years of the award passed by the Collector was upheld by the Court and it was observed:

"In the instant case, it is not the case of the petitioners that they had not been aware of the acquisition proceedings as the only ground taken in the writ petition has been that substance of the notification under Section 4 and declaration under Section 6 of the 1894 Act had been published in the newspapers having no wide circulation. Even if the submission made by the petitioners is accepted, it cannot be presumed that they could not be aware of the acquisition proceedings for the reason that a very huge chunk of land belonging to a large number of tenure-holders had been notified for acquisition. Therefore, it should have been the talk of the town. Thus, it cannot be presumed that the petitioners could not have knowledge of the acquisition proceedings."

25. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years from the date of passing of

award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1.

26. The two judgments relied upon by the learned counsel for respondent No.1 are not helpful to the cause of his client. In *Vyalikaval Housebuilding Coop. Society v. V. Chandrappa* (2007) 9 SCC 304, this Court held that where the acquisition was found to be vitiated by fraud and mala fide, the delay in filing the writ petition cannot be made a ground for denying relief to the affected person. In *Babu Ram v. State of Haryana* (supra), this Court held that the appellant cannot be denied relief merely because there was some delay in filing the writ petition. The facts of that case were that 34 kanals 2 marlas of land situated at Jind (Haryana) was acquired by the State Government under Section 4 read with Section 17(2)(c) and 17(4) for construction of sewage treatment plant. Notification under Section 4 was issued on 23.11.2005 and declaration under Section 6 was issued on 2.1.2006. Mitaso Educational Society, Narwana, filed suit for injuncting the State from constructing sewage treatment plant in front of the school. On 15.2.2006, the trial Court passed an order of injunction. In another suit filed by one Jagroop similar order was passed by the trial Court. After some time, the appellant filed writ petition under Article 226 of the Constitution. Before this Court it was argued that relief should be denied to the appellant because there was delay in filing the writ petition. Rejecting this argument, the Court observed:

> **"**Since Section 5-A of the LA Act had been dispensed with, the stage under Section 9 was arrived at within six months from the date of the notice issued under Sections 4 and 17(2)(*c*) of the LA Act. While such notice was issued on 23-11-2005, the award under Section 11 was made on 23-5-2006. During this period, the appellants filed a suit and thereafter, withdrew the same and filed a writ petition in an attempt to protect their constitutional right to the property. It cannot, therefore, be said that there was either

> any negligence or lapse or delay on the part of the appellants."

27. *De hors* the aforesaid conclusion, we are convinced that the premise on which the High Court declared that the acquisition proceedings will be deemed to have lapsed because the award was not passed within two years is *ex facie* erroneous. Admittedly, the State Government had acquired the land by issuing notification under Section 4 read with Section 17(1) and (4), which was followed by a declaration issued under Section 6(1) read with Section 17(1). By notification dated 7.9.1999, the Governor had directed Collector, Banda to take possession of the acquired land on the expiration of 15 days from the issue of notice under Section 9(1). In furtherance of the direction given by the Collector, the concerned revenue authorities took possession of the acquired land, which, as mentioned above, has already been utilized for implementing Tulsi Nagar Residential Scheme. Though, respondent No.1 succeeded in convincing the High Court that physical possession of his land had not been taken till 31.7.2002, after carefully perusing the record, we are convinced that the finding recorded on this issue is unsustainable. In paragraphs 8 and 11 of the plaint filed by him in the Court of Civil Judge (Senior Division), Banda, respondent No.1 had virtually admitted that possession of the acquired land was with the BDA. If this was not so, there was no occasion for him to make a grievance that the land had been demarcated by putting stones and the BDA was in the process of raising construction. That apart, respondent No. 1 did not deny the statements contained in the affidavits filed before the High Court that the revenue authorities visited the spot and made entries in the Field Book regarding delivery of possession. The photographs produced by the parties before this Court show that after taking possession of the acquired land, the BDA constructed roads,buildings etc., laid sewer lines and erected poles for electric lines. The photographs also reveal that by taking advantage of the impugned order, respondent No.1 took possession of a portion

of the land on which the BDA had already carried out development. All this is sufficient to discard the claim of respondent No.1 that actual possession of the acquired land had not been delivered to the BDA till July, 2002.

28. What should be the mode of taking possession of the land acquired under the Act? This question was considered in *Balwant Narayan Bhagde v. M.D. Bhagwat* (1976) 1 SCC 700. Untwalia, J. referred to the provisions contained in Order XXI Rules 35, 36, 95 and 96 of the Code of Civil Procedure, decisions of different High Courts and opined that even the delivery of so called "symbolical" possession is delivery of "actual" possession of the right, title and interest of the judgment-debtor. Untwalia,J. further observed that if the property is land over which there is no building or structure, then delivery of possession over the judgment-debtor's property becomes complete and effective against him the moment the delivery is effected by going upon the land. The Learned Judge went on to say:

> "When a public notice is published at a convenient place or near the land to be taken stating that the Government intends to take possession of the land, then ordinarily and generally there should be no question of resisting or impeding the taking of possession. Delivery or giving of possession by the owner or the occupant of the land is not required. The Collector can enforce the surrender of the land to himself under Section 47 of the Act if impeded in taking possession. On publication of the notice under Section 9(1) claims to compensation for all interests in the land has to be made; be it the interest of the owner or of a person entitled to the occupation of the land. On the taking of possession of the land under Section 16 or 17 (1) it vests absolutely in the Government free from all incumbrances. It is, therefore, clear that taking of possession within the meaning of Section 16 or 17 (1) means taking of possession on the spot. It is neither a

> possession on paper nor a "symbolical" possession as generally understood in civil law. But the question is what is the mode of taking possession? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority has taken possession of the land. The presence of the owner or the occupant of the land to effectuate the *taking of possession is not necessary. No further notice beyond that under Section 9(1) of the Act is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken the land vests in the Government.*
>
> (emphasis supplied)

Bhagwati J., (as he then was), speaking for himself and Gupta, J. disagreed with Untwalia, J. and observed:

> ".....We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking "symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. *There can be no hard and fast rule laying down what act would be sufficient to*

constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. *But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession.* It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it."

(emphasis supplied)

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

"It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is

difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession".

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

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

32. In *Sita Ram Bhandar Society v. Govt. of NCT, Delhi* (2009) 10 SCC 501 and *Omprakash Verma v. State of Andhra Pradesh* (2010) 13 SCC 158, it was held that when possession is to be taken of a large tract of land then it is permissible to take possession by a properly executed panchnama. Similar view was expressed in the recent judgment in *Brij Pal Bhargava v. State of UP* 2011(2) SCALE 692.

33. The judgment in *Nahar Singh v. State of U.P.* (supra) on which reliance was placed by the learned senior counsel for respondent No.1 is clearly distinguishable. In that case, the Court had found that possession of the acquired land had not been taken by the State and the award was not passed even after two years from the date of coming into force of the Land

Acquisition (Amendment) Act, 1984 whereby Section 11A was inserted in the Act.

34. The principles which can be culled out from the above noted judgments are:

(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised

in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

35. In the light of the above discussion, we hold that the action of the concerned State authorities to go to the spot and prepare panchnama showing delivery of possession was sufficient for recording a finding that actual possession of the entire acquired land had been taken and handed over to the BDA. The utilization of the major portion of the acquired land for the public purpose for which it was acquired is clearly indicative of the fact that actual possession of the acquired land had been taken by the BDA.

36. Once it is held that possession of the acquired land was handed over to the BDA on 30.6.2001, the view taken by the High Court that the acquisition proceedings had lapsed due to non-compliance of Section 11A cannot be sustained. In *Satendra Prasad Jain v. State of U.P.* (supra), this Court considered the applicability of Section 11A in cases involving acquisition of land under Section 4 read with Section 17 and observed:

"Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1)

is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. *Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner."*

(emphasis supplied)

37. The same view was reiterated in *Awadh Bihari Yadav v. State of Bihar* (supra), *Pratap v. State of Rajasthan* (supra), *Parsinni v. Sukhi* (1993) 4 SCC 375, *Allahabad Development Authority v. Nasiruzzaman (supra) and Government of A.P. v. Kollutla Obi Reddy* (supra).

38. In the result, the appeal is allowed. The impugned order is set aside and the writ petition filed by respondent No.1 is dismissed with cost quantified at Rs.1,00,000/-. Respondent No.1 shall deposit the amount of cost with the appellant within a period of two months from today.

B.B.B. Appeal allowed.

SHANKARA CO-OP HOUSING SOCIETY LTD.
v.
M. PRABHAKAR & ORS.
(Civil Appeal No. 4099 of 2000)

MAY 05, 2011

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

Displaced Persons (Compensation and Rehabilitation) Act, 1954:

s. 12 – Property notified u/s. 7 of the Evacuee Property Act – Subsequently issuance of Notification u/s. 12 – Acquisition of evacuee property for rehabilitation of displaced persons – Effect of – Held: Notification issued u/s. 7 of the Evacuee Property Act declaring the property to be evacuee property was valid in law – In view of the Notification issued by the Central Government u/s. 12, the property vested in the Central Government - Thus, the property lost the status of evacuee property – Administration of Evacuee Property Act, 1950 – s. 7.

s. 24 – Power of revision of Chief Settlement Commissioner under – Scope of – Held: Chief Settlement Commissioner can revise the order if in his opinion the orders passed by the officers named in the Section are either illegal or improper – On facts, the Chief Settlement Commissioner invoked his revisional powers at the request of the allottees/ displaced persons to revise the proceedings and the order passed by the Collector-cum-Deputy Custodian under the provisions of the Evacuee Property Act – Therefore, the orders passed by the Chief Settlement Commissioner is without jurisdiction and non-est in law – Administration of Evacuee Property Act, 1950.

Constitution of India, 1950:

Article 226 – Belated writ petition challenging the Notification issued under the Evacuee Property Act, declaring certain properties as evacuee property – Maintainability of – Held: High Court ought not to have entertained and granted relief to the writ petitioners since there was inordinate and unexplained delay in approaching the court/authorities at every stage for redressal of their grievance – They claimed wrong reliefs/incomplete reliefs before the Authorities – They questioned the correctness of the said Notification by way of filing an amendment application – Also in the earlier writ petition challenging the Notification, the finding regarding delay and failure to avail alternate remedy had attained finality – More so, during the period of delay, interest accrued in favour of the third party – Delay/laches.

Article 226 – Writ petition filed by original owner of land challenging the Notification issued u/s. 7 of the Evacuee Property Act declaring certain properties as evacuee properties – Petition dismissed by the High Court since the claim was highly belated and there was a failure to avail the alternate remedy provided under the Act – Said order attaining finality – Subsequently writ petition filed re-agitating the said issue which had attained finality and the Division Bench of the High Court entertained the same – Held: The judgment and order of the High Court having attained finality was binding on the authorities under the Evacuee Property Act - Division Bench of the High Court could not have permitted the writ petitioners to re-agitate the correctness or otherwise of the Notification issued u/s. 7 of the Evacuee Property Act in the subsequent writ petition – A subsequent writ petition was not maintainable in respect of an issue concluded between the parties in the earlier writ petition – Administration of Evacuee Property Act, 1950.

Articles 226 and 227 – High Court while entertaining writ petition filed under Article 226 and 227 wherein the proceedings u/s. 7 of the Evacuee Property Act was

questioned, going into disputed questions of facts – Maintainability of – Held: Writ petition is maintainable – Under the Evacuee Property Act, there is specific bar for the civil court to adjudicate on the issue whether certain property is or is not evacuee property – This issue can be decided only by the custodian under the Act – Any person aggrieved by the findings of the custodian can avail the other remedies provided under the Act – Thus, the finding and the conclusion reached by the Authorities under the Act in an appropriate case can be questioned in a petition filed under Article 226 – Administration of Evacuee Property Act, 1950.

Res judicata – Principles of constructive res judicata – Applicability of – When ground open to be raised was not raised in the earlier writ petition whereas in a subsequent writ petition, the High Court permitted the petitioners to raise the said ground – Justification of – Held: Not justified – The same is hit by the principles analogous to constructive res judicata – Doctrines/Principles.

Respondents are the legal representatives of 'M' who was owner of certain lands. One 'R' obtained a money decree against 'M' and allegedly in the execution proceedings, 'R' purchased the lands belonging to 'M' in an auction. Thereafter, his name was recorded in the Revenue Record as owner of the said lands. In the year 1940, 'R' expired and his legal representatives migrated to Pakistan after partition. In the year 1951, the Deputy Custodian and Collector issued notice to the legal heirs of 'R' under sub-Section (1) of Section 7 of the Administration of Evacuee Property Act, 1950. Public notices were issued as also the ancestors of the contesting respondents were given notices. However, no objections were filed to the notices. The Deputy Custodian and Collector issued a Notification dated 11.12.1952 declaring the said property as an Evacuee Property under Section 7 of the Evacuee Property Act.

The same was published and the name of the Collector/ Custodian was entered in the Revenue Records. Thereafter, the Central Government acquired the said lands by issuing Notification under Section 12 of the Displaced Persons Act for the rehabilitation of the persons who were displaced during the partition. The said declaration of the lands as evacuee property and the subsequent acquisition by the Central Government was not challenged upto the year 1955. Thereafter, the ancestors of the respondents made only repeated representations before the authorities.

In the year 1966, Tahsildar proposed to auction the disputed lands on yearly lease basis. Aggrieved, 'M'- ancestor of the respondents filed Writ Petition No. 1051 of 1966 *inter-alia*, seeking a writ of prohibition or direction restraining the Tahsildar from auctioning the said lands and to direct the authorities to decide the representation filed by them. The Regional Settlement Commissioner/ Custodian of Evacuee property averred that the notice as required had been issued to all the interested parties. The High Court dismissed the writ petition on the ground of delay/laches; and the failure to avail alternate remedy provided under the Evacuee Property Act. During the pendency of the writ petition, a portion of the land was allotted to 'EB' and she was impleaded as one of the respondents in the writ petition. Some of the respondents also filed a revision petition under Section 27 of the Evacuee Property Act before the Deputy Custodian General to revise the Notification dated 11.12.1952. In the year 1968, some portion of the lands was allotted to 'G' and 'J' as also 'MD' and their names were recorded in the revenue records. Thereafter, by order dated 25.09.1970 the revision petition was allowed and the case was remanded to the Custodian-cum-Collector for re-determination of the evacuee nature of the lands. On remand, the Collector-cum-Deputy Custodian of Evacuee

Property by order dated 28.05.1979 held that since there was no evidence to show that 'R' came to be the owner of the land in pursuance of an auction by the court in execution of the money decree, thus, 'M' and the other contesting respondents continue to be the owners of the disputed lands. Aggrieved, the allottees filed a revision petition before the Chief Settlement Commissioner under the Displaced Persons Act, who by order dated 11.05.1983 set aside the order of the Collector-cum-Deputy Custodian dated 28.05.1979 and declared that the property belonged to late 'R' and that by virtue of the Notification dated 11.12.1952, the disputed lands are evacuee property. Meanwhile, in view of the pendency of the proceedings, the Tahsildar refused to give possession of the disputed lands to the allottees.

The contesting respondents again filed a revision petition under Section 33 of the Displaced Persons Act and the same was dismissed. The contesting respondents then filed Writ Petition No. 7517 of 1983 *inter alia*, requesting the court to direct the authorities under the Displaced Persons Act to initiate *suo-moto* proceedings to determine the claim of ownership of the disputed lands and the same was also dismissed. The contesting respondents filed another Writ Petition No. 17722 of 1990 *inter alia* requesting the High Court to issue a writ or order directing the Commissioner, Survey Settlement and Land Records/Chief Settlement Commissioner, Evacuee Property to conduct an enquiry into questions of title of disputed lands and correctness of the declaration of the said property as evacuee property. Subsequently, the contesting respondents filed an application to amend the prayer in the writ petition. It was to include a prayer to quash the Notification dated 11.12.1952 and the same was allowed. The appellants also filed an application for impleadment as a party to the proceeding and the same was allowed. The Division

Bench of the High Court allowed the writ petition by setting aside the order passed by the Chief Settlement Commissioner dated 11.05.1983 and restored the order passed by the Collector-cum-Deputy Custodian of Evacuee Property dated 28.07.1979. Therefore, the instant appeals were filed.

Allowing the appeals, the Court

HELD: 1. (i)The High Court ought not to have entertained and granted relief to the writ petitioner/ contesting respondents, since there was inordinate and unexplained delay in approaching the court.

(ii) The judgment and order of the High Court in W.P. No. 1061 of 1966 having attained finality was binding on the authorities under the Evacuee Property Act and the High Court ought not to have permitted the writ petitioners/contesting respondents to re-agitate the correctness or otherwise of the Notification dated 11.12.1952 in the subsequent writ petition.

(iii) A subsequent writ petition was not maintainable in respect of an issue concluded between the parties in the earlier writ petition.

(iv) In view of the specific bar under Section 46 of the Evacuee Property Act, the writ petition filed by the contesting respondents before the High Court was maintainable.

(v) Since exception is taken to the orders passed by the Collector-cum-Deputy Custodian and the judgment and order passed by the High Court in W.P. No. 17222 of 1990, the Notification dated 11.12.1952 is valid in law.

(vi) Since the Notification issued under Section 7 of the Act is valid in law, the evacuee property acquired by the Central Government under Section 12 of the

Displaced Persons Act ceases to be evacuee property and becomes the property of the Central Government.

(vi) In view of the clear language employed in Section 24 of the Act, the Chief Settlement Commissioner had no jurisdiction to revise the order passed by the Collector-cum-Deputy Custodian under the Evacuee Property Act. Thus, the judgment and order passed by the High Court in W.P. 17222 of 1990 dated 27.04.2000 is set aside. [Paras 111 and 112] [546-E-H; 547-A-G]

Delay and Laches:

2.1. In the instant case, the respondents in the writ petition had raised a specific plea of delay, as a bar to grant relief to the petitioners. It was perhaps necessary for the Court to have specifically dealt with this issue. A person who seeks the intervention of the High Court under Article 226, should give a satisfactory explanation of his failure to assert his claim at an earlier date. The excuse for procrastination should find a place in the petition filed before the court and the facts relied upon by him should be set out clearly in the body of the petition. An excuse that he was agitating his claims before authorities by making repeated representations would not be satisfactory explanation for condoning the inordinate delay in approaching the Court. If a litigant runs after a remedy not provided in the Statute or the statutory rules, it cannot be a satisfactory explanation for condoning the delay in approaching the Court. [Para 60] [516-B-D]

2.2. There was no explanation, much less satisfactory explanation offered by the respondents in approaching the writ court after an inordinate delay of nearly 15 years from the date of the Notification issued under the Evacuee Property Act. For the delay from 1952 to 1955, the contesting respondents only submitted that

they were not aware of the Notification issued under the Evacuee Property Act, since no notice was served on them, though a public notice was issued by the authority under the Evacuee Property Act. While explaining the delay of nearly eleven years from 1955 to 1966, they contended that they were in possession of the property and they were making representations before the authorities under the Evacuee Property Act for redressal of their grievance. As regards the delay after the orders were passed by the Settlement Commissioner in the year 1983 till the writ petition was filed in the year 1990, it is explained that they had moved the State Government to *suo-moto* revise the order passed by the Chief Settlement Commissioner and since the State Government returned their request, they had approached the High Court to issue directions to the State Government to issue appropriate directions. Thus, at every stage, there was inordinate delay in approaching the authorities for redressal of their grievance. Even when they approached the authorities, they were claiming wrong reliefs or incomplete reliefs. Even when they filed the writ petition in the year 1990, they did not choose to question the correctness of the Notification issued under the Evacuee Property Act but was questioned by way of filing an amendment application in the year 1998. There is some merit in the submission made by the contesting respondents that the petitioners in their pleadings before the writ court, had not even offered any explanation, much less satisfactory explanation, in approaching the court nearly after three decades from the date of notification issued under the Evacuee Property Act. The power of the High Court under Article 226 of the Constitution to issue an appropriate writ, order or direction is discretionary. One of the grounds to refuse relief by a writ court is that the petitioner is guilty of delay and laches. Inordinate and unexplained delay in approaching the court in a writ is indeed an adequate ground for refusing to exercise

discretion in favour of the petitioners therein. The unexplained delay on the part of the petitioner in approaching the High Court for redressal of their grievances under Article 226 of the Constitution was sufficient to justify rejection of the petition. The other factor the High Court should have taken into consideration that during the period of delay, interest has accrued in favour of the third party and the condonatoin of unexplained delay would affect the rights of third parties. Delay defeats equity and that the discretionary relief of condonation can be had, provided one has not given by his conduct, given a go by to his rights'. [Para 61] [516-E-H; 517-A-H; 518-A-B]

Lindsay Petroleum Company vs. Prosper Armstrong Hurd etc **(1874)5 PC 221;** *Moon Mills Ltd. vs. Industrial Courts* **AIR 1967 SC 1450;** *Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service* **AIR 1969 SC 329: 1969 SCR 808;** *Amrit Lal Berry vs. CCE* **(1975) 4 SCC 714: 1975 (2) SCR 960;** *State of Maharashtra vs. Digambar* **(1995) 4 SCC 683: 1995 (1) Suppl. SCR 492;** *Shiv Dass vs. Union of India* **(2007) 9 SCC 274: 2007 (1) SCR 1127;** *City and Industrial Development Corporation vs. Dosu Aardeshir Bhinandiwala and Ors.* **(2009) 1 SCC 168: 2009 (1) SCR 196;** *State of M.P. and Ors. vs. Nandlal Jaiswal and Ors.* **(1986) 4 SCC 566: 1987 (1) SCR 1;** *M/s Dehri Rohtas Light Railway Company Ltd. vs. District Board, Bhojpur and Ors.* **(1992) 2 CC 598: 1992 (2) SCR 155;** *Municipal Council vs. Shaha Hyder Baig* **(2002) 2 SCC 48 – referred to.**

<u>Effect of the judgment and order of the High Court in W.P. No. 1051 of 1966:</u>

3.1. In the writ petition filed by 'M', the Regional Settlement Commissioner and Custodian of Evacuee Property, was arrayed as one of the respondents. That only means, he was fully aware of the judgment and order

passed by the Writ Court. In the revision petition filed by the other legal representatives of late 'M', he was also arrayed as one of the respondents. However, a perusal of the order passed by Deputy Custodian General does not clearly indicate whether it was brought to his notice the judgment and order passed by the High Court, yet again, in the order by the Collector-cum-Deputy Custodian dated 28.5.1979, there was no reference to the judgment and order passed by the High Court. However, in the order passed by Chief Settlement Commissioner of Evacuee Property, there was reference to the judgment of the High Court. The said authority while setting aside the order passed by Collector-cum-Deputy Custodian as nullity, did not rely on the judgment and order passed by the High Court. In the subsequent Writ Petition filed, the respondents, in their Counter Affidavit had specifically contended that the Notification dated 11.12.1952 has become final in view of the judgment and order passed by the High Court in Writ Petition No. 1051 of 1966 as also in Writ Petition 7517 of 1983. The Division Bench of the High Court while dealing with this aspect, observed in its order that it is not correct to read the judgment dated 14.6.1968 rendered in W.P. No. 1051 of 1966 that this Court had negatived the rights of the petitioners. A sentence here and there in a judgment cannot be picked up in construing it. A judgment has to be construed on reading and understanding as a whole and if so understood, the judgment in W.P. 1051 of 1966 is to the effect that in the writ petition, the rights of the parties cannot be adjudicated and more so in view of the fact that alternative remedy of appeal is available under the Act. By that, it cannot be assumed that this Court had upheld the Notification issued under Section 7 of the Act". The reasoning and conclusion reached by the Division Bench of the High Court cannot be accepted. The decision of the court was not correctly read. However, it is agreed that the judgment should be read as a whole and

understood in the context and circumstances of the facts of that case. [Paras 72 and 73] [524-E-H; 525-A-F]

U.P. State Road Transport Corporation v. Asstt. Commissioner of Police (Traffic) Delhi **2009(3) SCC 634 – referred to.**

3.2 The judgment and order passed by the High Court in W.P. No. 1051 of 1966 is noticed. The court, while narrating the facts, specifically observed that what was challenged before it by the petitioner was the Notification dated 11.12.1952 issued under Section 7 of the Evacuee Property Act declaring certain properties as evacuee properties. While dismissing the writ petition, the court observed that petitioner has failed to avail the alternate remedy of appeal provided under the Act and at the belated stage, he cannot question the correctness or otherwise of the Notification dated 11.12.1952. Therefore, it may not be correct to say that the court had rejected the writ petition only on the ground that the petitioner without availing the alternate remedy provided under the Act, could not have filed the writ petition. The writ petition was dismissed by the High Court not only on the ground that the petitioner had failed to avail the remedy under the Act, but also on the ground that the petitioner could not have questioned the Notification dated 11.12.1952 at a belated stage. Therefore, the approach of the Division Bench of the High Court was not justified in entertaining a writ petition on the very issue, which had attained finality in an earlier proceeding. This view has nothing to do with the Principle of res judicata nor it can be said that principles of res judicata would apply in the facts and circumstances of this case. This Court is only holding that when a competent court refuses to entertain a challenge made to a Notification issued on 11.12.1952 in a writ petition filed in the year 1966, the High Court could not have entertained the writ petition on the same cause

of action at a belated stage in a writ petition filed in the year 1990. The course adopted by the High Court not only leads to confusion but also leads to inconvenience. [Para 74] [526-B-G]

Shakur Basti Shamshan Bhumi Sudhar Samiti v. Lt. Governor, NCT of Delhi **(2007) 13 SCC 53: 2007 (13) SCR 145;** *A.P. Housing Board v. Mohd. Sadatullah* **(2007) 6 SCC 566: 2007 (5) SCR 107;** *Hindustan Construction Co. Ltd. and Anr. v. Gopal Krishna Sengupta and Ors.* **(2003) 11 SCC 210;** *Food Corporation of India v. S.N. Nagarkar,* **(2002) 2 SCC 475;** *Oriental Bank of Commerce v. Sunder Lal Jain and Anr.* **(2008) 2 SCC 280: 2008 (1) SCR 213;** *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.* **2007 (5) SCC 510: 2007 (3) SCR 726 – referred to.**

4. The submission that the writ petition was filed by one of the co-owners of late 'M' and judgment and order passed would not bind the other parties cannot be accepted. No co-owner has a definite right, title and interest in any particular item or portion thereof. On the other hand, he has right, title and interest in every part and parcel of the joint property or coparcenery under Hindu Law by all the coparceners. [Para 75] [527-B-C]

A. Viswanath Pillai and Ors. vs. The Special Tahsildar for Land Acquisition No. IV and Ors. **(1991) 4 SCC 17: 1991 (3) SCR 465 – referred to.**

Constructive Res judicata:

5. It is admitted fact that when the contesting respondents filed W.P. No. 1051 of 1966, the ground of non-compliance of statutory provision was very much available to them, but for the reasons best known to them, they did not raise it as one of the grounds while challenging the Notification dated 11.12.1952 issued

under the Evacuee Property Act. In the subsequent writ petition, initially, they had not questioned the legality of the Notification, but raised it by filing an application which was allowed by the High Court. Thus, the High Court was not justified in permitting the contesting respondents to raise that ground and answer the same, since the same is hit by the principles analogous to constructive res judicata. [Para 78] [529-A-C]

Daya Rao vs. State of U.P. **(1962) 1 SCR 574;** *Hosunak Singh vs. Union of India* **(1979) 3 SCC 135: 1979 (3) SCR 399;** *Devilal Modi, Proprietor, M/s Daluram Pannalal Modi v. Sales Tax officer Ratlam and Ors.* **AIR 1965 SC 1150: 1965 SCR 686 – referred to.**

Whether the High Court could have gone into the facts under its writ jurisdiction:

6.1. The High Court in its writ jurisdiction does not enquire into complicated questions of fact. The High Court also does not sit in appeal over the decision of an authority whose orders are challenged in the proceedings. The High Court can only see whether the authority concerned has acted with or without jurisdiction. The High Court can also act when there is an error of law apparent on the face of the record. The High Court can also interfere with such decision where there is no legal evidence before the authority concerned, or where the decision of the authority concerned is held to be perverse, i.e., a decision which no reasonable man could have arrived at on the basis of materials available on record. Where an enquiry into complicated questions of fact is necessary before the right of aggrieved party to obtain relief claimed may be determined, the court may, in appropriate cases, decline to enter upon that enquiry, but the question is always one of discretion and not of jurisdiction of the court which may, in a proper case,

enter upon a decision on questions of fact raised by the petitioner. [Para 80] [530-A-D]

6.2. The High Court has not committed an error while entertaining a writ petition filed under Article 226 and 227 of the Constitution, wherein the proceedings under Section 7 of the Evacuee Property Act was questioned. Under the Evacuee Property Act, there is specific bar for the civil court to adjudicate on the issue whether certain property is or is not evacuee property. This issue can be decided only by the custodian under the Act. Any person aggrieved by the findings of the custodian can avail the other remedies provided under the Act. The findings and the conclusion reached by the authorities under the Act in an appropriate case can be questioned in a petition filed under Article 226 of the Constitution even if it involves disputed questions of facts. [Para 90] [535-A-C]

Custodian of Evacuee Property Punjab and Ors. vs. Jafran Begum **(1967) 3 SCR 736 – relied on.**

Surya Dev Rai vs. Ramchander Rai and Ors. **(2003) 6 SCC 675: 2003 (2) Suppl. SCR 290;** *Ranjit Singh vs. Ravi Prakash* **(2004) 3 SCC 682:2004 (3) SCR 250;** *Karnataka State Industrial Investment and Development Corporation Ltd. vs. Cavalet India Ltd. and Ors.* **(2005) 4 SCC 456: 2005 (2) SCR 1183;** *State of Orissa vs. Dr. Miss Binapani Dei and Ors.* **(1967) 2 SCR 625:** *Smt. Gunwant Kaur and Ors. vs. Municipal Committee, Bhatinda and Ors.* **(1969) 3 SCC 769;** *Om Prakash vs. State of Haryana and Ors.* **(1971) 3 SCC 792;** *ABL International Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Ltd. and Ors.* **(2004) 3 SCC 553 – referred to.**

Whether the lands in question are evacuee property under Evacuee Property Act:

7.1 It is admitted that before the High Court, parties

to the *lis* had not produced any records. The contesting respondents claimed that they were not dispossessed from the lands in dispute pursuant to any money decree by late 'R' or his legal representatives. It is the stand of the appellants and also the State Government that the name of late 'R' had been recorded in the Khatra Khatauni and the authorities under the Evacuee Property Act after issuing notices to the legal representatives of late 'R' and also the public notice, the Notification under Section 7 of the Act was issued and gazetted. Since the records are of the year 1952, neither the State Government nor the contesting respondents could produce any records or documents in support of their claim. However, based on the affidavits filed by the petitioner, the High Court proceeds to hold that they were not dispossessed from their lands in accordance with law. The reasoning is firstly difficult to comprehend and secondly, difficult to accept. It is the specific case of the appellants, by placing reliance on the revenue records, that the name of late 'R' found a place in the revenue records prior to issuance of the Notification dated 11.12.1952 under the Evacuee Property Act and, thereafter, the name of the custodian is shown as the owner of the lands. The burden of proof was on the contesting respondents to prove their title, right and interest in the property. It is very strange that the High Court, in the absence of any records of the year 1952, proceeded to determine that the official respondents had not followed the mandatory requirement of the provisions of the Evacuee Property Act and rules framed thereunder before declaring the disputed lands as evacuee property. It also looks odd and queer that the High Court, in the absence of any records of the civil court and the executing court, proceeded to arrive at a definite finding that the sale of property had not taken place. Pursuant to the money decree passed, the executing court had not auctioned disputed lands and late 'R' became the owner

of the lands, though it concedes that the above said facts have to be proved with reference to the records and there cannot be oral evidence in this regard. It was highly inappropriate for the High Court to have proceeded to determine whether any notice was issued to late 'M' before notifying the property as evacuee property without there being any material nor the documents and records by relying only on the procedure prescribed under the Act and the Rules thereunder, even after noticing that both the parties have not produced any records, since the records are old and not traceable. Thus, the High Court was wholly incorrect when it arrived at a finding that there is manifest illegality while issuing Notification under Section 7 of the Evacuee Property Act. The findings and the conclusion reached by the Collector-cum-Deputy Custodian in his order dated 28.05.1979 that 'M' and other contesting respondent continue to be the owners of the disputed lands cannot be accepted. [Para 92] [537-B-H; 538-A-E]

7.2 The High Court in the impugned judgment, gave a finding that the authorities under the Act have violated the principles of natural justice in not issuing notice to the owners of the lands in dispute before taking any action under the Act. Whether any notice under the Act was issued or not, can only be decided with reference to the records. Such records were neither available nor any material was produced by the petitioners in support of their assertion made in the writ petition. Though, this assertion was denied by the respondents in their counter affidavit filed before the Court, this issue is answered by the High Court in favour of the contesting respondents. The findings and conclusion reached by the High Court in this regard, cannot be accepted. [Para 93] [538-E-G]

Effect of acquisition and distribution of the Evacuee Property under the Displaced Persons (Compensation and Rehabilitation) Act, 1954:

8.1 The Evacuee Property Act was mainly intended to provide for the administration of evacuee property. The Act is primarily concerned with evacuee property and not the person who is evacuee. The procedure prescribed to declare a particular property as an evacuee property is mandatory and they are to be complied with by the authorities notified under the Act and the Rules framed thereunder. The Act is a complete code in itself in the matter of dealing with evacuee property. The question whether any property or right or interest in any property is or is not evacuee property can be adjudicated only by the custodian and not the civil courts. The question whether evacuee property has been vested in custodian or not is a question of fact and the same cannot be interfered with except in exceptional circumstances which would include violation of principles of natural justice before notifying a property an evacuee property. [Para 102] [541-C-E; 542-C]

8.2 The Displaced Persons Act provides for payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. Section 12 of the Act authorizes the Central Government to acquire the evacuee property for rehabilitation of the displaced persons if it so desires and on such acquisition the property shall vest absolutely in the Central Government free from all encumbrances. The pre-requisite for acquiring property under Section 12 is that it must be evacuee property as defined under Section 2 (f) of the Act. The consequence of issuing Notification under Section 12 of the Act would denude the powers of the Custodian under Evacuee Property Act. As soon as the Notification is published, property ceases to be evacuee property. [Paras 103 and 106] [542-D; 523-B-D]

Major Gopal Singh and Ors. vs. Custodian, Evacuee Property,Punjab **(1962) 1 SCR 328;** *Basant Ram vs. Union*

of India **(1962) Supp. 2 SCR 733;** *Dafedar Niranjan Singh and Anr. vs. Custodian, Evacuee Property (Pb.) and Anr.* **(1962) 1 SCR 214;** *Abdul Majid Hazi Mohammed vs. P.R. Nayak* **AIR 1951 Bombay 440;** *Dr. Zafar Ali Shah and Ors. vs. The Assistant Custodian of Evacuee Property* **(1962) 1 SCR 749;** *Ebrahim Aboobaker vs. Tek Chand Dolwani* **(1953) SCR 691;** *Nasir Ahmed vs. Assistant Custodian General, Evacuee Property, U.P. Lucknow and Anr.* **(1980) 3 SCR 248;** *Haji Siddik Haji Umar and Others. vs. Union of India* **(1983) 1 SCC 408: 1983 (2) SCR 249 – referred to.**

9.1 Section 24 of the Displaced Persons Act gives power of revision to Chief Settlement Commissioner either on his motion or an application made to him to call for the record of any proceeding under the Act in order to satisfy himself as to legality or propriety of any order passed therein and to pass such order in relation thereto as he thinks fit. The Section also provides that the said powers can be used in relation to the orders passed by Settlement Commissioner, an Assistant Settlement Commissioner, an Additional Settlement Commissioner, a Settlement Commissioner, a Managing officer or a Managing Corporation. A bare reading of the Section shows that the Chief Settlement Commissioner can revise the order if in his opinion the orders passed by the officers named in the Section are either illegal or improper. [Para 110] [545-F-H; 546-A]

9.2 In the instant case, the Chief Settlement Commissioner invoked his revisional powers at the request of the allottees/displaced persons to revise the proceedings and the order passed by the Collector-cum-Deputy Custodian under the provisions of the Evacuee Property Act dated 28.05.1979. In view of the plain language of the Section, there cannot be two views. What the Chief Settlement Commissioner can do is only to revise the orders passed by those officers who are

notified in the Section itself and not of the officers under the provisions of the Evacuee Property Act, if the orders passed by the named officers in this Section is either illegal or improper. Therefore, the orders passed by the Chief Settlement Commissioner in exercise of his revisional powers under the Displaced Persons Act is without jurisdiction and non-est in law. [Para 110] [546-B-D]

S. S. Balu and Anr. vs. State of Kerala and Ors. **(2009) 2 SCC 479: 2009 (1) SCR 196;** *New Delhi Municipal Council vs. Pan Singh and Ors.* **(2007) 9 SCC 278: 2007 (3) SCR 711;** *K.V. Rajalakshmiah Setty and Anr. vs. State of Mysore and Anr.* **(1967) 2 SCR 70;** *Thakore Sobhey Singh vs. Thakur Jai Singh and Ors.* **(1968) 2 SCR 848;** *Mohan lal Goenka vs. Beney Krishan Mukher Jee and Ors.* **(1953) SCR 377;** *Shashivraj Gopalji vs. Ed. Appakath Ayissa and Ors.* **1949 PC 302 – referred to.**

Case Law Reference:

2008 (16) SCR 28	**Referred to.**	**Paras 27, 50**
2009 (1) SCR 196	**Referred to.**	**Para 27**
2007 (3) SCR 711	**Referred to.**	**Para 27**
(1967) 2 SCR 70	**Referred to.**	**Para 27**
(1968) 2 SCR 848	**Referred to.**	**Para 28**
(1953) SCR 377	**Referred to.**	**Para 28**
1949 PC 302	**Referred to.**	**Para 28**
2003 (2) Suppl. SCR 290	**Referred to.**	**Para 29, 79, 82**
2004 (3) SCR 250	**Referred to.**	**Para 29, 79, 83**
2005 (2) SCR 1183	**Referred to.**	**Para 29, 79, 84**
(1962) 1 SCR 328	**Referred to.**	**Para 30, 94, 95**

(1962) Supp. 2 SCR 733	**Referred to.**	**Para 30, 94, 96**
(1962) 1 SCR 214	**Referred to.**	**Para 30, 94**
(1874) 5 PC 221	**Referred to.**	**Para 46**
AIR 1967 SC 1450	**Referred to.**	**Para 46**
1969 SCR 808	**Referred to.**	**Para 46**
1975 (2) SCR 960	**Referred to.**	**Para 47**
1995 (1) Suppl. SCR 492	**Referred to.**	**Para 48**
2007 (1) SCR 1127	**Referred to.**	**Para 49**
1987 (1) SCR 1	**Referred to.**	**Para 51**
1992 (2) SCR 155	**Referred to.**	**Para 52**
(2002) 2 SCC 48	**Referred to.**	**Para 61**
2007 (13) SCR 145	**Referred to.**	**Para 65**
2007 (5) SCR 107	**Referred to.**	**Para 66**
(2003) 11 SCC 210	**Referred to.**	**Para 67**
(2002) 2 SCC 475	**Referred to.**	**Para 68**
2008 (1) SCR 213	**Referred to.**	**Para 69**
2007 (3) SCR 726	**Referred to.**	**Para 70**
2009 (3) SCC 634	**Referred to.**	**Para 73**
1991 (3) SCR 465	**Referred to.**	**Para 75**
(1962) 1 SCR 574	**Referred to.**	**Para 76**
1979 (3) SCR 399	**Referred to.**	**Para 76**
1965 SCR 686	**Referred to.**	**Para 77**
(1967) 2 SCR 625	**Referred to.**	**Para 79, 85**
(1969) 3 SCC 769	**Referred to.**	**Para 79, 86**

(1971) 3 SCC 792	**Referred to.**	**Para 79, 87**
(2004) 3 SCC 553	**Referred to.**	**Para 79, 88**
(1967) 3 SCR 736	**Relied on.**	**Para 90**
AIR 1951 Bombay 440	**Referred to.**	**Para 97**
(1962) 1 SCR 749	**Referred to.**	**Para 98**
(1953) SCR 691	**Referred to.**	**Para 99**
(1980) 3 SCR 248	**Referred to.**	**Para 100**
1983 (2) SCR 249	**Referred to.**	**Para 106**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4099 of 2000.

From the Judgment & Order dated 27.4.2000 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petitio No. 17722 of 1990

WITH

C.A. Nos. 4101, 4100, 3949 of 2011.

P.S. Narasimha, Ranjit Kumar, L. Nageswara Roa, C. Mukund, Avneesh Garg, P.V. Saravanaraja, Firdouse Outb Wani, Jayant Mohan, Pankaj Jain, Bijoy Kumar Jain, C.K. Sucharita, Nirada Das, T.V. Ratnam, Ramesh N. Keshwani, Ram Lal Roy, Shishir Pinaki, C. Satyanarayana Reddy, S. Ashok Reddy, C.S.N. Mohan Rao, Asha G. Nair, T.V. Ratnam, Farrukh Rasheek, V.N. Raghupathy, Lawyers' Knit & Co., M. Srinivas R Rao, Abid Ali Beeran P., John Mathew, P. Venkat Reddy, B. Ramamurthy, T. Anamika, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, D. Bharathi Reddy, Neeru Vaid for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J.1. We grant leave in the special leave petition filed by the State of Andhra Pradesh.

2. In these civil appeals, we are required to consider essentially the erstwhile legislations with regard to the administration of property left behind in India by evacuees migrated to Pakistan during partition and the compensatory redistribution of the same amongst those persons who had migrated from Pakistan, leaving behind their property, at the time of partition.

3. The subject matter are the lands in Survey Nos. 9, 11, 47, 140, 141, 142, 143, 151, 152, 153, 676 and 677, admeasuring about 90.08 acres, situated at Khapra Village, in the erstwhile Medchal Taluk (now Vallabhnagar Taluk) of the Ranga Reddy District, Andhra Pradesh [hereinafter referred to as 'the disputed lands'].

4. In this batch of three civil appeals, the appellant is the subsequent purchaser of the property in dispute from the allottees under the provisions of The Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as, "the Displaced Persons Act"). It assails the judgment and order of the Division Bench of the High Court of Andhra Pradesh in WP No. 17722 of 1990 dated 27.04.2000. The State Government has also filed Special Leave Petition (c) No. 6964 of 2001 under Article 136 of the Constitution, in defense of the notification which was struck down by the impugned judgment. Since the facts and questions of law raised before us are the same in all these civil appeals, we will take up C.A. No. 4099 of 2000, in the case of Shankara Co-op. Housing Society Ltd. as the lead case for the purpose of narrating the facts leading upto the impugned judgement.

5. The facts in extenso require to be noticed. They are:- The disputed lands originally belonged to one Mandal Bucham, whose legal representatives are respondents herein. Shri Mandal Bucham had borrowed paper currency from late Rahim Baksh Khan and since he failed to discharge the amount due, late Rahim Baksh Khan had filed a civil suit against Mandal Bucham before the District and Sessions Judge at Hyderabad

District. It appears that the Court had passed a judgment and decree in favour of late Rahim Baksh Khan. In the execution proceedings of the decree, it is alleged that late Rahim Baksh Khan had purchased the disputed lands belonging to Mandal Bucham in an auction under the supervision of the Court. Rahim Baksh Khan expired in the year 1940 and later on, it appears, his legal representatives had migrated to Pakistan after partition of India.

6. It is averred that the Deputy Custodian and Collector, Hyderabad District, had issued notice dated 11.01.1951, to the legal heirs of late Rahim Baksh Khan, namely Mr. Rafi Mohammed Khan and Mr. Shafi Mohammed Khan, under sub-Section (1) of Section 7 of the Administration of Evacuee Property Act, 1950 [hereinafter referred to as "the Evacuee Property Act"] *inter alia* stating that the "disputed lands" belonged to late Rahim Baksh Khan and they have migrated to Pakistan and they are evacuee and, therefore, he would hold an enquiry in the matter on 27.01.1951 and any person having any share or interest in the above "disputed lands" are directed to participate in the proceedings with necessary documents in support of their claim. It appears that general notices were also published in the village in which the said lands were situated on 26.01.1951. Notice was also given to the ancestors of the contesting respondents on 15.02.1951. It is stated that neither the contesting respondents nor anybody else had filed any objection to the notice issued under Section 7(1) of the Evacuee Property Act.

7. After conducting a detailed enquiry in respect to the claim of ownership of the said property, the Deputy Custodian and Collector issued a Notification No.55, in NO CE/4064 to 4080 dated 11.12.1952, declaring the disputed property in issue as an Evacuee Property under Section 7 of the Evacuee Property Act. This notification was subsequently published in the Hyderabad Government Gazette. Pursuant to the aforesaid declaration, the name of the Collector/Custodian was entered

in the Revenue Records. After such declaration, the Central Government has acquired the "disputed lands" by issuing notification under Section 12 of the Displaced Persons Act for the rehabilitation of the persons who were displaced during the partition.

8. The erstwhile owners of the property or the ancestors of the contesting respondents did not question the declaration of the "disputed lands" as evacuee property and the subsequent acquisition by the Central Government. It was on or about in the year 1955, the ancestors of the respondents herein claimed ownership of the 'disputed lands' and made their representation before the authorities under the Evacuee Property Act. The authorities, however, had informed them that they should prefer an appeal or a review petition. In spite of such counsel, they continued to make representations and petitions in furtherance of their claim.

9. The Tahsildar, Medchal Taluk, issued a letter dated 29.06.1966, *inter-alia*, seeking to auction the "disputed lands" on yearly lease basis. Aggrieved by the action of the authorities, Shri. Mandal Anjaiah, claiming to be ancestor of the contesting respondents, preferred a writ petition before the Andhra Pradesh High Court, in No. 1051 of 1966, *inter-alia*, seeking a writ of prohibition or direction restraining the respondents in the petition from auctioning the "disputed lands" and to direct the authorities to decide the representations/ petitions filed by the writ petitioner. The Regional Settlement Commissioner/Custodian of Evacuee property was arrayed as one of the respondents to the proceedings. In his affidavit dated 21.08.1967, he had averred that the notice as required under Section 7 of the Evacuee Property Act read with Rule 6 of the Rules notices had been issued to all the parties interested in the disputed lands.

10. During the pendency of the writ petition, a portion of the land was allotted to one Smt. Eshwari Bai, and therefore, she was impleaded as one of the respondents in the writ

petition. During the pendency of this writ petition, other contesting respondents had filed a Revision Petition under Section 27 of the Evacuee Property Act before the Deputy Custodian General, Jaisalmer House, New Delhi, to revise the notification dated 11.12.1952 declaring the disputed lands as evacuee property.

11. The writ petition came to be dismissed by the High Court vide its order dated 14.06.1968 on the ground that the claim of the respondents is highly belated and they have also not exhausted the alternate remedy provided under the provisions of the Evacuee Property Act. The order passed by the Court has some relevance and, therefore, the same is extracted. It reads :-

> "In this application for the issue of a writ under Article 226 of the Constitution, what is sought to be challenged by the petitioner is an order of the Deputy Custodian of Evacuee Property under Section 7 of the Administration of Evacuee Property Act declaring certain properties as evacuee properties. The notification was made on 11.12.1952. The petitioner did not avail himself of the remedy provided under Section 24 of the Act by way of an appeal. In fact, in 1955 and again in 1957 and 1959, he appears to have approached the Deputy Custodian with a request that the land should not be treated as evacuee property and on all these occasions, he was informed that he should go in appeal and not file review applications. It is not open to the petitioner without preferring an appeal, to approach this court at a late stage with a petition for the issue of a writ. There are no merits in this writ petition and it is therefore dismissed with costs."

12. After the dismissal of the writ petition, some portion of the lands was allotted to Shri. Gopaldas and Shri. Jangimal on 15.09.1968 and to Shri. Mathuradas (legal heir of Shri. Valiram Hiramal) on 21.11.1968. Sanads (Transfer of Titles and

Rights) were also issued to them and their names were recorded in the revenue records.

13. As we have already noticed, some of the legal representatives of late Mandal Bucham had approached the Deputy Custodian General, New Delhi by filing a revision petition under Section 27 of the Evacuee Property Act, inter alia questioning the notification dated 11.12.1952. The Deputy Custodian General vide his order dated 25.09.1970, had allowed the revision petition and remanded the case to Custodian-cum-Collector, Hyderabad District for re-determination of the evacuee nature of the lands after affording an opportunity of hearing to all the parties.

14. After such remand, Collector-cum-Deputy Custodian of Evacuee Property had conducted a re-enquiry and he had concluded that there was no evidence to show that late Rahim Baksh Khan came to be the owner of the land in pursuance of an auction by the Court in execution of any money decree. Hence, the Collector-cum-Deputy Custodian vide order dated 28.05.1979 came to the conclusion that since there were no records available to the contrary, Shri. Mandal Bucham and the other contesting respondents continue to be the owners of the disputed lands.

15. Aggrieved by the aforesaid order, the allottees had filed a Revision Petition before the Chief Settlement Commissioner of Evacuee Property, Hyderabad under the Displaced Persons Act, who, by an order dated 27.10.1979, had called for the records of the case in order to review the aforementioned order of the Collector-cum- Deputy Custodian dated 28.05.1979. It appears that in view of the pendency of the proceedings, the Tahsildar refused to give possession of the "disputed lands" to the allottees (who had sanads in their name) in the light of the aforesaid order of the Collector-cum-Deputy Custodian, Hyderabad District.

16. The Chief Settlement Commissioner of Evacuee

Property, by his order dated 11.05.1983, set aside the aforesaid order of the Collector-cum- Deputy Custodian, and declared that the said property belonged to late Rahim Baksh Khan and that by virtue of the Notification No. 55 in NO CE/ 4064 to 4080 of 1952, the disputed lands are evacuee property.

17. Once again, the contesting respondents had filed a revision petition under Section 33 of the Displaced Persons Act before the Secretary, Revenue Department, Govt. of Andhra Pradesh to revise/review the aforesaid order, which came to be rejected vide order dated 23.07.1983.

18. The contesting respondents filed a writ petition No. 7517 of 1983 before the High Court of Andhra Pradesh, inter alia, requesting the court to direct the authorities under the Displaced Persons Act to initiate suo-moto proceedings to determine the claim of ownership of the disputed lands. The High Court, by its order dated 26.07.1988, dismissed the writ petition, inter alia holding that it cannot compel any authority to initiate and dispose of the *suo moto* proceedings under Section 33 of the Displaced Persons Act.

19. The contesting respondents filed another Writ Petition No.17722 of 1990 on 13.11.1990 (from which the impugned judgment has arisen) before the High Court, *inter alia* requesting the High Court to issue a writ or order directing the Commissioner, Survey Settlement and Land Records/Chief Settlement Commissioner, Evacuee Property, Hyderabad to conduct an enquiry into questions of title of "disputed lands" and correctness of the declaration of the said property as evacuee property in pursuance of proceedings of the Chief Settlement Commissioner dated 27.10.1979. It is relevant to notice that the contesting respondents did neither seek for the quashing of the Notification No. 55 in NO CE /4064 to 4080 dated 11.12.1952, nor made the present appellant a party to the writ proceedings. Subsequently, on 13.03.1997, the prayer in the writ petition was sought to be amended to include a prayer to

quash the Notification No. 55 in NO CE 4064 to 4080 dated 11.12.1952, which was allowed on 27.08.1998. As the present appellant was not made party to the proceeding, it sought to implead itself by filing an application on 22.01.1999, and the same was allowed on 27.08.1999.

20. By the impugned judgment dated 27.04.2000, the learned Division Bench of the High Court allowed the writ petition by setting aside the order passed by the Chief Settlement Commissioner dated 11.05.1983 and restored the order passed by the Collector-cum-Deputy Custodian of Evacuee Property dated 28.07.1979. Aggrieved by the Judgment and order passed, the appellant-Shankar Co-operative Housing Society has come before us in these civil appeals.

21. The subject matter of the Civil Appeal No. 4100 of 2000 pertains to the lands in Survey No. 152 admeasuring about 13.17 acres. These lands were originally allotted to Mathura Das on 26.11.1968, Subsequently, Mathura Das has executed General Power of Attorney (GPA), in favour of P.H. Hasanand and Chandumal dated 19.12.1966. Before us, the appellant –P.H. Hasanand as General Power of Attorney Holder of the late Mathura Das (who died on 30.5.1970) is assailing the Judgment and order of the Division Bench of the High Court in W.P. 17722 of 1990 dated 27.4.2000. It is relevant to mention that the Special Leave Petition filed by Mathura Das through his legal representatives has been dismissed by an order made by this Court dated 13.8.2007 on the ground of delay.

22. The subject matter in Civil Appeal No. 4101 of 2000 pertains to lands in Survey nos. 9,11,140,142,143,676 and 677, admeasuring about 20.27 acres. These lands were originally allotted to Smt. Eswari Bai on 30.11.1966. During her life time, she had executed a General Power of Attorney in favour of Thakur Hadanani on 06.08.1999. During the pendency of the appeal, Smt. Eswari Bai expired. The application filed

by Thakur Hadanani to bring legal representatives of Smt. Eswari bai was dismissed by this Court vide its order dated 30.03.2010 as General Power of Attorney holder of deceased has no *locus- standi* to file the appeal. In this appeal, the appellants before us are (1) P. Laxmi Patni, who is the son-in-law of P.M. Rao; (2) Vidya Devi, legal representative of Seetha Devi wife of Gopal Das and (3) Thakur Das is minor and represented by Smt. Vidya Devi.

23. One of the appellants before us is a co-operative society, styled as Shankara Co-op. Housing Society Ltd. [hereinafter referred to as 'the society']. The said society has 600 members who are Government employees. The society has purchased the lands in disputes from the General Power of Attorney holders of three of the original allottees, namely, Shri. Gopaldas, Shri. Jangimal and Shri. Mathuradas, by paying the entire sale consideration. It is asserted that the Society, after obtaining permission from the competent authorities, has allotted residential plots carved out of the "disputed lands" to its members.

24. We have heard Shri. P.S. Narasimha, learned senior counsel and Shri. C. Mukund, learned counsel for the appellants and Shri. Ranjit Kumar and Shri. L. Nageshwar Rao, learned senior counsel for the respondents. The State of Andhra Pradesh is represented by Shri. T.V. Ratnam, learned counsel.

25. Shri. C. Mukund, learned counsel who appears for the appellants in C.A. No. 4100 of 2000 and C.A. No. 4101 of 2000, submits apart from others, that the delay and laches on the part of the contesting respondents in approaching various authorities for redressal of their grievances, would disentitle them to claim any reliefs. It is submitted that repeated representations filed before the authorities would not be a ground to condone the delay and it is further submitted that there is inordinate delay in filing the writ petition from the date of notification issued under the Evacuee Property Act; the claim of the respondents is barred by principles of constructive

Resjudicata since in the writ petition filed by the respondents before Andhra Pradesh High Court, the plea of non-service of notice on the interested persons while declaring the said lands as an evacuee property was not raised, though it was available to them; that the question of facts as to title of the said lands, etc., could not have been gone into by the High Court in its writ jurisdiction, under Article 226 of the Constitution; and that since the "disputed lands" have already been acquired under the Displaced Persons Act, the contesting respondents cannot have any right, title and interest over those lands.

26. While elaborating the issues raised, Shri. Mukund, learned counsel, submits that right from the beginning, the contesting respondents have either approached the authorities under the Evacuee Property Act or approached the judicial forums belatedly, or have gone before the wrong forum seeking either incorrect or incomplete reliefs. He submits that the competent authority under the Evacuee Property Act had not only issued the individual notices to the evacuee but also public notice was also issued on 26.01.1951. He further states that the ancestors of the contesting respondents were served with a notice dated 15.02.1951. He also submits that there can be no dispute that the "disputed lands" belonged to late Rahim Baksh Khan, as his name was recorded in the land revenue records. He further submits that there was no challenge to the declaration of the lands as evacuee property upto the year 1955, and for the next 11 years, upto 1966, the contesting respondents made only repeated representations to the authorities, without approaching the proper judicial forum provided under the Evacuee Property Act. He further asserts, that even in 1966, when the first writ petition was filed, the only prayer that was made was to set aside the action of the Tahsildar seeking to auction the lands for granting Ek saala lease and not to quash the Notification No. 55 dated 11.12.1952, which had declared the disputed lands as evacuee property. He points out that there was no averment in the writ petition filed in the year 1966 regarding non-service of the

notice, which is one of the principal grounds taken by the contesting respondents in the subsequent writ petition. Shri. Mukund further asserts that at no point of time prior to the 1997 amendment to the impugned writ petition, a challenge was made to the Notification No. 55 dated 11.12.1952, declaring the lands as evacuee property. He then referred to the counter affidavit filed by the State Government before the High Court in the 1966 writ petition which states that the contesting respondents were in possession of the land on the basis of Ek Saala or annual lease for the purpose of cultivation, and they had not paid the lease amount, and when their eviction was being attempted, they claimed ownership. Subsequently, even after the dismissal of the 1966 writ petition, Shri. Mukund submits that the contesting respondents again did not pursue the correct remedies after the 1983 order. In summation, Shri. Mukund contends that the contesting respondents did not take any steps from the time the notice was issued [period between 1951 to 1955], after which they made repeated representations to the authorities, which came to be rejected [period between 1955 to 1959] and then filed the writ petition in 1966 [without doing anything for 7 years for the period between 1959 to 1966]. After this, he states even pursuant to the 1983 Order, again they did not follow the correct course, till the filing of the writ petition in the year 1990. Even when the writ petition was filed, the notification declaring the said lands as evacuee property was not challenged. In other words, Shri. Mukund asserts that every time the contesting respondents raised their voice in protest, they did it before a wrong forum or seeking the wrong or incomplete reliefs.

27. The learned counsel further submits that a person who seeks intervention of the court under Article 226 of the Constitution should give satisfactory explanation of his failure to assert his claim at an earlier date. The excuse for his procrastination should find a place in the petition submitted by him and the facts relied upon by him should be set out clearly in the body of the petition. An excuse that the contesting

respondents were making repeated representations before various forums cannot merit serious consideration. In aid of his submission, the learned counsel has invited our attention to the observations made by this court in *City and Industrial Development Cooperation Vs. Dosu Andershir Bhiwandiwala and Anr.* (2009) 1 SCC 168 (Paras 26-30), *S. S. Balu and Another Vs. State of Kerala and others* (2009) 2 SCC 479(Para 17), *New Delhi Municipal Council Vs. Pan Singh and others* (2007) 9 SCC 278 (paras 17-18) and *K.V. Rajalakshmiah Setty & Anr. Vs. State of Mysore and Anr.* (1967) 2 SCR 70.

28. In support of his second submission, Shri. Mukund invites our attention to the judgment and order in Writ Petition No.1051 of 1966 dated 14.06.1968 and submits that the same had been decided not only on merits but also on the ground that the writ petitioners had not availed the alternate remedy available under the Act. Alternatively, the learned counsel contends that non-service of notice as required under Section 7 of the Evacuee Property Act and the Rules framed thereunder was not raised, though the same was available to the contesting respondents and therefore, they could not have been permitted to take that plea in the subsequent writ petition filed. Therefore, subsequent writ petition from which, the present appeal arises, is barred by the principles analogous to res judicata. In aid of his submission, our attention is drawn to the decisions of this court in *Thakore Sobhey Singh Vs. Thakur Jai Singh and others* (1968) 2 SCR 848, *Mohan lal Goenka Vs. Beney Krishan Mukher Jee and others* (1953) SCR 377 and *Shashivraj Gopalji Vs. Ed. Appakath Ayissa and others* 1949 PC 302.

29. Leaned counsel Shri. Mukund further urged that it is settled law that the fact finding task undertaken by the High Court, which is evident from the impugned judgment, is not warranted in a writ petition filed under Article 226 of the Constitution of India. He attempts to make good his argument

by reading out passages from the impugned judgment, and attempts to impress upon us that the prolixity of the judgment clearly showed that the questions of fact had been gone into by the High Court while granting reliefs to the respondents. This, according to the learned counsel, is impermissible. In aid of his submission, the learned counsel has invited our attention to the observations made by this Court in the case of *Surya Dev Rai Vs. Ramchander Rai and others* (2003) 6 SCC 675, *Ranjeet Singh Vs. Ravi Prakash* (2004) 3 SCC 682 and *Karnataka State Industrial Investment and Development Corporation Ltd. Vs. Cavalet India Ltd. and others* (2005) 4 SCC 456.

30. Shri. Mukund submits that once the 'disputed lands' are acquired under the Displaced Persons Act and allotted to the displaced persons, the Deputy Custodian of Evacuee Property will have no jurisdiction to initiate any proceedings under the Evacuee Property Act. He submits that the object of the two legislations are such that the Evacuee Property Act enabled that Government to first identify property as evacuee property and notify the same, after which, the Government would acquire such property under the Displaced Persons Act and distribute the same to the displaced persons. He contended, once such acquisition and redistribution take place under the Displaced Persons Act, the Deputy Custodian loses all his jurisdiction under the Evacuee Property Act to deal with the evacuee property. In other words, he contends that once property was distributed under the Displaced Persons Act to the displaced persons, it loses its evacuee status, and the status of such land had attained finality, and the same cannot be challenged. Reference is made to the observation of this court in the case of *Major Gopal Singh and Others Vs. Custodian Evacuee Property* (1962) 1 SCR 328, *Basant Ram Vs. Union of India* (1962) Supp. 2 SCR 733 and *Defedar Niranjan Singh and another Vs. Custodian Evacuee Property and another* (1962) 1 SCR 214.

31. Shri Mukund assails the judgment and order of the High

Court as perverse on the ground: (a) that the High Court has not taken into consideration the fact that the contesting respondents had taken the lands on an Ek Saala lease, for which they defaulted in making payment; (b) that the High Court had completely overlooked the Order passed by the Chief Settlement Commissioner dated 11.05.1983; (c) that the plea of notice, not being served, was not taken in the writ petition filed in the year 1966. Therefore, it was not open for the contesting respondents to raise such contention in the subsequent proceedings.

32. With regard to the question of non-service of notice, Shri. Mukund would contend that if the contesting respondents were in possession of the said lands, as claimed by them, they cannot plead that they were not served with the notice issued under sub-section (1) of Section 7 of the Evacuee Property Act. He further submits that the conduct of the contesting respondents cannot be brushed aside and had a very vital bearing on this case. He also points out that the revenue records produced by the State Government before the High Court would show late Rahim Baksh Khan as the owner of the property, a fact that was overlooked by the High Court in the impugned judgment.

33. Shri. P.S. Narasimha, learned senior counsel appearing for the Society, prefaces his submission with the purpose and object behind the enactment of the Evacuee Property Act and the Displaced Persons Act. He contends that property that was acquired under the Evacuee Property Act as evacuee property was redistributed to displaced persons for a consideration, and that the sanads issued were actually sale deeds. He further states that there were no prohibition/ restriction in the sanads for alienation of the property under the provisions of the Displaced Persons Act and, therefore, gave finality to question of ownership of the lands. While adopting the submissions of Shri. Mukund, the learned senior counsel would contend that once the Displaced Persons Act comes into

operation, the operation of the Evacuee Property Act comes to an end. He further emphasized that the contesting respondents could not be permitted to take advantage of their own wrongs, especially when third party rights had already been created. He also urged that the subsequent writ petition filed by the contesting respondents should have been dismissed by the High Court for the same reason for which earlier writ petition was dismissed inasmuch as the cause of action in both the petitions being the same, the subsequent writ petition would be barred by the principles analogous to res judicata.

34. Shri. T.V. Ratnam, learned counsel appearing for the State of Andhra Pradesh, submits that the Evacuee Property Act is a complete code by itself, with a mechanism to deal with the question of evacuee nature of the property. He states that once it is decided by the Custodian, in exercise of his powers under the Act, that the property was an evacuee property, then it was not available for challenge in a writ petition filed under Article 226 of the Constitution. Such declaration can be questioned only by filing either an appeal or revision, as provided under the Act. He further states that the contesting respondents did not follow the procedure prescribed under the Act. Even when the Revision filed by them was rejected by the Custodian, the same was never challenged. The learned counsel pointed out in the *pahani pathra* or revenue records that persons other than the contesting respondents were also in possession of the land, along with Shri. Mandal Anjaiah, and states that this possession was in pursuance of the Ek Saala lease that was granted in their favour. The learned counsel points out that the revenue records would clearly prove that it is the Custodian who was the owner and in possession of the lands in dispute. He also emphasized that there was inordinate delay in challenging the notification dated 11.12.1952 and the High Court ought not to have entertained the writ petition filed in the year 1990 and unsettle the settled things.

35. Per contra, Shri. Ranjit Kumar, learned senior counsel,

submitted that though late Rahim Baksh Khan had a money decree in his favour against Shri. Mandal Bucham, an ancestor of the contesting respondents, the same was never executed. He further states that there was no warrant for execution against the disputed lands in favour of late Rahim Baksh Khan. He submits that there is nothing on record to show how the rights of the contesting respondents got extinguished. It is his further submission that a proper enquiry, as required under Evacuee Property Act, was not conducted with regard to the nature of the lands. He submits that from the records, it can be made out that the Collector was informed by the Tahsildar that the lands in question were in the name of Mandal Bucham. He also states, that the requirements of personal notice as per Rule 6 of the Administration of Evacuee Property (Central) Rules, 1950 [hereinafter referred to as 'the EP Rules'] were not complied with. He also states that the contesting respondents have always been in possession of the said lands, as admitted by the Government, in its counter affidavit.

36. With regard to the question of delay and laches which was the forefront of the submission of Shri. Mukund, learned counsel, he submits that the contesting respondents, who were poor and illiterate farmers, have been continuously making representations and filing petitions before the various authorities, from the time they had the knowledge of the status of the property being declared as evacuee till the filing of the writ petition in 1966. He further states that since they were in possession of the land, when they came to know that the said lands were being auctioned, they moved the High Court under Article 226 of the Constitution, without further delay. He contends that there were no third party rights at least till 1966, and that the contesting respondents were in possession of the lands and were cultivating the same, and when their possession was threatened, they moved the High Court for appropriate reliefs. It is further submitted that the High Court has merely disposed of the writ petition filed only on the ground that the

petitioners therein had not exhausted alternate remedy available to them under the Evacuee Property Act.

37. Shri. Ranjit Kumar further submits that the lands allotted to Shri. Gopal Das and Shri. Jangimal that were made in 1968, and were cancelled by the Custodian, as the two allotees did not come forward to take possession of the same, vide order dt. 21.11.1987. With regard to the lands allotted to Shri. Mathuradas, the learned senior counsel would submit that this Court, by an order dt. 13.08.2007, dismissed the Special Leave Petition filed by the legal representatives of Shri. Mathuradas against the impugned judgment, on the ground of delay, as well as on merits.

38. The learned senior counsel then drew our attention to the revision undertaken by an order of the Dy. Custodian General in the year 1970, who found that Shri. Mandal Bucham was the *pattedar* and that the status of the lands required enquiry as there was no evidence to the claim that late Rahim Baksh Khan had purchased the said lands in an auction, as claimed by the appellants. Since the question of title was involved, the matter was rightly remanded back to the Collector-cum-Dy. Custodian, who, vide order dt. 28.05.1979, came to the conclusion that the lands were owned by the ancestors of the contesting respondents and the revenue records support their case.

39. The learned senior counsel also submits that the Order passed by the Chief Settlement Commissioner dated 11.05.1983 is manifestly illegal, as the Collector-cum-Dy. Custodian, was not one of those authorities whose order could have been revised by the Chief Settlement Commissioner in exercise of his jurisdiction under Section 24 of the Displaced Persons Act. Since the powers conferred under the aforesaid Section is only to revise those orders passed by the officers notified under the provisions of Displaced Persons Act. Therefore, it is argued that the said order is one without jurisdiction.

40. Shri. Ranjit Kumar rebuts the claim of the appellants that notice was served on the contesting respondents. He states that notice could not have been served on legal heirs of late Rahim Baksh Khan, who were in Pakistan, and were unlikely to come back; no notice was issued to the contesting respondents. On a query from the bench regarding as to why the contesting respondents held an Ek Saala lease if they owned the property, he submits that there was absolutely no record to show that the rights of the contesting respondents had been extinguished. He further submits in rebuttal to the contention of the appellants of pursuing the wrong remedies, by stating that a writ petition under Article 226 was the only remedy available, as Section 36 of the Displaced Persons Act bars the jurisdiction of civil courts. He also states that the argument of the appellants that once the lands are acquired by the Central Government under the Displaced Persons Act, the property ceases to be evacuee property and becomes the property of the Central Government, depends on the factor that the property is notified as evacuee property after following the due procedure prescribed under the Evacuee Property Act and the Rules framed thereunder. He further urged that if the property in question is not evacuee property, there is no question of the coming into operation of the Displaced Persons Act.

41. Shri. Ranjit Kumar further submits that the appellants are not the original allottees and they are only subsequent purchasers, from the general power of attorney ('GPA') holders of the original allottees. In some cases, he contends, the GPA holders have sold the property after the death of the principal, and in other cases, GPA holders of GPA holders of original allottees have sold the lands and in both cases, he submits that the same is impermissible in law. He further contends that the allotment to Shri. Gopal Das and Shri. Jangimal was cancelled in the year 1989, the Special Leave Petition of Shri. Mathuradas had been dismissed in the year 2007, and that this Court had disallowed the substitution of the legal heirs of Smt.

Eshwari Bai, on her death, due to which appellants cannot maintain these proceedings.

42. In summing up his contention, the learned senior counsel states that the Notification dated 11.12.1952 issued under sub-Section (1) of Section 7 of the Evacuee Property Act was manifestly illegal and the disputed lands could not have been declared as evacuee property, as the owners were not evacuee; that the argument of delay and laches was not available to the appellants, as the original allottees who had claimed that they weren't made a party have been heard at all stages right from the first writ petition in the year 1966; that the question of Ek Saala lease cannot be put against the respondents as the name of the contesting respondents was recorded in the Revenue records as owner of the lands; that the proceedings under the Displaced Persons Act can take place only if the proceedings under the Evacuee Property Act are validly made; that the proceedings under Section 24 of the Displaced Persons Act culminating in the order of Chief Settlement Commissioner in the year 1983 is illegal, for the reason it can be done only of those orders passed by the officers notified in Section 24 of the Act, and that the order of Chief Settlement Commissioner is without jurisdiction and hence is a nullity; that the High Court could correct any manifest illegality, such as declaring the disputed lands as evacuee property, under its writ jurisdiction, which need not be interfered with by this Court under Article 136; that the disputed questions of fact had to be necessarily gone into by the High Court under its writ jurisdiction due to the bar of jurisdiction of other Courts by virtue of Section 36 of the Displaced Persons Act; that the contesting respondents were in possession of the lands and continues to be so even till this day and this position is accepted by the State Government in the counter affidavit filed before this court; assuming that there was some delay on the part of the contesting respondents for redressal of their grievances before various forums, since the same has been condoned by the writ court, this court need not interfere with the said order.

43. Shri. L. Nageshwar Rao, learned senior counsel who appears for the contesting respondents in the Special Leave Petition filed by the State, supplemented the arguments of Shri. Ranjit Kumar. He also submitted that the only issue was whether the nature of the property was such that it fell within the ambit of evacuee property or not. He also submits that if the facts were not gone into by the High Court, there could be no decision on this aspect, and once this aspect was decided in favour of the contesting respondents, then nothing remains to be decided by this Court.

44. The learned counsel have referred to several case laws for the many propositions they have canvassed before us. The relevance of these decision we will deal with at appropriate stage.

45. In the background of these facts, the following questions arise for our consideration and decision:

(1) Whether the contesting respondents have been guilty of delay and laches.

(2) Whether the dismissal of the writ petition No. 1051 of 1966 by the High Court decided the matter fully and finally.

(3) Whether the lands in question are evacuee property as defined under the Evacuee Property Act.

(4) What is the effect and the consequence of the notification issued under Section 12(1) of the Displaced Persons Act.

(5) Whether the High Court could have gone into the facts under its writ jurisdiction.

46. **Re : Delay and Laches** : - Delay and laches is one of the factors that requires to be borne in mind by the High Courts when they exercise their discretionary power under

Article 226 of the Constitution of India. In an appropriate case, the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his rights taken in conjunction with the lapse of time and other circumstances. The Privy Council in *Lindsay Petroleum Company Vs. Prosper Armstrong Hurd etc;* (1874) 5 PC 221 at page 229, which was approved by this Court in *Moon Mills Ltd. Vs. Industrial Courts* AIR 1967 SC 1450 and *Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service* AIR 1969 SC 329, has stated :-

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

47. In *Amrit Lal Berry Vs. CCE* (1975) 4 SCC 714, this Court took the view that "if a petitioner has been so remiss or negligent as to approach the Court for relief after an inordinate and unexplained delay, he certainly jeopardises his claims as it may become inequitable, with circumstances altered by lapse of time and other facts, to enforce, a fundamental right to the detriment of similar claims of innocent third persons."

48. In *State of Maharashtra Vs. Digambar* (1995) 4 SCC 683, this Court observed that "unless the facts and circumstances of the case at hand clearly justify the laches or undue delay, writ petitioners are not entitled to any relief against any body including the State."

49. In *Shiv Dass Vs. Union of India* (2007) 9 SCC 274, this Court opined that "the High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction."

50. In *City and Industrial Development Corporation Vs. Dosu Aardeshir Bhinandiwala and others* (supra), this court held :-

> "It is well settled and needs no restatement at our hands that under Article 226 of the Constitution, the jurisdiction of a High Court to issue appropriate writs particularly a writ of Mandamus is highly discretionary. The relief cannot be claimed as of right. One of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum."

51. Shri Ranjit Kumar, learned senior counsel for contesting respondents, invites our attention to the observations

made by this court in the case of *State of M.P. and others Vs. Nandlal Jaiswal and others* (1986) 4 SCC 566, wherein this court has stated "this rule of laches or delay is not a rigid rule which can be cast in a straitjacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere inspite of delay or creation of third party rights would by their very nature be few and for between. Ultimately it would be a matter within the discretion of the Court ex-hypotheses every discretion must be exercised fairly and justly so as to promote justice and not to defeat it."

52. Reliance is also placed on the observations made by this Court in *M/s Dehri Rohtas Light Railway Company Ltd. Vs. District Board, Bhojpur and others* (1992) 2 SCC 598, wherein it is observed :

> "The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches."

53. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are: (1) there is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts. (2) The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners. (3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy. (4) No hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts. (5) That representations would not be adequate explanation to take care of the delay.

54. Let us now advert to the contentions canvassed by learned counsel in this regard. Mr. Mukund, learned counsel for the appellants, submitted that the contesting respondent during the period 1951 till 1955, had not taken any steps for redressal of their grievance, if any, including challenging the notification issued by the competent authority under the Evacuee Property Act dated 11.12.1952. He further submits that from 1955 till 1959, the contesting respondents were making representations before forums which could not have given them reliefs. In spite of the counsel of the authorities that they should file either appeal or revision against the notification issued under the Evacuee Property Act, they did not resort to those remedies. It is further contended that from the period 1959 till 1966, they

did not choose to approach any authorities nor took any judicial action. The learned counsel submits that for the first time, they approached the High Court by filing the writ petition some time in the year 1966, *inter-alia*, claiming the relief of certiorari to quash the action of the authorities for auction of the acquired lands under the Displaced Persons Act for grant of Ek saala lease, but, at the time of hearing of the petition, they advanced a new case by contending that an appropriate writ requires to be issued to quash the notification issued under the Evacuee Property Act. It is further submitted that the High Court refused to grant the relief on the ground of delay and laches in approaching the court for quashing the notification of the year 1952 and further on the ground that the writ petitioner has not availed the alternate remedies provided under the Evacuee Property Act. The learned counsel submits by this order that the writ court has given a finding that at a belated stage, the writ petitioner cannot challenge the notification issued on 11.12.1952 under the provisions of the Evacuee Property Act. The learned counsel further submits that after disposal of the writ petition, the contesting respondents had approached forums which could not have entertained their claim nor could have granted any relief. It is further submitted even assuming that the respondents were knocking at the doors of the wrong forum, the same should not be held against them, may not come to their aid, since the third party rights are created by allotment of the Evacuee Property to the Displaced Persons under the Displaced Persons Act. He further submits that though the writ petition filed by one of the contesting respondents was dismissed by the writ court, the other contesting respondents suppressing the filing of the writ petition and its dismissal, had filed a revision petition under Section 27 of the Evacuee Property Act before the Deputy Custodian General, New Delhi sometime in the year 1967 inter-alia questioning the Notification dated 11.12.1952 declaring the 'disputed lands' as Evacuee Property. Though they succeeded before that authority, the same was short lived and the said order was revised by the Chief Settlement Commissioner at

the instance of the allottees by his order dated 11.05.1983. The learned counsel further submits that instead of questioning the said order before a proper forum, they approached the State Government to revise the order by the Chief Settlement Commissioner and when the revision petition was returned, they approached the High Court by filing a writ petition to direct the State Government to invoke its power of 'Suo-Moto' revision, which came to be rejected on 26.07.1988. Therefore, the learned counsel submits that the time spent from 1983 till 1988 cannot be considered to be satisfactory explanation since they were seeking reliefs not in a manner provided by the law. The learned counsel submits that after about two years of the dismissal of the writ petition, they filed yet another Writ Petition No.17722 of 1990, inter-alia, seeking initially a direction to respondent No.3 to conduct an enquiry into the question of title of disputed lands and also the correctness of the declaration of the said property as evacuee property, and again after almost seven years of filing of the writ petition, an amendment was sought for quashing the Notification dated 11.12.1952. Therefore, the High Court ought not have entertained the writ petition in view of the inordinate and unexplained delay.

55. Shri. Ranjit Kumar contends that the contesting respondents were and are in continuous physical possession of the lands and it is only when their possession was threatened in the year 1966 by the Tahsildar for auctioning the lands to grant Ek saala lease, they had approached the High Court and prior to that, they were making representations before the authorities for redressal of their grievance. The learned senior counsel submits that the appellants have not placed any material before this Court that the contesting respondents were dispossessed from their lands and an inference should be drawn in favour of the respondents. He also submits that though Sanads were given to the allottees, they were never put in possession of the property. He states that even the Sanads so granted were cancelled on a later date since the allottee could not take possession of lands. It is also contended that if there is any

delay, it could only be after the Chief Settlement Commissioner had allowed the revision petition filed by the allottees by setting aside the earlier order passed by the Deputy Custodian in the year 1979. He further submits that the contesting respondent thereafter had approached the State Government to initiate its suo-moto revisional powers to revise the order passed by the Chief Settlement Commissioner and since that was not done, they immediately filed a writ petition for appropriate direction and the said writ petition was disposed of only in the year 1988 and immediately thereafter, they had approached the High Court by filing a writ petition for appropriate reliefs. Therefore, he submits that firstly, there was no delay or laches on the part of the contesting respondents in approaching the authorities for redressal of their grievances, secondly, assuming there is some delay, the same has been satisfactorily explained and lastly, when there was manifest illegality in the proceedings of the authorities both under the Evacuee Property Act and the Displaced Persons Act, the same has been corrected by the learned Division Bench of the High Court and this Court need not disturb the finding of the High Court in exercise of its jurisdiction under Article 136 of the Constitution.

56. Since this issue requires to be answered in the light of the pleadings of the contesting respondents in the writ petition filed by them before the High Court, it is desirable firstly to notice what was their explanation pleaded in approaching the writ court nearly after 28 years from the date of the notification issued under the Evacuee Property Act. We have carefully scanned through the pleadings in the writ petition and also the application filed for amendment nearly after eight years from the date of filing of the writ petition. There is no explanation, much less satisfactory explanation except a very casual statement in para 4 of the petition. Therein, it is said:

> "4. That in the meanwhile, there have been various proceedings whereunder the petitioners repeatedly knocking the doors of various authorities challenging the

very correctness of the proceedings treating the petitioners' lands as evacuee. However, no attempt was made to go to root of the case and to find out, if really said Rahim Bux or his family at time had any title, right or interest to be declared as evacuee. For no fault, the petitioners are sought to be deprived of their legitimate rights, without any justification or valid reason."

57. In the counter affidavit filed by respondent No.13 (Shankar Co-operative Society), they had specifically contended "that the writ petition is time barred and on the ground of latches, the writ petition is bound to be dismissed. The petitioners are seeking quashing the order or notification of the year 1952 and an order of the quasi-judicial authority of the year 1983 and of 1990 [Para 2(d)]. In para 23 of the counter affidavit, they had also asserted, "that the petitioners have referred to various representations alleged to have been made to the respondent authorities from time to time on various dates reflected in the petition. They did not choose to file copies of all representations. On the other hand, it is reliably learnt that it is falsely made and such representations are filed."

58. The High Court, in the course of its judgment and order, notices the specific allegations made by the respondents in their counter affidavit filed and the contention of the learned counsel in regard to delay and laches on the part of the petitioners in approaching the Court.

59. While answering the aforesaid stand of the respondents in the writ petition, the Division Bench of the High Court refers to several orders passed by the authorities and then observes that *"from what is narrated above, the petitioners cannot be found fault with for any inaction or lapse and they had been waging tireless legal battle since last 45 years. Further, they did not leave any chance in the litigation."* Beyond this, the High Court has not stated anything with regard to the explanation offered by the petitioner in approaching the Court, even according to them, nearly after 45 years. The High

Court has not recorded any finding whatsoever and ignored such a plea of far-reaching consequence.

60. In the present case, the respondents in the writ petition had raised a specific plea of delay, as a bar to grant relief to the petitioners. In our view, it was perhaps necessary for the Court to have specifically dealt with this issue. It is now well settled that a person who seeks the intervention of the High Court under Article 226, should give a satisfactory explanation of his failure to assert his claim at an earlier date. The excuse for procrastination should find a place in the petition filed before the Court and the facts relied upon by him should be set out clearly in the body of the petition. An excuse that he was agitating his claims before authorities by making repeated representations would not be satisfactory explanation for condoning the inordinate delay in approaching the Court. If a litigant runs after a remedy not provided in the Statute or the statutory rules, it cannot be a satisfactory explanation for condoning the delay in approaching the Court.

61. On this issue, we have heard the learned counsel for the parties in great detail, since the immoveable property rights of the parties are involved. In our considered view, there is no explanation, much less satisfactory explanation offered by the respondents in approaching the writ court after an inordinate delay of nearly 15 years from the date of the notification issued under the Evacuee Property Act. For the delay from 1952 to 1955, the contesting respondents would only submit that they were not aware of the notification issued under the Evacuee Property Act, since no notice was served on them, though a public notice was issued by the authority under the Evacuee Property Act. While explaining the delay of nearly eleven years from 1955 to 1966, they contend that they were in possession of the property and they were making representations before the authorities under the Evacuee Property Act for redressal of their grievance. The delay after the orders were passed by the Settlement Commissioner in the year 1983 till the writ

petition was filed in the year 1990, it is explained that they had moved the State Government to suo-moto revise the order passed by the Chief Settlement Commissioner and since the State Government returned their request, they had approached the High Court to issue directions to the State Government to issue appropriate directions. In our considered view, at every stage, there was inordinate delay in approaching the authorities for redressal of their grievance. As rightly contended by Shri. Mukund, learned counsel, even when they approached the authorities, they were claiming wrong reliefs or incomplete reliefs. Even when they filed the writ petition in the year 1990, they did not choose to question the correctness of the notification issued under the Evacuee Property Act but was questioned by way of filing an amendment application in the year 1998. There is some merit in the submission made by learned counsel for the contesting respondents that the petitioners in their pleadings before the writ court, had not even offered any explanation, much less satisfactory explanation, in approaching the court nearly after three decades from the date of notification issued under the Evacuee Property Act. It is now well settled that the power of the High Court under Article 226 of the Constitution to issue an appropriate writ, order or direction is discretionary. One of the grounds to refuse relief by a writ court is that the petitioner is guilty of delay and laches. Inordinate and unexplained delay in approaching the court in a writ is indeed an adequate ground for refusing to exercise discretion in favour of the petitioners therein. The unexplained delay on the part of the petitioner in approaching the High Court for redressal of their grievances under Article 226 of the Constitution was sufficient to justify rejection of the petition. The other factor the High Court should have taken into consideration that during the period of delay, interest has accrued in favour of the third party and the condonatoin of unexplained delay would affect the rights of third parties. We are also of the view that reliance placed by Shri Ranjit Kumar on certain observations made by this Court would not assist him in the facts and circumstances of this case. While concluding on this

issue, it would be useful to refer the observations made by the Court in the case of *Municipal Council Vs. Shaha Hyder Baig* (2002) 2 SCC 48, wherein it is stated that '*delay defeats equity and that the discretionary relief of condonation can be had, provided one has not given by his conduct, given a go by to his rights'.*

62. Re: **Effect of the judgment and order of the High Court in W.P. No. 1051 of 1966:-**

While narrating the facts, we have referred to the judgment and order of the High Court in Writ Petition No. 1051 of 1966 dated 14.06.1968. The relief that was sought for by the petitioner therein was to issue a writ or direction restraining the respondents from auctioning the lands in pursuance of the letter of Tahsildar, Medchal dated 29.6.1966. However, the High Court while dismissing the Writ Petition, specifically has observed that what was challenged by the petitioner in the Writ Petition was the order passed by the Deputy Custodian of Evacuee property under Section 7 of the Evacuee Property Act declaring certain properties as evacuee properties. The Court specifically notices the notification dated 11.12.1952 issued by the authorities under the Evacuee Property Act and observes that the petitioner had not availed the remedy provided under Section 24 of the Act, by way of an appeal. In conclusion, it observes that petitioner without preferring an appeal has approached the Court at a belated stage with a petition for issue of a writ. Accordingly, the High Court had dismissed the petition with costs. It is not in dispute nor it can be disputed that the said judgment and order has attained finality. Sri Mukund, learned counsel, submits that though petitioner had questioned the letter of the Tahsildar, Medchal for auctioning the lands for grant of Ek saala lease, at the time of the hearing of the petition, there is possibility of the learned counsel for the petitioner to have questioned the notification issued under the Evacuee Property Act. Since by then, the petitioner had the knowledge of the notification issued under the Act, otherwise

there was no reason for the High Court to have specifically noticed the notification dated 11.12.1952 issued under Section 7 of the Evacuee Property Act. However, Sri Ranjit Kumar, learned Senior counsel for the contesting respondents to get over this legal hurdle, submits that the writ petition was filed by Mandal Anjaiah,who was one of the legal representatives of late Mandal Buchaiah and the judgment and order passed by the Writ court cannot be put against the other legal representatives of the Mandal Buchaiah. The learned senior counsel also submits that after disposal of the writ petition, the other heirs of late Mandal Buchaiah had preferred a revision before the Deputy Custodian General, New Delhi under Section 27 of the Evacuee Property Act and the same was not only entertained but necessary relief was also granted to him. Therefore, the Judgment and order of the High Court would not affect the rights of the other legal heirs of late Mandal Buchaiah.

64. Before we consider the contentions of learned counsel, let us first notice the settled legal position in matters like the present case.

65**.** *In Shakur Basti Shamshan Bhumi Sudhar Samiti v. Lt. Governor, NCT of Delhi* (2007) 13 SCC 53, the order passed by the High Court for closure of cremation ground, in conformity with zonal development plan, had attained finality. This Court has held that any subsequent order passed in ignorance of the order of the High Court which has attained finality is nullity. It was further observed:

> "40. The learned Subordinate Judge has also passed an order in a suit filed by one Balvant Rai in 1991. What was the nature of the decree passed by the Subordinate Judge has not been disclosed. The only contention raised in the list of dates is that the same was a collusive suit. With whom, the said Balvant Rai colluded or what was the nature and purport of the decree had not been disclosed. Some orders appear to have been passed also by the Additional District Judge. We do not know whether the Additional District Judge has passed the order in the same proceeding or in some other proceedings. If the judgments directing user of the land in conformity with the zonal development plan and further directing that a cremation ground should not be allowed to operate become final, an order passed in ignorance thereof would be a nullity."[Emphasis supplied by us]

66. Once the order of the High Court has attained finality, then it is not open for the lower courts or even for the High Court to ignore the said Order. In *A.P. Housing Board v. Mohd. Sadatullah*, (2007) 6 SCC 566, it was held:

> "34**.** Though in the appeal filed by the A.P. Housing Board in the present proceedings, it was asserted that the decision of the High Court in Writ Petition No. 4194 of 1988 was not final as appeal was filed against the said decision, at the time of hearing of the appeal, *it was admitted that no such appeal was filed against the judgment of the High Court and the decision had attained finality.* The consequence of the decision of the High Court in the circumstances is that in respect of two acres of land, proceedings under the Land Acquisition Act were held bad, award nullity and the landowner continued to remain owner of the property with all rights, title and interest therein.
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> 41**.** In our opinion, the learned counsel for the original petitioner landowners is right in contending that when the acquisition proceedings and award in respect of two acres of land was held bad and nullity by the High Court in previous proceedings, *it was not open to the Special Court or the High Court to ignore the said order."*

67. The Finality of Order by the High Court has been considered and upheld by this Court in *Hindustan Construction Co. Ltd. and Anr. v. Gopal Krishna Sengupta and Ors.,* (2003) 11 SCC 210. This Court has held:

> "25. The question still remains whether, on facts of this

case, the direction given in the Order dated 19th October, 2000 can be maintained. In the application there was no prayer to examine Pritika Prabhudesai. The prayer was to quash the proceedings and start trail afresh. There is no provision in law which permits this. Thus the application could not be allowed. Undoubtedly the High Court has proceeded on the footing that this evidence is essential and necessary. Section 311 of the Criminal Procedure Code permits taking of evidence at any stage. The High Court undoubtedly felt that it was in the interest of all parties that necessary evidence be recorded at this stage itself. *But the fact remains that the application for this very relief has been rejected on 6th November, 1997. No appeal or revision was filed against that order. The Order dated 6th November, 1997 has therefore become final. Once such a relief has been refused and the refusal has attained finality, judicial propriety requires that it not be allowed to be reopened. The High Court was obviously not informed of the Order dated 6th November, 1997. Thus the High Court cannot be blamed. However as that Order has been brought to notice of this Court we cannot ignore it."*

68**.** In *Food Corporation of India v. S.N. Nagarkar,* (2002) 2 SCC 475, this Court has held:

"15. … In the instant case, the writ petition filed by the respondent was allowed by judgment and order dated 6thMay, 1994 passed in Civil Writ Petition No. 4983 or 1993. *That order attained finality as it was not appealed from.* In execution proceedings, the appellant cannot go beyond the order passed by the Court in the writ petition and, therefore, what has to be considered is whether the High Court was right in holding that in terms of the order of the Court dated 6thMay, 1994 passed in Civil Writ Petition No. 4983 of 1993, the respondent is entitled to the arrears of pay and allowances with effect from the date of promotions. If the answer is in the affirmative, the question

whether such relief ought to have been granted cannot be agitated in execution proceeding. We find considerable force in the submission urged on behalf of the respondent. *In these proceedings it is not permissible to go beyond the order of the learned Judge dated 6thMay, 1994 passed in Civil Writ Petition No. 4983 of 1993. The execution application giving rise to the instant appeal was filed for implementing the order dated 6thMay, 1994 and in such proceeding, it was not open to the appellant either to contend that the judgment and order dated 6thMay, 1994 was erroneous or that it required modification. The judgment and order aforesaid having attained finality, has to be implemented without questioning its correctness.* The appellant therefore, cannot be permitted to contend in these proceedings that the judgment and order dated 6thMay, 1994 was erroneous in as much as it directed the appellant to pay to the respondent arrears of salary with effect from the dates of promotion, and not from the dates the respondent actually joined the promotional posts."

69**.** In *Oriental Bank of Commerce v. Sunder Lal Jain and Anr.* (2008) 2 SCC 280*,* the respondents had availed credit facility to the tune of '20 Lacs and defaulted in repaying the same to the Bank. The Bank declared their account as Non Performing Asset and initiated recovery proceedings against the respondents before the DRT, which has issued a recovery certificate in favour of the Bank. However, against this, respondents did not prefer any appeal, instead filed writ petition before the High Court. The High Court has stayed the execution proceedings and directed the bank to consider the respondent's case in terms of RBI guidelines. Aggrieved by this, appellant Bank approached this Court against the order of the High Court. This Court observed that when a decree passed by the DRT had attained finality, then the proceedings for execution of decree cannot be stayed by High Court in an independent writ petition. This Court further held:

"13. The High Court, therefore, erred in issuing a writ of mandamus directing the appellant bank to declare the respondents' account as NPA from 31st March, 2000 and to apply the RBI Guidelines to their case and communicate the outstandings which shall be recoverable by quarterly instalments over a period of two years. *The later part of the order passed by the High Court wherein a direction has been issued to stay the recovery proceedings and the recovery certificate issued against the respondents has been cancelled is also wholly illegal as the decree passed by the DRT had attained finality and proceedings for execution of decree could not be stayed in an independent writ petition when the respondents had not chosen to assail the decree by filing an appeal,* which is a statutory remedy provided under Section 20 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993."

70. Doctrine of Amity and Comity requires the Court of Concurrent Jurisdiction to pass similar orders. In *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.,* 2007 (5) SCC 510, this Court has held:

"The doctrine of comity or amity required a court not to pass and order which would be in conflict with another order passed by a competent court of law."

It was further held:

"17. This aspect of the matter has been considered in A Treatise on the Law Governing Injunctions by Spelling and Lewis wherein it is stated:

Section 8. Conflict and loss of jurisdiction. —Where a court having general jurisdiction and having acquired jurisdiction of the subject- matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established

rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or Judge from jurisdiction, yet the granting of the injunction by a second Judge may lead to complications and retaliatory action...."

71. The issue before us is whether the judgment and order passed by the High Court in the writ petition filed by one of the legal representatives having attained finality in so far as the notification dated 11.12.1952 issued under the Evacuee Property Act, could have been re-agitated by the other legal heirs of late Mandal Buchaiah and whether the authorities under the Evacuee Property Act could have gone beyond the Judgment and order passed by the Writ Court and whether the High Court was justified in the subsequent Writ Petition filed to have re-agitated the issue which had attained finality.

72. In the Writ Petition filed by Mandal Anjaiah, the Regional Settlement Commissioner and custodian of Evacuee Property, Bombay, was arrayed as one of the respondents. That only means, he was fully aware of the Judgment and order passed by the Writ Court. In the revision petition filed by the other legal representatives of late Mandal Buchaiah, he was also arrayed as one of the respondents. However, a perusal of the order passed by Deputy Custodian General does not clearly indicate whether it was brought to his notice the Judgment and order passed by the High Court, yet again, in the order by the Collector-cum-Deputy Custodian dated 28.5.1979, there is no reference to the Judgment and order passed by the High Court. However, in the order passed by Chief Settlement Commissioner of Evacuee Property, there is reference to the judgment of the High Court. The said authority while setting

aside the order passed by Collector-cum-Deputy Custodian as nullity, the reliance is not placed on the judgment and order passed by the High Court. In the subsequent Writ Petition filed, the respondents therein, in their Counter Affidavit had specifically contended that the notification dated 11.12.1952 has become final in view of the judgment and order passed by the High Court in Writ Petition No. 1051 of 1966 as also in Writ petition 7517 of 1983. The Division Bench of the High Court while dealing with this aspect, has observed in its order "*it is not correct to read the Judgment dated 14.6.1968 rendered in W.P. No. 1051 of 1966 that this Court had negatived the rights of the petitioners. A sentence here and there in a Judgment cannot be picked up in construing it. A Judgment has to be construed on reading and understanding as a whole and if so understood, the judgment in W.P. 1051 of 1966 is to the effect that in the writ petition, the rights of the parties cannot be adjudicated and more so in view of the fact that alternative remedy of appeal is available under the Act. By that, it cannot be assumed that this Court had upheld the notification issued under Section 7 of the Act".*

73. We do not agree with the reasoning and conclusion reached by the Division Bench of the High Court. We do not think that the decision of the court has been correctly read. However, we do agree with the learned Judges that the Judgment should be read as a whole and understood in the context and circumstances of the facts of that case. In this context, it is worthwhile to recall the observations made by this court in the case of *U.P. State Road Transport Corporation v. Asstt. Commissioner of Police (Traffic) Delhi* [2009(3) SCC 634], wherein it is observed that "*a decision is an authority, it is trite for which it decides and not what can logically be deduced therefrom. This wholesome principle is equally applicable in the matter of construction of a judgment. A judgment is not to be construed as a Statute. It must be construed upon reading the same as a whole. For the said*

purpose, the attending circumstances may also be taken into consideration."

74. At the cost of repetition, we once again intend to notice the judgment and order passed by the High Court in W.P. No. 1051 of 1966. The Court, while narrating the facts, specifically observes that what is challenged before it by the petitioner was the notification dated 11.12.1952 issued under Section 7 of the Evacuee Property Act declaring certain properties as evacuee properties. While dismissing the writ petition, the Court has observed that petitioner has failed to avail the alternate remedy of appeal provided under the Act and at the belated stage, he cannot question the correctness or otherwise of the notification dated 11.12.1952. Therefore, it may not be correct to say that the court had rejected the writ petition only on the ground that the petitioner without availing the alternate remedy provided under the Act, could not have filed the writ petition. We hold that the writ petition was dismissed by the High Court not only on the ground that the petitioner had failed to avail the remedy under the Act, but also on the ground that the petitioner could not have questioned the notification dated 11.12.1952 at a belated stage. Therefore, in our view, the approach of the Division Bench of the High Court was not justified in entertaining a writ petition on the very issue, which had attained finality in an earlier proceeding. This view has nothing to do with the Principle of res judicata nor are we saying Principles of res judicata would apply in the facts and circumstances of this case. We are only holding that when a competent court refuses to entertain a challenge made to a notification issued on 11.12.1952 in a writ petition filed in the year 1966, the High Court could not have entertained the writ petition on the same cause of action at a belated stage in a writ petition filed in the year 1990. The course adopted by the High Court not only leads to confusion but also leads to inconvenience. We also hold that the Judgment and order of the High Court was binding on the authorities under the Evacuee Property Act and, therefore, they could not have reagitated the correctness or

otherwise of the notification dated 11.12.1952 issued under Section 7 of the Evacuee Property Act.

75. Shri. Ranjit Kumar, learned senior counsel, contends that the writ petition was filed by one of the co-owners of late Mandal Buchaiah and judgment and order passed would not bind the other parties. We cannot agree. It is a settled law that no co-owner has a definite right, title and interest in any particular item or portion thereof. On the other hand, he has right, title and interest in every part and parcel of the joint property or coparcenery under Hindu Law by all the coparceners. Our conclusion is fortified by the view expressed by this court in *A. Viswanath Pillai and Others vs*. *The Special Tahsildar for Land Acquisition No.IV and Others* (1991) 4 SCC 17), in which this Court observed:

> "It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners. It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenery under Hindu law by all the coparceners. In Kanta Goel v. B.P. Pathak (1977) 2 SCC 814, this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable. The same view was reiterated in Sri Ram Pasricha v. Jagannath (1976) 4 SCC 184 and Pal Singh v. Sunder Singh..."
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> "....A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property alongwith others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds. Therefore, a co-owner of the property is an owner of the property acquired but entitled to receive compensation pro rata."

76. Re. **Constructive Res judicata**:- Learned counsel Shri. Mukund submits that the respondents herein for the first time in the writ petition filed in the year 1990 had raised a contention that the procedure prescribed under the Evacuee Property Act and the rules framed thereunder were not followed before notifying the lands in question as evacuee property. Though this ground was available, the same was not raised. Therefore, it is contended that a ground, though opened to be raised, but not raised in earlier writ petition, cannot be allowed to be raised in a subsequent writ petition.

Sri Ranjit Kumar, learned senior counsel, would contend that the judgment and order in W.P. No. 1051 of 1966 was not dismissed on merits but only on the ground of delay and laches and therefore, principles of constructive res judicata would not apply. Our attention is invited to the decision of this court in the case of Daya Rao Vs. State of U.P. (1962) 1 SCR 574 and in the case of Hosunak Singh Vs. Union of India (1979) 3 SCC 135.

77. In our view, this issue need not detain us for long. This Court in the case of *Devilal Modi, Proprietor, M/s Daluram Pannalal Modi v. Sales Tax officer Ratlam & Ors.* [AIR 1965 SC 1150], has observed that *"the rule of constructive res judicata that of a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding, which is based on the same cause of action, is founded on the same considerations of public policy. If the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take proceedings one after another and urge new grounds every time, and that plainly is inconsistent with considerations of Public policy."*

78. In the present case, it is admitted fact that when the contesting respondents filed W.P. No. 1051 of 1966, the ground of non-compliance of statutory provision was very much available to them, but for the reasons best known to them, they did not raise it as one of the grounds while challenging the notification dated 11.12.1952 issued under the Evacuee Property Act. In the subsequent writ petition filed in the year 1990, initially, they had not questioned the legality of the notification, but raised it by filing an application, which is no doubt true, allowed by the High Court. In our view, the High Court was not justified in permitting the petitioners therein to raise that ground and answer the same, since the same is hit by the principles analogous to constructive res judicata.

79. Re: *Whether the High Court could have gone into the facts under its writ jurisdiction:-* The learned counsel Shri Mukund contends that the High Court in exercise of its power under Article 226 of the Constitution of India ought not have gone into the disputed facts and render a finding on those facts. The learned counsel invites our attention to the observations made by this Court in *Surya Dev Rai vs. Ramchander Rai and Others* (2003) 6 SCC 675, *Ranjit Singh* vs. *Ravi Prakash (2004) 3 SCC 682* and *Karnataka State Industrial Investment and Development Corporation Ltd. vs. Cavalet India Ltd. and Others* (2005) 4 SCC 456. Per contra, Shri Ranjit Kumar, learned senior counsel submits that since there is a bar for filing civil suit under Section 28 and Section 48 of the Evacuee Property Act and Section 36 of the Displaced Persons Act, the High Court necessarily has to go into disputed question of facts. In aid of his submission, the learned senior counsel has relied on the decisions of this Court in the case of *State of Orissa vs.* Dr*. Miss Binapani Dei and Ors.* (1967) 2 SCR 625, *Smt. Gunwant Kaur and Ors. vs. Municipal Committee, Bhatinda and Ors.* (1969) 3 SCC 769, Om Prakash Vs. State of Haryana and others (1971) 3 SCC 792, *Surya Dev Rai vs. Ram Chander Rai and Ors.* (2003) 6 SCC 675 and *ABL International Ltd. and Anr. Vs. Export Credit Guarantee*

Corporation of India Ltd. and Ors. (2004) 3 SCC 553.

80. The High Court in its writ jurisdiction, will not enquire into complicated questions of fact. The High Court also does not sit in appeal over the decision of an authority whose orders are challenged in the proceedings. The High Court can only see whether the authority concerned has acted with or without jurisdiction. The High Court can also act when there is an error of law apparent on the face of the record. The High Court can also interfere with such decision where there is no legal evidence before the authority concerned, or where the decision of the authority concerned is held to be perverse, i.e., a decision which no reasonable man could have arrived at on the basis of materials available on record. Where an enquiry into complicated questions of fact is necessary before the right of aggrieved party to obtain relief claimed may be determined, the court may, in appropriate cases, decline to enter upon that enquiry, but the question is always one of discretion and not of jurisdiction of the court which may, in a proper case, enter upon a decision on questions of fact raised by the petitioner.

81. Before we advert to the settled legal position, we will notice the decisions on which reliance is placed by the learned counsel for the parties.

82. This Court in Surya Devi Rai's case (supra), for parameters for the exercise of jurisdiction, held as under :-

> "(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules or procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

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

83. In *Ranjeet Singh's* case (supra), this Court, while explaining the jurisdiction of the High Court in exercise of its power under Article 226 and 227 of the Constitution, held :-

"Feeling aggrieved by the judgment of the Appellate Court, the respondent preferred a writ petition in the/High Court of Judicature at Allahabad under Article 226 and alternatively under Article 227 of the Constitution. It was heard by a learned Single Judge of the High Court. The High Court has set aside the judgment of the Appellate Court and restored that of the Trial Court. A perusal of the judgment of the High Court shows that the High Court has clearly exceeded its jurisdiction in setting aside the judgment of the Appellate Court. Though not specifically stated, the phraseology employed by the High Court in its judgment, goes to show that the High Court has exercised its certiorari jurisdiction for correcting the judgment of the Appellate Court."

84. In Karnataka State Industrial Investment and Development Corporation Ltd. (supra), while explaining the jurisdiction of the High Court in exercising its jurisdiction under Article 226 of the Constitution, has stated :-

"The High Court while exercising its jurisdiction under Article 226 of the Constitution does not sit as an appellate authority over the acts and deeds of the financial corporation and seek to correct them. The Doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities."

85. Shri Ranjit Kumar, per contra, has placed reliance on the observations made by this Court in the case of State of Orissa Vs. Dr. (Miss) Binapani Dei and others (1967) 2 SCR 625, has observed :-

"Under Article 226 of the Constitution the High Court is not precluded from entering upon a decision on questions of fact raised by the petition. Where an enquiry into complicated questions of fact arises in a petition under Article 226 of the Constitution before the right of an aggrieved party to obtain relief claimed may be determined, the High Court may in appropriate cases decline to enter upon that enquiry and may refer the party claiming relief to a suit. But the question is one of discretion and not of jurisdiction of the Court."

86. In *Smt. Gunwant Kaur and others Vs. Municipal Committee, Bhatinda and others* (1969) 3 SCC 769, this Court held as under :-

"The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioners right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try

issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition."

87. In *Om Prakash Vs. State of Haryana and others* (1971) 3 SCC 792, this Court observed :-

"The two judgments referred to by the High Court proceeded on the ground that the High Court would not in deciding a petition for a writ under Article 226 of the Constitution enter upon disputed questions of fact. But whether in the present case there are disputed questions of fact of such complexity as would render it inappropriate to try in hearing a writ petition is a matter which has never been decided. There is no rule that the High Court will not try issues of fact in a writ petition. In each case the court has to consider whether the party seeking relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs."

88. In *ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others* (2004) 3 SCC 553, this Court has held :-

"Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the

Constitution is not always bound to relegate the parties to a suit. In the above case of Smt. Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact."

89. In *Custodian of Evacuee Property Punjab and others Vs. Jafran Begum* (1967) 3 SCR 736, this Court held :-

"It may be added that the only question to be decided under s. 7 is whether the property is evacuee property or not and the jurisdiction of the Custodian to decide this question does not depend upon any finding on a collateral fact. Therefore there is no scope for the application of that line of cases where it has been held that where the jurisdiction of a tribunal of limited jurisdiction depends upon the first finding certain state of facts, it cannot give itself jurisdiction on a wrong finding of that state of fact. Here under s. 7 the Custodian has to decide whether certain property is or is not evacuee property and his jurisdiction does not depend upon any collateral fact being decided as a condition precedent to his assuming jurisdiction. In these circumstances, s. 46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under s. 7. This conclusion is reinforced by the provision contained in s. 4(1) of the Act which provides that the Act overrides other laws and would thus override s. 9 of the Code of Civil Procedure on a combined reading of Sections 4, 28 and 46. But as we have said already, s. 46 or s. 28 cannot bar the jurisdiction of the High Court Art. 226 of the Constitution, for that is a power conferred on the High Court under the Constitution."

90. We are of the view that the High Court has not committed an error while entertaining a writ petition filed under Article 226 and 227 of the Constitution, wherein the proceedings under Section 7 of the Evacuee Property Act was questioned. We say so for the reason that under the Evacuee Property Act, there is specific bar for the civil court to adjudicate on the issue whether certain property is or is not evacuee property. This issue can be decided only by the custodian under the Act. Any person aggrieved by the findings of the custodian can avail the other remedies provided under the Act. The findings and the conclusion reached by the authorities under the Act in an appropriate case can be questioned in a petition filed under Article 226 of the Constitution even it involves disputed questions of facts. This issue, in our view, is no more res integra in view of three Judge Bench decision of this Court in *Jafran Begum's* case (supra).

91. Re : **Whether the lands in question are evacuee property under Evacuee Property Act :**

Shri Mukund, learned counsel for the appellants, submits that the disputed lands belong to late Rahim Baksh Khan and after issuing notice to the sons of late Rahim Baksh Khan and after following the procedure prescribed under the Evacuee Property Act and the rules framed thereunder, the lands were notified as evacuee property by issuing notification dated 11.12.1952. Learned counsel further submitted that late Rahim Baksh Khan had the money decree against late Mandal Buchaiah and in execution of the court decree, Rahim Baksh Khan became the owner of the property and his name had been recorded in the Khatra Khatauni as owner of the said lands. The entry so made in the revenue records was not questioned by anybody including late Mandal Buchaiah during his lifetime.

It is further submitted that the records of the execution petition was not traceable since the matter is 60 years old and they have also not been placed on record by the contesting respondents. Therefore, in view of the entries made in the

Revenue records, late Rahim Baksh Khan and his legal representatives were in possession of the lands under dispute. It is also submitted that the contesting respondents took the said lands on Ek saala lease from the Government in the year 1952 to 1955 and only in the year 1956, they made representation for the redressal of their grievance before the authorities under the Evacuee Property Act and since those representations did not yield any result, they approached the High Court only in the year 1966 only questioning the action of Tahsildar who had proposed to auction of the lands for grant of Ek saala lease. However, Shri Ranjit Kumar would submit that late Rahim Baksh Khan never became the owner of the lands since he did not execute the money decree that he had obtained from a civil court. The learned senior counsel by placing reliance on various provisions of the Evacuee Property Act and the rules framed thereunder, submits that since procedure prescribed under the Evacuee Property Act is not followed, the authorities under the Act could not have declared the disputed lands as evacuee property. It is submitted that the order passed under Section 7 of the Evacuee Property Act is manifestly illegal and the illegality cannot be perpetuated against the contesting respondents since they are owners and in continuous possession of the property. The learned senior counsel also submits that except the notification issued under Section 7 of the Act, no other document such as order passed under the Act after notice to the persons interested in the lands is produced by the State Government in whose custody the records of the proceedings were available. Therefore, Deputy Custodian General was justified in setting aside the declaration made under Section 7 of the Evacuee Property Act which order has merged with the impuged judgment and order of the High Court. However, learned counsel for the State of Andhra Pradesh by referring to their counter affidavit filed in the writ petition before the High Court submits that the authority under the Act before issuing notification under Section 7 of the Evacuee Property Act, the procedure prescribed therein had been followed and this assertion had not been denied by the

respondents by filing their reply affidavit and since no denial of the factual assertion made by the State Government, the only inference that can be drawn is that the proper procedure prescribed under the Act had been followed before issuing the notification under the Evacuee Property Act.

92. Admittedly, before the High Court, parties to the lis had not produced any records. Petitioners therein claimed that they were not dispossessed from the lands in dispute pursuant to any money decree by late Rahim Baksh Khan or his legal representatives. It is the stand of the appellants and also the State Government that the name of late Rahim Baksh Khan had been recorded in the Khatra Khatauni and the authorities under the Evacuee Property Act after issuing notices to the legal representatives of late Rahim Baksh Khan and also the public notice, the notification under Section 7 of the Act was issued and gazetted. Since the records are of the year 1952, neither the State Government nor the contesting respondents could produce any records or documents in support of their claim. However, based on the affidavits filed by the petitioner, the High Court proceeds to hold that they were not dispossessed from their lands in accordance with law. This reasoning of the learned Judges is firstly difficult to comprehend and secondly, difficult to accept. It is the specific case of the appellants, by placing reliance on the revenue records, that the name of late Rahim Baksh Khan found a place in the revenue records prior to issuance of the notification dated 11.12.1952 under the Evacuee Property Act and, thereafter, the name of the custodian is shown as the owner of the lands. The burden of proof was on the petitioners therein to prove their title, right and interest in the property. It looks again very strange to us that the High Court, in the absence of any records of the year 1952, proceeds to determine that the official respondents had not followed the mandatory requirement of the provisions of the Evacuee Property Act and rules framed thereunder before declaring the disputed lands as evacuee property. It also looks odd and queer to us that the High Court, in the absence of any

records of the civil court and the executing court, proceeds to arrive at a definite finding that the sale of property had not taken place. Pursuant to the money decree passed, the executing court had not auctioned disputed lands and late Rahim Baksh Khan became the owner of the lands, though it concedes that the above facts have to be proved with reference to the records and there cannot be oral evidence in this regard. To say the least, it was highly inappropriate for the High Court to have proceeded to determine whether any notice was issued to late Mandal Buchaiah before notifying the property as evacuee property without there being any material nor the documents and records by relying only on the procedure prescribed under the Act and the rules thereunder, even after noticing that both the parties have not produced any records, since the records are old and not traceable. In view of the above, we are of the opinion, the High Court was wholly incorrect when it arrives at a finding that there is manifest illegality while issuing notification under Section 7 of the Evacuee Property Act. For the very same reason, we cannot also accept the findings and the conclusion reached by the Collector-cum-Deputy Custodian in his order dated 28.05.1979.

93. The High Court in the impugned Judgment, also gives a finding that the authorities under the Act have violated the principles of natural justice in not issuing notice to the owners of the lands in dispute before taking any action under the Act. We are of the view that whether any notice under the Act was issued or not, can only be decided with reference to the records. Such records were neither available nor any material was produced by the petitioners in support of their assertion made in the writ petition. Though, this assertion was denied by the respondents in their counter affidavit filed before the Court, this issue is answered by the High Court in favour of the petitioners. We disagree with the findings and conclusion reached by the High Court in this regard.

94. Re *: Effect of acquisition and Distribution of the*

Evacuee Propety under the Displaced Persons (Compensation and Rehabilitation) Act, 1954.

The contention of the learned counsel Shri Mukund is that once the notification under Section 12 of the Displaced Property Act is issued and the lands are acquired for re-distribution, no proceedings can lie under the Evacuee Property Act. Per contra, learned senior counsel Shri Ranjit Kumar would submit this can be so, provided notification issued under Evacuee Property Act is valid and legal. Shri Mukund, learned counsel has placed reliance on *Major Gopal Singh and Others. vs. Custodian, Evacuee Property, Punjab (1962) 1 SCR 328, Basant Ram vs. Union of India (1962) Supp. 2 SCR 733 and Dafedar Niranjan Singh and Another vs. Custodian, Evacuee Property (Pb.) and Another (1962) 1 SCR 214.*

95. In Major Gopal Singh's case, this Court held that "the power of the Custodian under the Administration of Evacuee Property Act, 1950, to allot any property to a person or to cancel an allotment existing in favour of a person rests on the fact that the property vests in him. But the consequence of the publication of the notification by the Central Government under Section 12(1) of the Displaced Persons (Compensation and Rehabilitation) Act with regard to any property or a class of property would be to divest the custodian completely of his right in the property flowing from Section 8 of the Administration of the Evacuee Property Act, 1950 and vest that property in the Central Government."

96. In *Basant Ram's* case, this Court held that *"It is not in dispute that the evacuee property in these two villages was notified under Section 12(1) of the Act on March 24, 1955. The consequence of that notification is that all rights, title and interest of the evacuee in the property ceased with the result that the property no longer remained evacuee property. Once, therefore, the property ceased to be evacuee property, it cannot be dealt with under Central Act No. XXXII of 1950 or the Rules framed thereunder."*

97. Shri Ranjit Kumar's submission is that the proceedings under the 1954 Act only happen if the proceedings under the 1950 Act are valid. If the proceedings under 1950 Act is invalid, the 1954 Act does not come into operation. To demonstrate that, the proceedings under the Evacuee Property Act is invalid for want of notice on the person/persons who would be effected by an order under the Act, the learned senior counsel has relied on the observations made by the High Court of Bombay in the case of *Abdul Majid Hazi Mohammed vs. P.R. Nayak* (*AIR 1951 Bombay 440),* wherein the Court has observed that mode of service of notice under Section 7 of Act read with Rule 25 of the Rules, contents of the notice and the nature of the order that requires to be passed by the Custodian under the Evacuee Property Act.

98. In *Dr. Zafar Ali Shah and Others vs. The Assistant Custodian of Evacuee Property [1962] 1 SCR 749,* wherein this Court has observed that Section 12 of Displaced Persons Act, 1954 only affects the rights of Evacuee in his property. The notification made under that Section did not have the effect of extinguishing the petitioners' rights in the houses as they had never been declared evacuees.

99. In *Ebrahim Aboobaker vs. Tek Chand Dolwani [1953] SCR 691*, wherein the Court has stated that it is well established and not disputed that no property of any person can be declared to be evacuee property unless that person had first been given a notice under Section 7 of the Act.

100. In *Nasir Ahmed vs. Assistant Custodian General, Evacuee Property, U.P. Lucknow and Another [1980] 3 SCR 248,* it is held, that Section 7 of the Evacuee Property Act required the custodian to form an opinion that the property in question was evacuee property within the meaning of the Act before any action under that Section was taken. Under Rule 6 of the Administration of Evacuee Property (Central) Rules, 1950, the custodian had to be satisfied from information in his

possession or otherwise that the property was *prima-facie* evacuee property before a notice was issued.

101. To answer this issue, we are required to notice certain provisions of both the Acts to arrive at a finding whether both the Acts operate independent of each other or whether they are complimentary and the action of one Act has some bearing on the other Act which we are concerned in these appeals.

102. The Evacuee Property Act was mainly intended to provide for the administration of evacuee property. The Act is primarily concerned with evacuee property and not the person who is evacuee. The procedure prescribed to declare a particular property as an evacuee property is mandatory and they are to be complied with by the authorities notified under the Act and the Rules framed thereunder. The Act is a complete code itself in the matter of dealing with evacuee property. The question whether any property or right or interest in any property is or is not evacuee property can be adjudicated only by the custodian and not the civil courts. Section 7 of the Act confers the power upon the custodian to declare certain property as evacuee property. Sub-section (1) provides that where the custodian is of the opinion that any property is evacuee property within the meaning of Section 2(f) of the Evacuee Property Act, then he may pass an order declaring such property to be evacuee property, provided he causes notice thereof to be given in such manner as may be prescribed to the persons interested and he holds such inquiry into matter as the circumstances of the case permit. Section 8(1) of the Act envisages that once the property has been declared to be evacuee property under Section 7, that property must be deemed to have vested in the custodian for the State. Section 8(4) contemplates a situation even where any evacuee property has vested in the custodian, any person is in possession thereof shall be deemed to be holding it on behalf of the custodian. Section 9 gives the power to the custodian to take possession of evacuee property which is vested in him. Section

24 confers a right of appeal against the orders passed under Section 7, 40 and 48 of the Act. Section 27 confers on the Custodian General the power of revision to revise the orders under the Act either 'suo-moto' or on an application filed by the aggrieved person. Section 28 bars the jurisdiction of the civil courts from entertaining suits relating to matters within the exclusive jurisdiction of the custodian. But Section 28 or Section 46 of the Act cannot bar jurisdiction of the High Court under Article 226 of the Constitution. The question whether evacuee property has been vested in custodian or not is a question of fact and the same cannot be interfered with except in exceptional circumstances which would include violation of principles of natural justice before notifying a property an evacuee property.

103. The Displaced Persons Act provides for payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. The Sections which require to be noticed for the purpose of this case are Sections 12 and 24 of the Displaced Persons Act. Section 12 of the Act authorizes the Central Government to acquire evacuee property for rehabilitation of the displaced persons. Section 24 of the Act vests power in the Chief Settlement Commissioner to set aside or vary any order passed by any of the officers named in that sub-section at any time, if the Chief Settlement Commissioner is not satisfied about the legality or propriety of such order.

104. To appreciate and resolve the controversy raised in these appeals, it would be useful to extract the relevant Section 12 which reads as under:

> *"12. Power to acquire evacuee property for rehabilitation of displaced persons*—(1) If the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose, being a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation to such persons, the

Central Government may at any time acquire such evacuee property by publishing in the Official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section.

(2) On the publication of a notification under sub-section (1), the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.

(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notification referred to in sub-section (1) in respect of—

(a) all evacuee property generally; or

(b) any class of evacuee property; or

(c) all evacuee property situated in a specified area; or

(d) any particular evacuee property.

(4) All evacuee property acquired under this Section shall form part of the compensation pool."

105. At the cost of repetition, let us once again notice the submissions made by learned counsel for the parties. Shri Mukund, learned counsel for the appellant submits that once the notification is issued under Section 12 of the Displaced Property Act, the evacuee property notified under the Evacuee Property Act no more exists and therefore, the authorities under the Evacuee Property Act could not have passed the order dated 25.09.1970 and 28.05.1979 and, therefore, Chief Settlement Commissioner of Displaced Persons Act was justified in passing the order dated 11.05.1983. The learned

senior counsel Shri Ranjit Kumar would submit that since there was irregularity in declaring the disputed lands as evacuee property, the Deputy Custodian General was justified in setting aside the notification declaring the disputed land as evacuee property.

106. Section 12 of the Act authorizes the Central Government to acquire the evacuee property if it so desires and on such acquisition the property shall vest absolutely in the Central Government free from all encumbrances. The pre-requisite for acquiring property under Section 12 is that it must be evacuee property as defined under Section 2 (f) of the Act. The consequence of issuing notification under Section 12 of the Act would denude the powers of the Custodian under Evacuee Property Act. As soon as the notification is published, property ceases to be evacuee property. This Court in the case of *Haji Siddik Haji Umar and Others. Vs. Union of India (19*83) 1 SCC 408, has held *"that the publication of a notification under Section 12 extinguishes the right, title or interest of the evacuee in the evacuee properties. By virtue of Section 12(2) they vest absolutely in the Central Government free from all encumbrances. The only relief available to an evacuee is compensation in accordance with such principles and in such manner as may be agreed upon between the two countries. The jurisdiction of the Court to consider any orders passed by the Custodian or any action taken by him would not be barred if the orders passed or the action taken was without jurisdiction. But, if a party succeeds in establishing that the action taken or the orders passed were outside the purview of the Act, then, those would not be the orders passed under the Act.*"

107. While answering the issue whether the 'disputed lands' is evacuee property or not, we have held that the notification issued under Section 7 of the Evacuee Property Act is valid in law and, therefore, one and the only conclusion that can be reached on this issue is, in the facts and circumstances

of the case, in view of the notification issued by the Central Govt. under Section 12 of the Displaced Persons Act, for the 'disputed lands' had vested in the Central Govt. and thereby had lost the status of evacuee property.

108. Shri Ranjit Kumar also submitted that the order passed by the Chief Settlement Commissioner is one without jurisdiction, since the said authority can exercise his power of revision to set a side any order passed by any of the officers named in that Section. Since Deputy Custodian General is not one of those officers named in that sub-section, he could not have exercised his power of revision against an order passed by Deputy Custodian General dated 28.05.1979.

109. Section 24 of the Act speaks of power of revision of the Chief Settlement Commissioner. The said Section reads:-

> "Power of revision of the Chief Settlement Commissioner – (1) The Chief Settlement Commissioner may at any time call for the record of any proceeding under this Act in which a Settlement Officer, an Assistant Settlement Officer, an Assistant Settlement Commissioner, an Additional Settlement Commissi oner, a Settlement Commissioner, a Managing officer or a managing corporation has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit."

110. Section 24 of the Act gives power of revision to Chief Settlement Commissioner either on his motion or an application made to him to call for the record of any proceeding under the Act in order to satisfy himself as to legality or propriety of any order passed therein and to pass such order in relation thereto as he thinks fit. The Section also provides that the said powers can be used in relation to the orders passed by Settlement Commissioner, an Assistant Settlement Commissioner, an Additional Settlement Commissioner, a Settlement Commissioner, a Managing officer or a managing corporation.

A bare reading of the Section shows that the Chief Settlement Commissioner can revise the order if in his opinion that the orders passed by the officers named in the Section are either illegal or improper. In the instant case, the Chief Settlement Commissioner has invoked his revisional powers at the request of the allottees/displaced persons to revise the proceedings and the order passed by the Collector-cum-Deputy Custodian under the provisions of the Evacuee Property Act dated 28.05.1979. In view of the plain language of the Section, there cannot be two views. In our view, what the Chief Settlement Commissioner can do is only to revise the orders passed by those officers who are notified in the Section itself and not of the officers under the provisions of the Evacuee Property Act, if the orders passed by the named officers in this Section is either illegal or improper. To this extent, we are in agreement with the submission made by the learned senior counsel Shri Ranjit Kumar. Therefore, the orders passed by the Chief Settlement Commissioner in exercise of his revisional powers under the Displaced Persons Act is without jurisdiction and non-est in law.

111. To sum up, our conclusions are :

(I) The High Court ought not to have entertained and granted relief to the writ petitioner/contesting respondents, since there was inordinate and unexplained delay in approaching the court.

(II) The Judgment and order of the High Court in W.P. No. 1061 of 1966 having attained finality was binding on the authorities under the Evacuee Property Act and the High Court ought not to have permitted the writ petitioners/contesting respondents herein to re-agitate the correctness or otherwise of the notification dated 11.12.1952 in the subsequent writ petition.

(III) A subsequent writ petition was not maintainable in

respect of an issue concluded between the parties in the earlier writ petition.

(IV) In view of the specific bar under Section 46 of the Evacuee Property Act, writ petition filed by the contesting respondents before the High Court was maintainable.

(V) Since we have taken exception to the orders passed by the Collector-cum-Deputy Custodian and the Judgment and order passed by the High Court in W.P. No. 17222 of 1990, we hold notification dated 11.12.1952 is valid in law.

(VI) Since the notification issued under Section 7 of the Act is valid in law, the evacuee property acquired by the Central Govt. under Section 12 of the Displaced Persons Act ceases to be evacuee property and becomes the property of the Central Govt.

(VII) In view of the clear language employed in Section 24 of the Act, the Chief Settlement Commissioner had no jurisdiction to revise the order passed by the Collector-cum-Deputy Custodian under the Evacuee Property Act.

112. In view of the above discussion, the appeals are allowed. The Judgment and order passed by the High Court in W.P. 17222 of 1990 dated 27.04.2000 is set aside. Costs are made easy.

N.J. Appeals allowed.

UNION OF INDIA THROUGH THE SECRETARY, NATIONAL COUNCIL OF EDUCATIONAL RESEARCH & TRAINING

v.

SHYAM BABU MAHESHWARI

(Civil Appeal No. 4202 of 2011)

MAY 09, 2011

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

Service Law:

Service benefits – Switchover from CPF scheme to pension scheme – Permissibility of – Respondent-employee while he was in service of NCERT had opted for the CPF Scheme way back in 1977 and on his retirement, had availed the benefits of the CPF Scheme – Claim of respondent to switch over from CPF scheme to Pension Scheme – Allowed by Tribunal, the Single Judge and the Division Bench of the High Court – Justification of – Held: Not justified – Once an employee has opted for the CPF Scheme, his exercise of option is final and he is not entitled to change over to the Pension Scheme because the two schemes are entirely different – However, Ministry of Personnel and Training by O.M. dated 06.06.1985 gave an opportunity to Central Government employees who had earlier opted for the CPF Scheme to opt for the Pension Scheme – The O.M. dated 06.06.1985 was adopted by the NCERT in its Circular dated 18.07.1985 – It is clear from the language of O.M. dated 06.06.1985 that the option to an employee to switch over from the CPF Scheme to the Pension Scheme was open to only those employees who were in service on 31.03.1985 and who were retiring on or after 31.03.1985 – By 31.03.1985, the respondent had retired, his date of retirement being 31.07.1984 – He was, therefore, not entitled to fresh option to switch over from the CPF Scheme to the Pension Scheme –

Contributory Provident Fund Rules, 1962 – Rule 38 – Central Civil Services (Pension) Rules, 1972.

The respondent was in the service of the National Council of Educational Research and Training (NCERT). The employees of the NCERT were given an option to choose either the CPF Scheme or the General Provident Fund-cum-Pension Scheme. In 1977, the respondent opted for the CPF Scheme. On 31.07.1984, the respondent retired from service and withdrew his benefits under the CPF Scheme. On 06.06.1985, the Ministry of Personnel and Training Administrative Reforms & Public Grievances and Pension (Department of Personnel and Training) issued O.M. No.F.3(1)-Pension Unit/85 intimating the decision of the Government that Central Government employees who had retained the Contributory Provident Fund benefits in terms of Rule 38 of the Contributory Provident Fund Rules, 1962 or in terms of any other orders issued in that behalf, may be allowed another opportunity to opt for the Pension Scheme as laid down in the Central Civil Services (Pension) Rules, 1972. In the O.M. dated 06.06.1985, it was made clear that the option was open to those employees who were in service on 31.03.1985 and were retiring from service on or after that date.

NCERT issued a circular dated 18.07.1985 intimating all concerned that employees of NCERT, who had earlier opted for the CPF Scheme, may exercise their option before 06.12.1985 to switch over to the Pension Scheme and such option once exercised will be treated as final. Before his retirement, the Respondent claims to have applied on 27.02.1984 to change over from the CPF Scheme to the Pension Scheme. The said request for change over from the CPF Scheme to the Pension Scheme was rejected on 23/26.06.1989.

The respondent filed an application before the Rajasthan Non-Government Education Tribunal in the year 1995, seeking permission to opt for the Pension Scheme. The Tribunal relying on the decision of this Court in R. Subramaniam directed the appellant to declare the respondent as entitled to the benefits of the Pension Scheme with effect from the date of his retirement and fix his pension accordingly. The appellant challenged the order of the Tribunal before the High Court in Civil Writ Petition which was dismissed by a Single Judge of the High Court. The appellant then filed Civil Special Appeal (Writ) which was also dismissed by the Division Bench of the High Court.

In the instant appeal, the appellant submitted that a Constitution Bench of this Court in Krishena Kumar has clearly held that employees who opt for the CPF Scheme and employees who opt for the Pension Scheme fall into two distinct classes and once an employee opts within the cut-off date to be under the CPF Scheme, he cannot later on make a request to switch over to the Pension Scheme. He further submitted that in any case it will be clear from the language of the O.M. dated 06.06.1985 which was adopted by the NCERT that the option to switch over from the CPF Scheme to the Pension Scheme was available to only those employees who were in service on 31.03.1985 and were to retire from service on or after 31.03.1985 and not to the appellant who was not in service on 31.03.1985 having retired on 31.07.1984.

Allowing the appeal, the Court

HELD:1. In the decision of this Court in R. Subramaniam, the Tribunal, by its order dated 11.11.1987 had directed that Railway employees who had indicated their option in favour of Pension Scheme either at any time while in service or after their retirement and who then

desired to opt for the Pension Scheme should be given the benefit of the Pension Scheme. This order dated 11.11.1987 of the Tribunal was challenged by the Union of India in a Special Leave Petition, but the Special Leave Petition was dismissed and a Review Petition was also dismissed by this Court. When the matter came before this Court for the second time in R. Subramaniam this Court held that the Union of India cannot resist the claim of R. Subramaniam. It is thus clear that in R. Subramaniam the claim of the employee had to be allowed by this Court because in an earlier order, the Tribunal had allowed the claim of the railway employees to switch over to the Pension Scheme and the order of the Tribunal had become final on the dismissal of the Special Leave Petition and the Review Petition by this Court. The facts of this case are entirely different. There is no such earlier order of the Tribunal or a Court allowing the claim of the respondent to switch over from the CPF Scheme to the Pension Scheme, which had become final. In the instant case, the Tribunal, the Single Judge and the Division Bench of the High Court were thus not right in relying on the decision of this Court in R. Subramaniam in allowing the claim of the respondent to switch over from the CPF Scheme to the Pension Scheme. [Para 7] [555-E-H; 556-A-D]

R. Subramaniam v. Chief Personnel Officer, Central Railways, Ministry of Railways **(AIR 1995 SC 983) – distinguished.**

2. The respondent while he was in service of NCERT had opted for the CPF Scheme way back in 1977 and on his retirement, he had availed the benefits of the CPF Scheme. Once an employee has opted for the CPF Scheme, his exercise of option is final and he is not entitled to change over to the Pension Scheme because the two schemes are entirely different. It, however,

appears that the Government in the Ministry of Personal and Training by the O.M. dated 06.06.1985 gave an opportunity to Central Government employees who had earlier opted for the CPF Scheme to opt for the Pension Scheme. The O.M. dated 06.06.1985 was adopted by the NCERT in its Circular dated 18.07.1985. It is clear from the language of the O.M. dated 06.06.1985 that the option to an employee to switch over from the CPF Scheme to the Pension Scheme was open to only those employees who were in service on 31.03.1985 and who were retiring on or after 31.03.1985. By 31.03.1985, admittedly, the respondent had retired, his date of retirement being 31.07.1984. He was, therefore, not entitled to fresh option to switch over from the CPF Scheme to the Pension Scheme. [Para 8] [556-E-G]

Krishena Kumar, etc. v. Union of India & Ors. **[(1990) 4 SCC 207: 1990 (3) SCR 352];** *V.K. Ramamurthy v. Union of India & Anr.* **[(1996) 10 SCC 73: 1996 (4) Suppl. SCR 583] and** *Union of India & Ors. v. Kailash* **[(1998) 9 SCC 721] – relied on.**

Case Law Reference:

AIR 1995 SC 983	**distinguished**	**Para 4, 5, 6, 7,8**
1990 (3) SCR 352	**relied on**	**Para 5, 8**
1996 (4) Suppl. SCR 583	**relied on**	**Para 5, 8**
(1998) 9 SCC 721	**relied on**	**Para 5, 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4202 of 2011.

From the Judgment & Order dated 23.5.2006 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in DB Civil Appeal (Writ) No. 898 of 2005.

Raju Ramachandran, S. Rajappa, Dr. Puran Chand, B. Badrinath, Puneet Sharma for the Appellant.

V. Seshagiri, Alok Tiwari, (for Dua Associates) for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1.Leave granted.

2. This is an appeal against the order dated 23.05.2006 of the Division Bench of the Rajasthan High Court, Jaipur Bench, dismissing Civil Special Appeal (Writ) No.898 of 2005 of the appellant.

3. The facts of this case are that the respondent was in the service of the National Council of Educational Research and Training (for short 'the NCERT'). The employees of the NCERT were given an option to choose either the Central Provident Fund Scheme (for short 'the CPF Scheme') or the General Provident Fund-cum-Pension Scheme (for short 'the Pension Scheme'). In 1977, the respondent opted for the CPF Scheme. On 31.07.1984, the respondent retired from service and withdrew his benefits under the CPF Scheme. On 06.06.1985, the Ministry of Personnel and Training Administrative Reforms & Public Grievances and Pension (Department of Personnel and Training) issued O.M. No.F.3(1)-Pension Unit/85 (for short 'the O.M. dated 06.06.1985') intimating the decision of the Government that Central Government employees who had retained the Contributory Provident Fund benefits in terms of Rule 38 of the Contributory Provident Fund Rules, 1962 or in terms of any other orders issued in that behalf, may be allowed another opportunity to opt for the Pension Scheme as laid down in the Central Civil Services (Pension) Rules, 1972. In the O.M. dated 06.06.1985, it was made clear that the option was open to those employees who were in service on 31.03.1985 and were retiring from service on or after that date. NCERT issued a circular dated 18.07.1985 intimating all concerned that

employees of NCERT, who had earlier opted for the CPF Scheme, may exercise their option before 06.12.1985 to switch over to the Pension Scheme and such option once exercised will be treated as final.

4. Before his retirement, the Respondent claims to have applied on 27.02.1984 to change over from the CPF Scheme to the Pension Scheme. The said request for change over from the CPF Scheme to the Pension Scheme was rejected on 23/26.06.1989. The respondent filed an application before the Rajasthan Non-Government Education Tribunal, Jaipur (for short 'the Tribunal') in the year 1995, seeking permission to opt for the Pension Scheme. By order dated 02.11.1995, the Tribunal relying on the decision of this Court in *Subramaniam v. Chief Personnel Officer, Central Railways, Ministry of Railways* (AIR 1995 SC 983) directed the appellant to declare the respondent as entitled to the benefits of the Pension Scheme with effect from the date of his retirement and fix his pension accordingly. The appellant challenged the order of the Tribunal before the High Court in Civil Writ Petition No.1447 of 1997 which was dismissed by the learned Single Judge of the High Court by order dated 02.08.2005. The appellant then filed Civil Special Appeal (Writ) No.898 of 2005 which was also dismissed by the Division Bench of the High Court by the impugned order.

5. Learned counsel for the appellant submitted that the Tribunal, the learned Single Judge of the High Court and the Division Bench of the High Court have all relied on the decision of this Court in *R. Subramaniam v. Chief Personnel Officer, Central Railways, Ministry of Railways* (AIR 1995 SC 983 = (1996) 10 SCC 72) which was rendered on the peculiar facts of that case. He submitted that a Constitution Bench of this Court in *Krishena Kumar, etc. v. Union of India & Ors.* [(1990) 4 SCC 207] has clearly held that employees who opt for the CPF Scheme and employees who opt for the Pension Scheme fall into two distinct classes and once an employee opts within the cut-off date to be under the CPF Scheme, he cannot later

on make a request to switch over to the Pension Scheme. He submitted that the decision of the Constitution Bench of this Court in *Krishena Kumar* (supra) has subsequently been followed in *V.K. Ramamurthy v. Union of India & Anr*. [(1996) 10 SCC 73] and Union of India & Ors. v. Kailash [(1998) 9 SCC 721] and in these subsequent decisions this Court has explained that the decision of this Court in *R. Subramaniam* (supra) was rendered on the particular facts of that case. He further submitted that in any case it will be clear from the language of the O.M. dated 06.06.1985 which was adopted by the NCERT that the option to switch over from the CPF Scheme to the Pension Scheme was available to only those employees who were in service on 31.03.1985 and were to retire from service on or after 31.03.1985 and not to the appellant who was not in service on 31.03.1985 having retired on 31.07.1984.

6. Learned counsel for the respondent, on the other hand, supported the orders of the Tribunal, the learned Single Judge of the High Court and the Division Bench of the High Court and relied on the decision of this Court in *R. Subramaniam* (supra).

7. We have carefully perused the decision of this Court in *R. Subramaniam* (supra) on which reliance has been placed by the Tribunal, the learned Single Judge and the Division Bench of the High Court as well as learned counsel for the respondent and we find that in that case the Central Administrative Tribunal, Bombay, by its order dated 11.11.1987 had directed that Railway employees who had indicated their option in favour of Pension Scheme either at any time while in service or after their retirement and who then desired to opt for the Pension Scheme should be given the benefit of the Pension Scheme. This order dated 11.11.1987 of the Central Administrative Tribunal was challenged by the Union of India in a Special Leave Petition, but the Special Leave Petition was dismissed and a Review Petition was also dismissed by this Court. When the matter came before this Court for the second time in *R. Subramaniam* (supra) this Court held that the Union

of India cannot resist the claim of R. Subramaniam. It is thus clear that in *R. Subramaniam* (supra) the claim of the employee had to be allowed by this Court because in an earlier order, the Central Administrative Tribunal had allowed the claim of the railway employees to switch over to the Pension Scheme and the order of the Central Administrative Tribunal had become final on the dismissal of the Special Leave Petition and the Review Petition by this Court. The facts of this case are entirely different. There is no such earlier order of the Tribunal or a Court allowing the claim of the respondent to switch over from the CPF Scheme to the Pension Scheme, which had become final. The Tribunal, the learned Single Judge and the Division Bench of the High Court were thus not right in relying on the decision of this Court in *R. Subramaniam* (supra) in allowing the claim of the respondent to switch over from the CPF Scheme to the Pension Scheme.

8. We may now consider whether dehors the decision of this Court in *R. Subramaniam* (supra) the respondent could be allowed to opt for the Pension Scheme having earlier opted for the CPF Scheme while in service. Admittedly, the respondent while he was in service of NCERT had opted for the CPF Scheme way back in 1977 and on his retirement, he had availed the benefits of the CPF Scheme. This Court has held in *Krishena Kumar, etc. v. Union of India & Ors., V.K. Ramamurthy v. Union of India & Anr. and Union of India & Ors. v. Kailash* (supra) that once an employee has opted for the CPF Scheme, his exercise of option was final and he is not entitled to change over to the Pension Scheme because the two schemes are entirely different. It, however, appears that the Government in the Ministry of Personal and Training by the O.M. dated 06.06.1985 gave an opportunity to Central Government employees who had earlier opted for the CPF Scheme to opt for the Pension Scheme. The relevant portion of the O.M. dated 06.06.1985 is extracted hereinbelow:-

"… In the light of these changes, the President is now

pleased to decide that Central Government employees who have retained the Contributory Provident Fund benefits in terms of rule 38 of the Contributory Provident Fund Rules (India), 1962 or in terms of any other orders issued in this behalf, may be allowed another opportunity to opt for the Pension Scheme as laid down in the Central Civil Services (Pension) Rules, 1972. The option is open to those Government employees who were in service on the 31st March, 1985 and retiring from service on or after that date. The option should be exercised within a period of six months from the date of issue of this O.M. Option once exercised shall be final."

The O.M. dated 06.06.1985 has been adopted by the NCERT in its Circular dated 18.07.1985. It will be clear from the language of the O.M. dated 06.06.1985 that the option to an employee to switch over from the CPF Scheme to the Pension Scheme was open to only those employees who were in service on 31.03.1985 and who were retiring on or after 31.03.1985. By 31.03.1985, admittedly, the respondent had retired, his date of retirement being 31.07.1984. He is, therefore, not entitled to fresh option to switch over from the CPF Scheme to the Pension Scheme.

9. For these reasons, we set aside the orders of the Tribunal, the learned Single Judge of the High Court and the Division Bench of the High Court and allow this appeal. There shall be no order as to costs.

B.B.B. Appeal allowed.

COMMISSIONER OF POLICE, DELHI & ORS.

v.

JAI BHAGWAN

(Civil Appeal No. 4213 of 2011)

MAY 10, 2011

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

Service Law:

Dismissal – Gross misconduct – Charges of demand and receipt of illegal gratification, against respondent-police constable – Departmental enquiry – Consequent dismissal of respondent – Challenge to – High Court ordered re-instatement of respondent, but without any back wages – On appeal, held: No direct and reliable evidence was produced by the appellants to prove and establish that the respondent demanded and received illegal gratification – Also, the complainant was not examined as witness in the departmental enquiry and, therefore, there was no opportunity to cross-examine her and, therefore, there was a violation of Rule 16(iii) of the Rules – The case of the appellants was a case of no evidence at all – In the facts and circumstances of this case, Supreme Court not only re-iterated the order passed by the High Court but further directed that he not be given any sensitive posting and be kept under watch – Delhi Police Act, 1978 – s.21 – Delhi Police (F & A) Rules, 1980 – Rule 16 (iii) – Violation of – Doctrines/Principles – Principle of natural justice.

The respondent was working as a Constable in Delhi Police and posted at the IGI airport, New Delhi at the X-Ray Machine Belt. It was alleged that while being so posted, the respondent extorted Rs.100/- by way of illegal gratification from one 'R' during the course of security

check of passengers. 'R' purportedly made a complaint to one 'N', Operations Officer of Air France who took the complainant to 'Y', a Police Inspector on duty at the Delhi Airport. It was also alleged that the complainant 'R' identified the respondent, who thereupon returned the aforesaid sum of Rs. 100/- to the complainant in the presence of 'Y, and one 'A', a Police Sub-Inspector.

In view of the allegations made against the respondent, a departmental enquiry was initiated against him and an enquiry officer was appointed, who found the respondent guilty, and consequently the disciplinary authority passed an order dismissing the respondent from service on ground of grave misconduct. The order of dismissal was upheld by the appellate authority as well as by the Tribunal. Respondent thereafter filed writ petition in the High Court. The High Court held that the case of the appellants was a case of no evidence and that there was violation of Rule 16 (iii) of the Delhi Police (F &A) Rules, 1980 and accordingly ordered the reinstatement of respondent in service but without any back wages.

In the instant appeal, it was contended by the appellants that the High Court was not justified in setting aside the order of dismissal passed against the respondent.

Dismissing the appeal, the Court

HELD: 1.1. During the departmental enquiry proceedings, 'Y' and 'A' only deposed that Rs. 100/- was returned by the respondent to the complainant 'R'. During the course of enquiry proceedings no witness was examined on behalf of the appellants to prove and establish by tendering any direct, cogent and reliable evidence that the aforesaid amount of Rs. 100/- was received by the respondent by way of illegal gratification from anyone. [Para 12] [566-D-E]

1.2. Strangely the two persons, namely, 'Y' and 'A', on the basis of whose statement the present case was initiated, have stated that they have not witnessed/seen respondent taking any money from the complainant and that they have only witnessed the fact of respondent returning money to the complainant. Besides these two persons, there must have been many other persons including police officers on duty near about the X-Ray machine belt but none of them was cited and examined as witness during the departmental proceedings to prove and establish that such money as alleged was received by the respondent as illegal gratification. The place where security check was carried out was an open place and there must have been many other persons, besides police officers, present at that time but none of them has been examined during the departmental proceedings against the respondent to prove the alleged fact of demand and receipt of illegal gratification by him. Although there is some evidence that an amount of Rs. 100/- was returned by the respondent to the complainant but there is no such direct and reliable evidence produced by the appellants in the departmental proceedings which clearly prove and establish that the respondent demanded and received an illegal gratification of the said denomination. It seems that the proof of taking such illegal gratification has been drawn from the evidence of returning of Rs. 100/- to the complainant by way of a link up. [Paras 13 and 14] [566-F-H; 567-A-C]

1.3. It also seems quite impracticable to presume that in the presence of so many passengers, the respondent could have extorted money. The allegation of receiving Rs. 100/- as illegal gratification is framed on suspicions and possibilities while trying to link it up with the instance of returning back of Rs. 100/- by the respondent to the complainant. There are many other shortcomings in the

entire investigation and the enquiry like the statement of 'R' was not recorded by the Inspector and the Inspector also did not take down in writing and also attest the complaint made by her. The statement of 'N' was also not recorded by the Inspector nor did the Inspector seize Rs. 100/- note nor noted down its number. 'N' was also not examined during the course of departmental proceedings. Non-examination of the complainant and 'N' during the departmental proceeding has denied the respondent of his right of cross-examination and thus caused violation of Rule 16 (iii) of the Delhi Police (F & A) Rules, 1980. [Para 15] [567-E-G]

1.4. In the absence of a definite/clear proof supporting the case of the appellants, it is difficult to draw a finding of taking illegal gratification by the respondent from the complainant. Therefore, as rightly held by the High Court the present case was a case of no evidence and there was a violation of Rule 16 (iii) of the Delhi Police (F &A) Rules, 1980. Albeit there could be a needle of suspicion pointed towards the respondent. However, suspicion cannot take the place of proof. In the facts and circumstances of this case, this Court not only re-iterates the order passed by the High Court that the respondent on reinstatement would not be paid any back-wages or arrears of wages for the period during which he was out of service but also that he would not be given any sensitive posting and he shall be kept under watch. [Paras 16, 17, 18 and 19] [567-H; 568-A-E]

Kuldeep Singh v. Commissioner of Police **AIR 1999 SC 677 – referred to.**

Case Law Reference:

AIR 1999 SC 677	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4213 of 2011.

From the Judgment & Order dated 20.1.2010 of the High Court of Delhi at New Delhi in W.P. (C) No. 3591 of 2001.

Vimla Sinha, D.L. Chidananda, Anil Katiyar for the Appellants.

A.K. Botha, Ravi Kant Jain, Vibhuti Sushant Gupta, Kailash Chand 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 20.01.2010 passed by the High Court of Delhi in Civil Writ Petition No. 3591 of 2001, whereby the High Court allowed the Writ Petition filed by the respondent herein and set aside the order dated 15.01.2001 passed by the Central Administrative Tribunal.

3. The facts leading to the filing of the present case are that the respondent herein, at the relevant point of time, was working as a Constable in Delhi Police and was posted at the IGI airport, New Delhi at the X-Ray Machine Belt. An allegation was made by one Mrs. Ranjana Kapoor that while being so posted there the respondent extorted Rs. 100/- by way of illegal gratification from her during the course of security check of passengers. It is alleged that Mrs. Kapoor made a complaint to one S.P. Narang, Operations Officer of Air France who took the complainant to O.P. Yadav, Inspector, Delhi Police on duty at the Delhi Airport. It is also alleged that the complainant identified the respondent, who thereupon returned the aforesaid sum of Rs. 100/- to the complainant in the presence of O.P. Yadav, Inspector, and Arjun Singh, Sub-Inspector, who were also present at that time.

4. In view of the aforesaid allegations made against the respondent, a departmental enquiry was initiated against him

and a chargesheet was drawn up with a charge to the following effect: -

"Charge:

You, Ct. Jai Bhagwan No. 770/A are hereby charged that on the night intervening 6/7.3.95 while performing duty on Belt at X-Ray machine at gate No. 7, 8 and 9 in Shift A. NITC had extorted Rs. 100/- as an illegal gratification from Mrs. Ranjana Kapoor during the course of Security Check of passengers of flight No. AF-177. She made a complaint of this incident to Shri P.S. Narang Operations Officer of Air France, who introduced her to Shri O.P. Yadav Inspr. She handed over a complaint to the Inspector and identified you, Ct. Jai Bhagwan No. 770/A as you had accepted Rs. 100/- from her which was later on returned to her by you in the presence of Inspr. O.P. Yadav and SI Arjun Singh.

The above act on the part of you, Ct. Jai Bhagwan No. 770/A amounts to gross misconduct and unbecoming of a police officer which renders you liable to be punished Under Section 21 of D.P. Act, 1978."

5. Pursuant to the initiation of the aforesaid enquiry, an enquiry officer was appointed, who examined four witnesses produced on behalf of the appellants. Two witnesses were also produced on behalf of the respondent. After recording evidence and after appreciating the said evidence as also the written defence statement of the respondent a report was submitted by the enquiry officer finding the respondent guilty of the charge drawn up against him.

6. With the aforesaid records and the findings, matter was placed before the disciplinary authority who directed that any representation as against the findings recorded by the enquiry officer could be submitted by the respondent. Pursuant to the same, the respondent submitted a detailed representation on

30.10.1995. The disciplinary authority after going through the entire records passed an order dated 15.11.1995 dismissing the respondent from service. It was stated in the said order passed by the disciplinary authority that after considering the evidence on record, gravity of misconduct and overall facts / circumstances of the case it is proved that the respondent misused his official position and involved himself in corrupt practices / malpractices of illegal gratification and, therefore, he is not a fit person to be retained in the police force, consequent upon which the punishment of dismissal was awarded to the respondent.

7. Being aggrieved by the aforesaid order passed by the disciplinary authority the respondent filed an appeal before the appellate authority which was also dismissed vide its order dated 19.01.1996. Consequently, the respondent filed a revision which also came to be dismissed. Feeling still aggrieved the respondent filed an original application before the Central Administrative Tribunal [for short "the Tribunal"] which was registered as OA No. 1755/1997. By order dated 15.01.2001 the Tribunal dismissed the aforesaid original application as against which the respondent filed a Writ Petition in the High Court of Delhi. By the impugned judgment and order passed on 20.01.2010 the High Court allowed the Writ Petition filed by the respondent. In the aforesaid judgment and order the High Court made following observations: -

"4. Undoubtedly, the charges of misuse of position and extortion are very serious charges. However, before a person is fastened with the punitive liability of charges of corruption / extortion, a proper inquiry, following the principles of natural justice has to be conducted.

5. It is well settled that the High Court or the Central Administrative Tribunal will not interfere with the findings of fact recorded at the domestic enquiry, however, if the case is a case of no evidence or the finding is highly perverse or improbable then it is the duty of the High Court

and the Central Administrative Tribunal to go into the merits of the case....."

And while referring to the decision in the case of *Kuldeep Singh v. Commissioner of Police* reported in AIR 1999 SC 677 the High Court held that the case of the appellants herein is a case of no evidence and that there is violation of Rule 16 (iii) of the Delhi Police (F &A) Rules, 1980 (for short "the Rules") and ordered the reinstatement of respondent in service but without any back wages.

8. As against that order of the High Court appellants have filed the present appeal, in which, notice was issued and upon service of the said notice, the respondent entered appearance and, therefore, we heard the learned counsel appearing for the parties and also perused the materials on record.

9. The learned counsel appearing for the appellants submitted that there was enough evidence on record to find the respondent guilty of the charge against him. In support of the said contention reference was made to the decision of the disciplinary authority as also to the findings of the enquiry officer. It was also submitted that Inspector, O.P. Yadav and S.I. Arjun Singh stated in clear terms that they had seen the respondent returning the aforesaid amount of Rs. 100/- to the complainant. It was also submitted that there was no violation of Rule 16(iii) in the present case and, therefore, High Court was not justified in setting aside the order of dismissal passed against the respondent.

10. The learned counsel appearing for the respondent, however, while refuting the aforesaid contentions submitted that the Mrs. Ranjana Kapoor, complainant of the case, was not examined as witness in the departmental enquiry and, therefore, there was no opportunity to cross-examine her and, therefore, there is a violation of Rule 16(iii) of the Rules. It was also submitted that so far as the receiving of illegal gratification by the respondent is concerned, the case of the appellants is

a case of no evidence at all. In this regard support was also taken by the counsel appearing on behalf of the respondent from the statements of the Nirmala Devi [DW-1].

11. In the light of the aforesaid submissions we have perused the records. The complainant Mrs. Ranjana Kapoor complained about the said incident to P.S. Narang, Operations Officer of Air France, who took the complainant to O.P. Yadav, Inspector, Delhi Police on duty at the Delhi Airport and there she lodged the complaint to Inspector-O.P. Yadav that the respondent has extorted illegal gratification from her amounting Rs. 100/- during the course of security check of passengers. The records disclose that thereupon Inspector-O.P. Yadav along with complainant and P.S. Narang went to the place of the security check where, it is stated that, the respondent gave Rs. 100/- to the complainant in the presence of Arjun Singh, S.I..

12. O.P. Yadav, Inspector, and Arjun Singh, S.I., during the departmental enquiry proceedings have only deposed that Rs. 100/- was returned by the respondent to the complainant. During the course of enquiry proceedings no witness was examined on behalf of the appellants to prove and establish by tendering any direct, cogent and reliable evidence that the aforesaid amount of Rs. 100/- was received by the respondent by way of illegal gratification from anyone.

13. In the present case the strange thing is that the two persons, namely, O.P. Yadav and Arjun singh, on the basis of whose statement present case was initiated, have stated that they have not witnessed/seen respondent taking any money from the complainant and that they have only witnessed the fact of respondent returning money to the complainant. Even otherwise, besides these two persons, there must have been many other persons including police officers on duty near about the X-Ray machine belt but none of them was cited and examined as witness during the departmental proceedings to prove and establish that such money as alleged was received by the respondent as illegal gratification. The place where

security check was carried out was an open place and there must have been many other persons, besides police officers, present at that time but none of them has been examined during the departmental proceedings against the respondent to prove the alleged fact of demanding and receiving illegal gratification by him.

14. In the present case, although there is some evidence that an amount of Rs. 100/- was returned by the respondent to the complainant but there is no such direct and reliable evidence produced by the appellants in the departmental proceedings which clearly prove and establish that the respondent demanded and received an illegal gratification of the said denomination. It seems that the proof of taking such illegal gratification has been drawn from the evidence of returning of Rs. 100/- to the complainant by way of a link up.

15. It also seems quite impracticable to presume that in the presence of so many passengers, the respondent could have extorted money. The allegation of receiving Rs. 100/- as illegal gratification is framed on suspicions and possibilities while trying to link it up with the instance of returning back of Rs. 100/- by the respondent to the complainant. There are many other shortcomings in the entire investigation and the enquiry like the statement of Mrs. Ranjana Kapoor was not recorded by the Inspector and the Inspector also did not take down in writing and also attest the complaint made by her. The statement of S.P. Narang was also not recorded by the Inspector nor did the Inspector seize Rs. 100/- note nor noted down its number. Mr. Narang was also not examined during the course of departmental proceedings. Non-examination of the complainant and P.S. Narang during the departmental proceeding has denied the respondent of his right of cross-examination and thus caused violation of Rule 16 (iii) of the Delhi Police (F & A) Rules, 1980.

16. In the absence of such a definite/clear proof supporting the case of the appellants it is difficult to draw a finding of taking

illegal gratification by the respondent from the complainant. Therefore, as rightly held by the High Court the present case is a case of no evidence.

17. Therefore, in view of the facts and circumstances of the present case at hand we have no hesitation to hold that the view taken by the High Court does not suffer from any infirmity and that the present is a case of no evidence and that there is a violation of Rule 16 (iii) of the Delhi Police (F &A) Rules, 1980.

18. Albeit there could be a needle of suspicion pointed towards the respondent. However, suspicion cannot take the place of proof and, therefore, we find no merit in this appeal which is hereby dismissed.

19. However, in the facts and circumstances of this case we not only reiterate the order passed by the High Court that the respondent on reinstatement would not be paid any back-wages or arrears of wages for the period during which he was out of service but we also observe that he would not be given any sensitive posting and he shall be kept under watch.

B.B.B. Appeal dismissed.