M/S. L.K. TRUST
v.
EDC LTD. & ORS.
(Civil Appeal Nos. 4214-4215 of 2011)

MAY 10, 2011

[J.M. PANCHAL AND CYRIAC JOSEPH, JJ.]

Transfer of Property Act, 1882 – ss. 60 and 54 – Right of redemption – Nature and scope of – When can be exercised and when extinguished – Held: Right of redemption is a statutory right – A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt on the due date – Any provision inserted to prevent, evade or hamper redemption is void – Right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists – It stands extinguished on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument or by decree of a court – Dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists – On facts, no sale/transfer worth the name of the mortgaged property had taken place in favour of the contender of the mortgaged property – There was no concluded contract between the contender and the mortgagee – Thus, it cannot be said that that the mortgagor had lost its right to redeem the mortgaged property or that by the acts of the contender for the mortgaged property and mortgagee, the right of the mortgagor to redeem the property was extinguished – Acceptance of proposal of the mortgagor by the mortgagee to permit it to redeem the property cannot be said to be illegal in any manner – The statutory right of redemption available to the mortgagor was never lost – Mortgage.

Constitution of India, 1950 – Article 136 – Special Leave Petition filed against the order passed in the application filed in writ petition by which the status-quo order granted earlier was modified as well as SLP filed against the order passed in another writ petition permitting withdrawal of the writ petition – Maintainability of – Held: Petitions filed under Article 136 should not be rejected on the ground of availability of alternative remedy nor it should be rejected on the ground that SLP is filed against order permitting withdrawal of writ petition.

Respondent No. 3 company took loan of Rs. 7.00 crores from the respondent No. 1 company against mortgage of the property. It also took loan from respondent No. 2-State Bank of India. Respondent no. 3 was unable to repay the loan amount and respondent No. 1 attached the property of respondent No. 3. Thereafter, respondent No. 1 made several attempts to auction the property. By private negotiation respondent No. 1 accepted the proposal of appellant-trust to sell the said property for a sum of Rs.12.99 crores and informed respondent No. 3 as also gave them three days time to bring in matching offers. Respondent No. 3 made an offer through third party 'C' for Rs. 14 crores but respondent No. 1 did not consider the same. Aggrieved, respondent No. 3 filed Writ Petition No. 19 of 2006. The appellant was impleaded in the petition. During the pendency of the writ petition, the appellant trust issued cheques to respondent No. 1, purporting to be in full payment. The High Court dismissed the writ petition holding that there was a concluded contract between respondent No. 1 and the appellant. Thereafter, the unit holders in the hotel project of respondent No. 3 filed Writ Petition No. 124 of 2006 challenging the action of respondent No. 1 in selling the property to the appellant-trust. They offered to pay higher amount than offered by the appellant-trust and the same was conveyed to the respondent No. 1.

Aggrieved, against the dismissal of the Writ Petition No. 19 of 2006, respondent No. 3 filed Special Leave Petition. This Court rejected the highest offer made by respondent No. 3 through third party and dismissed the SLP on August 24, 2006. The Board of Directors of respondent No. 1 were not informed that the appellant-trust had defaulted in making the balance payment and as such they rejected the offer made by respondent No. 3 through 'C'. Thereafter, the Board of Directors noted that the cheques issued by the appellant-trust were dishonoured and resolved to accept the higher bid of offered by 'C' but this decision of Board of Directors of the respondent No. 1 was not brought to the notice of this Court during the course of hearing of the aforesaid Special Leave Petition.

After the dismissal of SLP, respondent No. 3 addressed a letter to respondent No. 1 and exercised its right of redemption. Respondent No. 3 made certain payments. Thereafter, respondent No. 1 company acknowledged the right of redemption of mortgage of respondent No. 3 and stated that it was in the process of implementing the Supreme Court orderdated August 24, 2006, thus, respondent No. 3 could not be given further concession for extension of time to exercise the right of redemption. Respondent no. 3 showed its bonafide and offered to deposit Rs.18.15 crores in the State Bank of India which was permitted by the High Court in Writ Petition No. 124 of 2006.

Meanwhile, the Advocate General opined that there was a concluded contract between respondent No. 1 and the appellant-trust and the right of respondent No. 3 of redemption stood extinguished by its conduct as envisaged under Section 60 of the Transfer of Property Act, 1882. Acting thereupon, the Board of Directors of respondent No.1 passed a resolution that the respondent

No. 1 would conclude the sale transaction with the appellant-trust and go ahead with the conveyance and delivery of possession in favour of the appellant-trust. Aggreived, respondent No. 3 filed W.P. No. 601 of 2006 before the High Court praying for writ of mandamus against the respondent Nos. 1 and 2 *inter alia* directing them to permit respondent No. 3 to exercise the rights of redemption of mortgaged property. The High Court tagged W P (C) No. 601 of 2006 with W P (C) No. 124 of 2006 and directed the parties to maintain *status quo*. Thereafter, respondent No. 1 in its Board Meeting passed a resolution dated February 20, 2008 to the effect that the offer of the respondent No. 3 to redeem the mortgage was favourably accepted provisionally, subject to the approval of the High Court in writ petitions pending before the High Court. Respondent no. 1 then filed Misc. Civil Application No. 165 of 2008 in W P No. 601 of 2006 *inter alia* praying for appropriate orders directing approval of the Board resolution dated February 20, 2008. The High Court by order dated April 7, 2008 held that the order of *status quo* passed by the High Court shall not come in the way of respondent Nos. 1 and 2 in considering the proposal of respondent No. 3. Thereafter, the respondent No. 1 passed a resolution on April 8, 2008, accepting the offer of the respondent No. 3 to redeem the mortgage. On April 9, 2008, the High Court permitted respondent No. 3 to withdraw the writ petition. The High Court by an order dated April 9, 2008, also dismissed the Writ Petition No. 124 of 2006 filed by unit holders of the hotel project as infructuous. Therefore, the instant appeals are filed against the orders dated April 7, 2008 passed in Misc. Civil Application No. 165 of 2008 in Writ Petition No. 601 of 2006 and order dated April 9, 2008 in Writ Petition No. 601 of 2006.

Dismissing the appeals and the contempt petition, the Court

HELD: 1.1 The petitions filed under Article 136 of the Constitution should not be rejected on the ground of availability of alternative remedy nor it should be rejected on the ground that the special leave petition is filed against order permitting withdrawal of writ petition. Right from the beginning, the case of the appellant is that there was a concluded contract between the appellant and the respondent No. 1 and, therefore, the respondent No. 1 could not have accepted proposal of the respondent No. 3 to redeem the mortgage executed by the respondent No. 3. This issue was raised by the appellant in Writ Petition No. 601 of 2006. Without adjudicating the said claim the High Court permitted the respondent no. 3 to withdraw the petition filed by them. Also it is the case of the appellant that in view of decision of this Court dated August 24, 2006 rendered in Special Leave Petition (Civil) No.4957 of 2006, the rights of the parties were crystallized and, therefore, permission to withdraw the petition unconditionally should not have been granted to respondent No. 3. In Writ Petition No. 601 of 2006 filed by the respondent No. 3 and another against respondent No. 1 and others, the prayer was to issue a Writ of Mandamus directing respondent No.1 to permit the respondent Nos. 3 and 4 to exercise the right of redemption of mortgaged property and to direct the respondent Nos. 1 and 2 to execute the re-conveyance and release the documents of title deposited with the respondent No.1. The interim relief claimed by the respondent No. 3 in the writ petition was to restrain the respondent No.1 from proceeding to finalize the sale of the mortgaged property in favour of the appellant. The record shows that by an order dated December 18, 2006 the High Court had directed the parties to maintain *status quo.* By the impugned order dated April 7, 2008 passed in M.C.A. No. 165 of 2008 filed in W P No. 601 of 2006, the High Court has modified the same. This modification of interim relief would have certainly adversely affected the claim of the appellant that

in view of concluded contract between the appellant and the respondent No. 1, the respondent No. 1 could not have been permitted to consider the claim of the respondent No. 3 for redemption of the mortgaged property and, therefore, Special Leave Petition under Article 136 of the Constitution would certainly be maintainable against that order. [Para 14] [594-A-H; 595-A-C]

1.2 A fair and reasonable reading of the judgment dated August 24, 2006 in SLP (Civil) No. 4957 of 2006 makes it evident that in fact this Court did not record any finding that a concluded contract had come into existence between the appellant and the respondent No. 1. It was noticed that on December 12, 2005 the offer made by the appellant was accepted by the respondent No.1 and the same was communicated to the appellant incorporating the relevant conditions for the sale. It is nobody's case that those conditions, which were stipulated, were complied with by the appellant nor any such finding was recorded by this Court. It is relevant to notice is that in the operative part of the judgment, this Court observed that if the respondent No.3 makes the payment as promised within such time as might be granted by respondent No.1 and fulfills the conditions of sale, that might be the end of the matter which means that at the time when the judgment was delivered, this Court proceeded on the footing that there was no concluded contract between the appellant and respondent No. 1. Further it was stipulated by this Court that if the appellant failed to do so it was always open to respondent No.1 to take necessary steps to safeguard the interests which included *inter alia* the consideration of other offers made by the other parties. Such weighty observations would not have been made by this Court if this Court had come to the conclusion that there was a concluded contract of sale between the appellant and the respondent No. 1.

This Court had never recorded any finding to the effect that sale of the property mortgaged by respondent No.3 was concluded between the appellant and the respondent No.1 and the Court was essentially concerned with exercise of discretion under Article 136 of the Constitution. Further the question whether the respondent No.3 had subsisting right to redeem the property was never gone into by the Court in the said special leave petition because it was never raised either before the High Court or before this Court in the said matter. [Paras 16, 17] [598-E-H; 599-A-E]

2.1 In India it is only on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption stands extinguished. Further it is not the case of the appellant that a registered Sale Deed had been executed between the appellant-trust and the respondent No. 1 pursuant to the Resolution passed by the respondent No. 1 and, therefore, in terms of Section 54 of the Transfer of Property Act 1882 no title relating to the disputed property had passed to the appellant at all. [Para 21] [602-C-D]

Narandas Karsandas vs. S.A. Kamtam **(1977) 3 SCC 247: 1977 (2) SCR 341;** *Gajraj Jain vs. State of Bihar and Ors.* **(2004) 7 SCC 151: 2004 (2) Suppl. SCR 677 – referred to.**

2.2 No transfer of mortgaged property had taken place in favour of the appellant and, therefore, the statutory right of redemption available to the respondent No. 3 was never lost. The record of the case indicates that the matter had rested at the level of passing some resolution by the respondent No. 1 Company in favour of the appellant and nothing more than that. If the appellant was keen to complete its title over the suit properties, nothing prevented it from instituting

appropriate proceedings to compel the respondent No. 1 to execute a sale deed in its favour and getting it registered, but admittedly no such step was taken by the appellant. By letters dated October 9, 2006 and September 27, 2006, the respondent No. 1 had already accepted and acknowledged the right of the respondent No. 3 to redeem the mortgaged property on the payment of amount due. Further by filing affidavit, the respondent No. 2, State Bank of India, had declared that it had accepted the proposal of the respondent No. 3 for redemption of mortgage on payment of Rs.12.87 crores to the respondent No. 1 and Rs.9.18 crores to the State Bank of India. However, after receipt of the opinion of the Advocate General, the respondent No. 1 had drastically changed its stand without considering the subsisting right of the respondent No. 3 to redeem the mortgaged property and was inclined to proceed with completion of sale transaction in favour of the appellant. It was at that stage that the respondent No. 3 had to file Writ Petition No. 601 of 2006 asserting its right to redeem the mortgaged property in which in fact no relief is granted to the respondent No. 3. The issues in the earlier proceedings were quite different from those raised in Writ Petition No. 601 of 2006. [Para 22] [603-H; 604-A-H]

Mohanlal Goenka vs. Benoy Krishna Mukherjee and Ors. **(1953) SCR 377 – Distinguished.**

2.3 The mortgagor under Indian law is the owner who had parted with some rights of ownership and the right of redemption is the right which he exercises by virtue of his residuary ownership to resume what he has parted with. In India this right of redemption, however, is statutory one. A right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a

second suit for redemption so long as the mortgage subsists. This right cannot be extinguished except by the act of parties or by decree of a court. The right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by contract between the parties, by a merger or by statutory provision which debars the mortgager from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper redemption is void. Having regard to the facts of the instant case, it is difficult to hold that the respondent No. 3 had lost its right to redeem the mortgaged property or that by the acts of the appellant and the respondent No. 1, the right of the respondent No. 3 to redeem the property was extinguished. No sale worth the name of the mortgaged property had taken place in favour of the appellant because there is no agreement of sale on the record of the case nor the facts indicate that the same was registered. The right to redeem the mortgage property which was available to the respondent No.3 had never extinguished at all and, therefore, the acceptance of proposal of the respondent No. 3 by the respondent No. 1 to permit it to redeem the property dated April 8, 2008 cannot be said to be illegal in any manner. [Paras 23 and 24] [605-A-H; 606-A-B]

Jaya Singh D. Mhoprekar and another vs. Krishna Balaji Patil and Anr. **(1985) 4 SCC 162: 1985 (2) Suppl. SCR 308 – relied on.**

2.4 The submission that reliance placed on Clause 16 of the General Terms and Conditions by the respondent No.1 is misconceived and untenable in view of decision of this Court in earlier round of litigation, has no substance. This Court while delivering judgment dated August 24, 2006 in Special Leave Petition (Civil) No. 4957 of 2006 was not called upon and in fact did not consider the effect of Clause 16 of the General Terms and Conditions. The record shows that Clause 16 of the General Terms and Conditions was expressly accepted by the appellant. The Resolution dated December 5, 2005 read with the Agenda Note records that the appellant had agreed to follow the General Terms of Auction. [Para 25] [606-C-E]

2.5 The record of the case shows that the actions of the Corporation-respondent No.1 have been entirely in accordance and consistent with the provisions of Clause 16 of the General Terms and Conditions that the Corporation would execute transfer documents only after entire accepted offer amount is received. When the appellant-trust wrote a letter dated August 24, 2006 to the respondent No.1 and asked for possession of the property and to complete other legal formalities, the respondent No. 1 had informed the appellant by its letter dated September 27, 2006 making it clear that the respondent No. 1 was in the process of proceeding further with the sale transaction. On September 28, 2006 the respondent No.1 had informed the appellant that the borrower company had approached it for redemption of the mortgage. On October 9, 2006 the respondent No.1 had informed the respondent No. 3 that they were in the process of implementing the judgment of this Court in Special Leave Petition (Civil) No.4957 of 2006 dated August 24, 2006 and, therefore, all legal formalities were required to be completed with respect to the transfer of the property in its name in accordance with the law. The

resolution dated November 24, 2006 on which the appellant had placed reliance makes it clear that the transactions would have to be concluded by execution of the conveyance and delivery of possession in favour of the appellant, which never happened. The record does not indicate that the appellant had filed any proceedings either to obtain specific performance of the agreement to sell entered into between it and the respondent No. 1 nor the appellant had initiated any proceedings for obtaining possession of the property in question. If in fact the contract had been concluded between the parties as is claimed by the appellant, the appellant would not have failed to obtain possession of the property after execution of registered deed in its favour. These facts, thus, indicate that there was no concluded contract between the appellant and the respondent No.1. [Para 26] [606-H; 607-A-H]

2.6 It cannot be ignored the fact that on September 27, 2006, the respondent No. 3 had deposited cheques of Rs.9.25 crores in favour of the first respondent and Rs.5.90 crores in favour of the respondent No. 2. The bonafide of the first respondent can be seen from the fact that these cheques were not immediately encashed, and as on January 2007, the total amount lying with the first respondent and the respondent No. 2 paid by the respondent No.3 was Rs.24.15 crores as against the redemption amount of Rs.18.40 crores. As the respondent No.3 had made payment to redeem the property which was accepted by respondent No.1 and as respondent No.1 had agreed to permit the respondent No.3 to redeem the property a prayer was made to permit respondent No.3 to withdraw Writ Petition No. 601 of 2006 which can neither be regarded as arbitrary nor as illegal nor contrary to the decision of this Court dated August 24, 2006 rendered in Special Leave Petition (Civil) 4957 of 2006. Similarly, as the grievance of the

respondent No.3 did not survive, the modification of the order of *status quo* granted earlier at the instance of the respondent No. 3 who was petitioner in the writ petition, also cannot be held to be bad in law because if the *statusquo* order had not been modified the respondent No.1 would not have been in a position to accept the offer of respondent No.3 to permit it to redeem the property which would have been in derogation of right of the respondent No. 3 to redeem the property as recognized by Section 60 of the Transfer of Property Act. Thus, there is no substance in the challenge to the two orders dated April 7, 2008 modifying the order of *status quo* and order dated April 9, 2008 permitting the respondent No.3 to withdraw W P No. 601 of 2006 warranting inference of this Court in appeals arising by grant of special leave filed under Article 136 of the Constitution. Therefore, the two appeals which are directed against the said orders respectively have no substance. [Paras 27 and 28] [608-A-H]

2.7 The appellant-trust has filed a Contempt Petition against the respondents for willfully disobeying and acting against the order passed by this Court on August 24, 2006 in Special Leave Petition (Civil) No.4957 of 2006. The exercise of right of redemption in accordance with Section 60 of the Transfer of Property Act was neither a subject matter of Writ Petition No. 19 of 2006 nor it was subject matter of Special Leave Petition (Civil) No.4957 of 2006 which is clear from the enumeration of the main points by the High Court in Writ Petition No. 19 of 2006, which was whether there was a concluded contract. This Court had never prohibited the respondent Nos. 3 and 4 from exercising right of redemption nor restrained the respondent No.1 from considering the proposal of the Respondent No.3 to permit it to redeem the disputed property and had in fact expressed strongly that the respondent No. 1 should take that action which is in its

best interest. Under the circumstances the passing of resolutions by the respondent No.1 company can hardly be regarded as breach of direction given by this Court. No case is made out by the petitioner either to exercise powers under Section 12 of the Contempt of Courts Act 1971 nor any case is made out to set aside the resolutions passed by the Board of Directors of the respondent No.1 company. Therefore, the prayers made in the Contempt Petition cannot be granted. [Paras 29, 30, 31] [609-A-H; 610-A-E]

Executive Officer, Arthanareswarar Temple vs. R. Sathyamoorthy **(1999) 3 SCC 115: 1999 (1) SCR 485;** *R. Rathinavel Chettiar vs. V. Sivaraman* **(1999) 4 SCC 89: 1999 (2) SCR 313 – referred to.**

Case Law Reference:

1999 (1) SCR 485	**Referred to.**	**Para 13**
1999 (2) SCR 313	**Referred to**	**Para 13**
1977 (2) SCR 341	**Referred to.**	**Para 22**
2004 (2) Suppl. SCR 677	**Referred to.**	**Para 22**
(1953) SCR 377	**Distinguished.**	**Para 22**
1985 (2) Suppl. SCR 308	**Relied on.**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4214-4215 of 2011.

From the Judgment & Order dated 7.4.2008 of the High Court of Bombay in MCA No. 165 of 2008 and WP No. 601 of 2006.

WITH

Contempt Petition (C) No. 165 of 2008.

Dushyant R. Dave, Jaideep Gupta, Dhruv Mehta, S. Sukumaran, Ananad Sukumar, Meera Mathur, Shobhit

Chandra, Yashraj Singh, Sriram Krishna, Sarv Mitter, A.V. Rangam, Buddya A. Rangandhan, Sukumar Pattjoshi, Somesh Kr. Dubey, Rajiv Kumar, Sudarsh Menon, A.V. Rangam and K.L. Mehta and Co. for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J.1. Leave is granted in each Special Leave Petition.

2. The appeal arising from Special Leave Petition (C) No. 10334 of 2008 is directed against order dated April 07, 2008 passed by the High Court of Bombay at Goa in Misc. Civil Application No. 165 of 2008 which was filed in Writ Petition No. 601 of 2006 by which it is clarified that the order of status quo passed by the High Court vide order dated December 18, 2006 shall not come in the way of EDC Ltd., i.e., the respondent no. 1 Company herein and the State Bank of India, i.e., the respondent No. 2 herein in considering the proposal of the respondent no. 3 Company who is mortgagor and the petitioner in Writ Petition No. 601 of 2006. The appeal arising from SLP (C) No. 10335 of 2008 is directed against order dated April 9, 2008 passed by the Division Bench of the High Court of Bombay at Goa in Writ Petition No. 601 of 2006 by which the resolution passed by the respondent no. 1 EDC Ltd. on April 8, 2008 had resolved to accept the proposal of respondent no. 3 the Falcon Retreat Pvt. Ltd. for redemption of mortgage and affidavit tendered by the State Bank of India, i.e., the respondent No. 2, stating that the State Bank of India has accepted the proposal of M/s. Falcon Retreat Pvt. Ltd. for redemption of mortgage on payment of Rs.12.87 crores to EDC Ltd. and Rs.9.18 Crores to the State Bank of India, are noticed and in view of the said resolution as well as the affidavit of the State Bank of India, the respondent no. 3, who was the original petitioner, is granted leave to withdraw the petition.

3. This Court proposes to refer to certain relevant facts, which are as under:

The respondent no. 1, i.e., EDC Ltd. is a Company registered under the Indian Companies Act, 1956. Earlier it was known as the Economic Development Corporation of Goa. It is an investment company in which the State of Goa holds majority shares. The main objects of the respondent no. 1 Company, as per its Memorandum of Association, amongst others, are providing financial assistance to the industrial enterprises and enterprises carrying on other economic activities whether for starting, running, expanding, modernizing etc. and to aid, assist, initiate, promote, expedite and accelerate the economic development of the State in various spheres. The respondent no. 3 is a Private Limited Company. It is also incorporated under the provisions of the Companies Act, 1956. The respondent No. 3 company is engaged inter alia in the business of development/operation of hotel and tourism. During the years 1994 to 1999, the respondent no. 3 proposed to develop and to start hotel project in the property admeasuring approximately 28000 sq. mtrs. of Survey Nos. 142/1 and 142/1 of Revenue Village Arpora, in Taluka Bardez. For the purpose of implementing the said hotel project, the respondent no. 1 company i.e. EDC Ltd. granted term loan of Rs.7.00 crores to respondent No. 3 against mortgage of aforesaid hotel property vide agreement dated February 8, 1999. Respondent No. 2 has also granted a loan of Rs. 5 crores to the respondent No. 3 against pari pasu charge of the hotel property.

4. The record indicates that about 80 per cent of the project was completed by the middle of the year 2001 but subsequently because of global recession in the tourism and real estate business, the development of the project was severely affected and project implementation was halted. In view of this hurdle, the repayment of the loan amount became difficult resulting in arrears of installments of loan with mounting interest liability.

5. When the respondent no. 3 was not able to repay the loan amount, the respondent no. 1 company initiated coercive action for the recovery of loan amount and attached the property

of respondent no. 3 company on July 15, 2003 under Section 29 of State Finance Corporation Act, 1951. On the request of the respondent No. 3 that it would be able to sustain the adverse market conditions and convert the project into profitable venture provided some time was granted, the property attached was released and, therefore, the respondent no. 1 handed over the possession of the property to the respondent no. 3 on certain conditions stipulated in agreement dated August 19, 2003, but subsequently in the month of October, 2003 the respondent No. 1 again attached the property. The respondent no. 3 challenged the action of the respondent no. 1 in attaching the property by way of filing Writ Petition No. 608 of 2003 before the High Court. The said petition was, however, withdrawn subsequently.

6. The offer made by the respondent No. 3 for financial restructuring and/or one time settlement by payment of Rs.12.00 crores was rejected by the respondent No. 1 and the respondent No. 2. Pursuant thereto, the respondent no. 1 made several attempts between 2004 to 2005 to sell the attached property, which was mortgaged by way of public auction, but in none of the public auctions, it received offers equivalent to market value of the property. Thereafter, by private negotiation the respondent No. 1 had accepted the proposal of appellant trust to sell the property in question for a sum of Rs.12.99 crores.

7. The respondent no. 3 thereafter received a letter dated December 5, 2005 on December 13, 2005 from the respondent no. 1 whereby the respondent no. 1 notified that it had received an offer of Rs.12.99 crores from the appellant and was inclined to accept the said offer and in case the respondent no. 3 had any party with better offer, the same should be sent to respondent no. 1 within 3 days from the date of the letter, failing which the respondent no. 1 would proceed further in the matter without prejudice to the rights of the respondent no. 1 company to recover the balance outstanding dues from the respondent no. 3. On the same date i.e. on December 5, 2005 EDC Board while accepting the offer of the present appellant

trust, the respondent No. 1 had also passed a resolution that only 3 days notice be given in future to borrowers to bring in matching offers in case of private auctions. The offer received by the respondent no. 1 from the appellant was subject matter of Writ Petition No. 19 of 2006 filed by the respondent no. 3 before the High Court. The ground raised in the petition was that the offer made by the respondent no. 3 through third party i.e. Condor Polymeric for Rs. 14 crores made on January 18, 2006 was not being considered by the respondent no. 1 despite the said offer being the higher offer than made by the appellant trust. The respondent no. 3 had prayed for a writ of mandamus directing the respondent no. 1 to consider and accept the proposal of the respondent no. 3 communicated vide a letter dated 18.01.2006 and restrain the respondent no. 1 from proceeding to sell the property attached to the appellant.

8. While the said petition was pending before the High Court, the appellant had filed an application for intervention and impleadment in the petition on the ground that the property in issue was already agreed to be sold to the appellant trust by the respondent no. 1 and part payment towards it was already made. Upon hearing the parties the High Court had directed the impleadment of appellant, i.e., L.K. Trust as the respondent no. 3 in the Writ Petition pending before it.

At the hearing of the said petition, the High Court questioned respondent no. 1 as to whether there was an agreement to sell the property to the appellant. The stand taken by the respondent no. 1 was that there was a concluded contract with the appellant. In support of the said stand, the respondent no. 1 had relied upon the resolution dated December 5, 2005 of the Board of Directors indicating that the Board of Directors had accepted the offer of the appellant and acceptance was communicated to the appellant on December 12, 2005. However, the respondent no. 1 did not bring to the notice of the Court the fact that 3 days time was granted to the respondent no. 3 to bring better offer and before

expiry of the said period resolution was passed by the Board of Directors of respondent no. 1 company. The respondent no. 1 company also concealed the fact that on January 18, 2006 Condor Polymeric has made offer of Rs. 14 crores to the Board of Directors of respondent no. 1 company. The High Court, therefore, relying upon the stand taken by the respondent No. 1, held that there was a concluded contract between the respondent no. 1 and the appellant and in view of the said conclusion dismissed the petition filed by the respondent no. 3 vide judgment and order dated February 22, 2006. Feeling aggrieved, the respondent no. 3 approached this Court by filing Special Leave Petition on March 27, 2006 which was ultimately dismissed on August 24, 2006. Thus the higher offer made by the respondent no. 3 through third party which was subject matter of Writ Petition No. 19 of 2006 was not accepted when petition for special leave to appeal was dismissed on August 24, 2006. During the pendency of Writ Petition No. 19 of 2006, filed by the respondent No. 3 herein, the appellant trust, on February 13, 2006 issued cheques to the respondent No. 1, purporting to be in full payment of Rs.12,99,00,000/- as per the terms and conditions of sale. After the High Court dismissed Writ Petition No. 19 of 2006 on February 22, 2006, R.C. Mirchandani and others, who are unit holders in the hotel project of the respondent No. 3, filed Writ Petition No. 124 of 2006 challenging the action of the respondent No. 1 in selling the property to the appellant-trust. Those petitioners (Mirchandani and others) offered to pay higher amount than offered by the appellant-trust in Writ Petition No. 19 of 2006, i.e., Rs.. 15 crores, which was conveyed to the respondent No. 1 by letter dated January 3, 2006. The respondent Nos. 3 and 4 herein were impleaded as the respondent Nos. 4 and 5 in Writ Petition No. 124 of 2006.

9. The Board of Directors of the respondent No. 1 was informed that offer of Rs. 14 crores was made by Condor Polymeric to sabotage the offer made by the appellant-trust. The record indicates that the Board of Directors was not

informed that the appellant-trust had defaulted in making the balance payment as per the terms of acceptance dated December 12, 2005 by January 12, 2006. Because of this concealment and wrong representation regarding Condor Polymeric, the Board of Directors of the respondent No. 1 in its meeting held on January 18, 2006 rejected the offer of Rs. 14 crores made by the respondent No. 3 through Condor Polymeric. In the meeting held on April 10, 2006, the Board of Directors of the respondent No. 1 was informed that the cheques issued by the appellant-trust, which were delivered during the pendency of the Writ Petition No. 19 of 2006, were subsequently deposited by the respondent No. 1 for realization but the same were dishonoured. The Board of Directors noted this default and resolved to accept the higher bid of Rs. 14 crores offered by Condor Polymeric, brought by the respondent No. 3. This decision of Board of Directors of the respondent No. 1 was not brought to the notice of this Court during the course of hearing of Special Leave Petition on April 12, 2006, but an affidavit was filed stating as to why the offer of the respondent No. 3 was not acceptable.

The respondent no. 3 was of the view that its right of redemption of the mortgaged property under Section 60 of the Transfer of Property Act ('T.P. Act' for short) was not defeated by mere agreement to sell the property between the respondent no. 1 and the appellant nor by the Judgment of the High Court which was confirmed by the Supreme Court because the said question was never raised before the Court and was, therefore, not considered. According to the respondent no. 3 such a right in law was recognized in Clause 16 of terms and conditions of tender document entered into between the appellant and the respondent no. 1. Thereafter, by addressing a letter dated August 25, 2006 to the respondent No. 1, the respondent no. 3 exercised its right of redemption and requested the respondent no. 1 to confirm the exact amount due from the respondent no. 3 payable to the respondent Nos. 1 and 2. Meanwhile, the respondent No. 3 enclosed banker's cheque of

Rs. 25 lakhs stating that the balance amount which was due on the date of attachment of the mortgaged assets would be paid in full on settlement of the amount. The respondent no. 3 addressed another letter dated September 27, 2006 requesting the respondent no. 1 to issue the letter of acceptance as it had received information that the Board of Directors of the respondent no. 1 company had acknowledged the equity of redemption. The respondent no. 3, by subsequent letter dated September 29, 2006, made a fair estimate of outstandings, on the basis of outstanding amount quoted by respondent no. 1 before the Supreme Court on April 12, 2006 in Special Leave Petition No. 4957 of 2006 read with resolution passed by the Board of Directors in its meeting held on August 27, 2004 wherein it was recorded that the interest would not be levied on the dues if the property was attached or taken possession of, from the date of taking such possession read with Loan Settlement Scheme approved by Government of Goa as proposed by the respondent no. 1 company in line with RBI Guidelines, and sent to the respondent no. 1 an amount of Rs.9,25,00,000/- by cheque, in addition to earlier payment of Rs.25,00,000/- which was made on August 25, 2006. The respondent no. 3 also sent an amount of Rs.5,90,00,000/- to the respondent no. 2 by a cheque. The respondent no. 1 vide its letter dated September 27, 2006 purportedly, in response to the letter dated August 25, 2006 of the respondent no. 3, informed the respondent no. 3 that, for the purpose of redemption of the mortgaged property, the outstanding dues were Rs.19,22,922.12. It was mentioned in letter dated September 27, 2006 by the respondent No. 1 that it was in the process of proceeding further with the transaction entered into with the appellant-trust as the appellant-trust had forwarded balance consideration to the respondent no. 1 subject to the decision of the Supreme Court dated August 24, 2006. By subsequent letter dated 09.10.2006 the respondent no. 1 company had acknowledged the right of the respondent no. 3 of redemption of mortgage but had stated that it was in the process of implementing the Supreme Court order and

therefore no further concession for extension of time to exercise the right of redemption could be considered in the case of the respondent no. 3. As mentioned above, the respondent no. 3 had sent an amount of Rs.9,72,00,690/- to the respondent no. 1 on August 24, 2006 and vide letters dated September 27, 2006 and October 9, 2006 the respondent No. 1 had clearly accepted and acknowledged the right of the respondent no. 3 to redeem the mortgaged property on the payment of liabilities due. Meanwhile, the appellant trust received a letter from the President of Goa Chamber of Commerce, who was also Vice Chairman of respondent no. 1 company stating that the respondent no. 1 at its Board Meeting held on October 19, 2006 had acknowledged legal and inherent right of respondent no. 3 to redeem the mortgaged property and that in light of one time settlement policy of the Government of Goa, which also had the effect of redemption of the mortgage, the case of the respondent no. 3 was referred to the Office of Advocate General whose opinion would be tabled before Board of Directors of respondent no. 1 company again for a decision. The record further indicates that the respondent no. 3 had, for exercising the right of redemption, shown willingness to pay an amount of Rs. 18.40 crores to the respondent nos. 1 and 2 and also agreed to pay Rs. 11.50 crores towards the liabilities of unit holders and Court creditors etc. Meanwhile, SBI filed an affidavit on November 21, 2006 in Writ Petition No. 124 of 2006 that they were willing to accept offer of Rs.18.40 crores offered to EDC Ltd. and State Bank of India by the respondent no. 3. By its letter dated November 23, 2006, the respondent no. 3 again asserted its right of redemption and informed that its financial supporters i.e. M/s. R N R Hotels Pvt. Ltd. had already deposited Rs.25 lakhs with the respondent no.1. The respondent no. 3 to show its bonafide, offered to deposit Rs.18.15 crores on or before December 8, 2006 in the Commercial Branch of the State Bank of India which was permitted by the High Court on November 28, 2006 in Writ Petition No. 124 of 2006.

10. The opinion of Advocate General of Goa dated 22.11.2006 mentioned that there was a concluded contract between the respondent no. 1 and the appellant-trust and the right of the respondent no. 3 of redemption stood extinguished by its conduct as envisaged under Section 60 of the Transfer of Property Act, 1882. Acting upon the said opinion Board of Directors of respondent no.1 passed a resolution dated November 24, 2006 deciding that the respondent no. 1 would conclude the sale transaction with the appellant-trust and go ahead with the conveyance and delivery of possession in favour of the appellant-trust. Thereupon, the respondent no. 3 filed W.P. No. 601 of 2006 before the High Court of Bombay at Goa praying for writ of mandamus against the respondent nos. 1 and 2 inter alia directing them to permit the respondent No. 3 to exercise the rights of redemption of mortgaged property by accepting the offer of Rs.18.40 crores towards full and final settlement of the liability of the respondent No. 3 towards the respondent Nos. 1 and 2 to exercise the reconveyance and release the documents of title deposited with the respondent No. 1 and further prayed that pending hearing and final disposal of the petition the respondent No. 1 to be restrained from proceeding to finalize the sale of the mortgaged property in favour of the appellant-trust. Vide order dated December 18, 2006, High Court of Bombay at Goa, while tagging Writ Petition (C) No. 601 of 2006 with Writ Petition (C) No. 124 of 2006, directed the parties to maintain status quo and to list the matter in the second week after vacation, for final disposal at the stage of admission. Thereafter, on February 19, 2008, the respondent no. 3 made representation to respondent no. 1 to permit it to exercise its right of redemption of mortgage on payment of Rs.12.99 crores to the respondent no. 1 and Rs. 9 crores to respondent no. 2, i.e., the State Bank of India. The respondent no. 1 considered the representation of respondent no. 3 in its 309th Board Meeting and passed a resolution dated February 20, 2008 to the effect that the offer of the respondent no. 3 to redeem the mortgage was favourably accepted provisionally,

subject to the approval of the High Court in Writ Petitions No. 601 of 2006 and 124 of 2006 pending before the High Court.

11. Thereafter, respondent no. 1 preferred Misc. Civil Application No. 165 of 2008 in Writ Petition No. 601 of 2006 on February 22, 2008 inter alia praying therein for appropriate orders directing approval of the Board resolution dated February 20, 2008 which in turn resolved to accept the offer of the respondent no. 3 seeking redemption of mortgage in terms mentioned therein. The appellant-trust filed its reply to the said application on March 8, 2008 and opposed the grant of prayers made therein. The High Court by the impugned order dated April 7, 2008 held that the order of status quo passed by the High Court shall not come in the way of respondent nos. 1 and 2 in considering the proposal of respondent no. 3. Thereafter, the respondent no. 1 passed a resolution on April 8, 2008, accepting the offer of the respondent no. 3 to redeem the mortgage. On April 9, 2008, the High Court took the resolution dated 08.04.2008 passed by the respondent no. 1 as well as the affidavit tendered by the State Bank of India, i.e., the respondent No. 2, stating that the State Bank of India has accepted the proposal of M/s. Falcon Retreat Pvt. Ltd. (the respondent No. 3) for redemption of mortgage on payment of Rs.12.87 crores to EDC Ltd. and Rs.9.18 crores to the State Bank of India, on the record of the Writ Petition No. 601 of 2006 and permitted the respondent No. 3 to withdraw the Writ Petition. The High Court by an order dated April 9, 2008, also dismissed the Writ Petition No. 124 of 2006 preferred by Mirchandani as infructuous. The above two orders dated April 7, 2008 passed in Misc. Civil Application No. 165 of 2008 in Writ Petition No. 601 of 2006 and April 9, 2008 in Writ Petition No. 601 of 2006 have given rise to the instant appeals.

12. The learned counsel for the respondent Nos. 3 and 4 had spelt out a preliminary objection as to the maintainability of the Special Leave Petition against the order dated April 7, 2008 passed in M.C.A. No.165 of 2008 which was filed in Writ

Petition (C) No. 601 of 2006 by which the status-quo order granted earlier was modified as well as special leave petition filed against the order dated April 9, 2008 passed in Writ Petition (C) No. 601 of 2006 permitting the Respondent No. 3 who was original Petitioner therein to withdraw the Writ Petition. According to the learned counsel for the respondent Nos. 3 and 4, those two orders could not have been made subject matter of challenge in petitions filed under Article 136 of the Constitution and, therefore, the same should be dismissed. Elaborating the said preliminary objection, it was argued that the impugned order permitting respondent No. 3 to withdraw the Writ Petition cannot be construed as giving rise to any grievance to any person as it has not decided or adjudicated any lis or right and has not granted any relief whatsoever, much less, the reliefs prayed for by the respondent No.3 in the writ petition and, therefore, the Special Leave Petition should not be entertained at all. What was claimed was that the learned counsel for the appellant could not point out that any of the rights of the appellant were infringed or sought to be affected when permission to withdraw the petition was granted to the respondent No. 3 nor could cite any case law to demonstrate that order permitting withdrawal of Writ Petition can be challenged under Article 136 of the Constitution and, therefore, the special leave petition should be dismissed at the threshold.

13. As against this the learned counsel for the appellant submitted that the circumstances, namely, (a) the facts leading to judgment dated August 24, 2006 rendered by this Court in Special Leave Petition (C) No. 4957 of 2006, (b) the action of statutory corporation, i.e., EDC Limited (the respondent No. 1), in first seeking clarification of the order granting status quo dated December 18, 2006 pursuant to its Resolution dated February 20, 2008, (c) passing the Resolution on April 8, 2008 for accepting the proposal of the respondent No. 3 for redemption of mortgage, (d) producing the said resolution before the Court on April 9, 2008 and (e) helping the respondent No. 3 to withdraw the Writ Petition, indicate acts which are

pulpably and manifestly contrary to judgment of this Court reflecting grossest abuse of the process of law and, therefore, petitions filed by the appellant under Article 136 of the Constitution are maintainable. According to the learned counsel for the appellant, the impugned orders passed by the High Court though appear to be innocuous, have the propensity to cause grave and irreparable injury to the appellant and as the orders impugned are a direct affront to the directions of this Court which were binding upon the High Court as also upon the respondent No. 1 and the Respondent No. 3 by virtue of Article 141 read with Article 144 of the Constitution, the petitions filed by the appellant should be entertained. The learned counsel for the appellant asserted that by allowing its process to be abused in the manner that has been done by the respondent No. 3 in connivance with the respondent No. 1 and the respondent No. 2, the High Court has lent its hands to such unscrupulous parties to defeat and destroy the efficacy of the judgment of this Court. Therefore, although the appellant may have an alternative remedy to assail those actions by a separate writ petition, the filing of the petitions under Article 136 of the Constitution was the first and proper remedy, because the question involved is about the binding nature of judgment of this Court and, therefore, it would be wrong to non-suit the appellant at the threshold. The learned counsel for the appellant emphasized that the nationalized bank like the State Bank of India to help an unscrupulous defaulter like the respondent No. 3 and to defeat the crystallized rights of the appellant which were accepted and judicially acknowledged by this Court has caused injury to the appellant and in order to avoid multiplicity of proceedings, also the present petitions should be entertained. In support of these submissions the learned counsel for the appellant placed reliance on *Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy,* (1999) 3 SCC 115 and *R. Rathinavel Chettiar Vs. V. Sivaraman,* (1999) 4 SCC 89.

14. After taking into consideration the facts of the case and

the points raised at the Bar by the learned counsel for the parties, this Court is of the opinion that the petitions filed under Article 136 of the Constitution should not be rejected on the ground of availability of alternative remedy nor it should be rejected on the ground that the special leave petition is filed against order permitting withdrawal of writ petition. Right from the beginning, the case of the appellant is that there was a concluded contract between the appellant and the respondent No. 1 and, therefore, the respondent No. 1 could not have accepted proposal of the respondent No. 3 to redeem the mortgage executed by the respondent No. 3. This was the issue which was raised by the appellant in Writ Petition No. 601 of 2006. Without adjudicating the said claim the High Court has permitted the respondent no. 3 to withdraw the petition filed by the respondent No. 3. Further it is also the case of the appellant that in view of decision of this Court dated August 24, 2006 rendered in Special Leave Petition (Civil) No.4957 of 2006, the rights of the parties were crystallized and, therefore, permission to withdraw the petition unconditionally should not have been granted to respondent No. 3. In Writ Petition No. 601 of 2006 filed by the respondent No. 3 and another against EDC Limited, i.e., respondent No. 1 herein and others, the prayer was to issue a Writ of Mandamus directing respondent No.1 to permit the respondent Nos. 3 and 4 herein to exercise the right of redemption of mortgaged property by accepting the offer of Rs. 18.40 crores towards the full and final settlement of the liability of the respondent No.3 towards the respondent Nos. 1 and 2 and to direct the respondent Nos. 1 and 2 to execute the reconveyance and release the documents of title deposited with the respondent No.1. The interim relief which was claimed by the said respondent No. 3 in the writ petition was to restrain the respondent No.1 herein from proceeding to finalize the sale of the mortgaged property in favour of the present appellant. The record shows that by an order dated December 18, 2006 the High Court had directed the parties to maintain status-quo. By the impugned order dated April 7, 2008 passed in M.C.A. No. 165 of 2008 filed in Writ

Petition No. 601 of 2006, the High Court has modified the same. There is no manner of doubt that this modification of interim relief would have certainly adversely affected the claim of the appellant that in view of concluded contract between the appellant and the respondent No. 1, the respondent No. 1 could not have been permitted to consider the claim of the respondent No. 3 for redemption of the mortgaged property and, therefore, Special Leave Petition under Article 136 of the Constitution would certainly be maintainable against that order. Having regard to the facts and circumstances of the case this Court is of the opinion that it would not serve purpose of any party to dismiss the petitions on the basis preliminary objections raised on behalf of the respondent Nos. 3 and 4 and, therefore, this Court has decided to entertain the Special Leave Petitions and to adjudicate the claims raised therein on merits.

15. The first contention advanced on behalf of the appellant that Falcon Retreat Pvt. Ltd., i.e., respondent No.3, EDC Ltd., i.e., respondent No.1 and the State Bank of India, i.e., respondent No. 2, are all precluded by principles of res judicata and principles of constructive res judicata, from re-opening the matter to overcome the sale of the mortgaged property in favour of the appellant-trust under a concluded contract, as affirmed by this Court vide Judgment dated August 24, 2006 rendered in Special Leave Petition (Civil) No. 4957 of 2006 and, therefore, the impugned orders are liable to be set aside has no substance. It may be mentioned that in Special Leave Petition (Civil) No. 4957 of 2006 what was impugned by the respondent No.3 and another was judgment and order dated February 2, 2006 rendered by the High Court of Bombay at Goa in Civil Writ Petition No.19 of 2006, whereby the writ filed by respondent No.3 praying that its proposal contained in letter dated January 18, 2006 be considered and the respondent No.1, herein, be restrained from selling the assets in question to the appellant was dismissed. It was not disputed that respondent No.3 had committed defaults in payment of dues of the respondent No.1 and therefore an action was taken

under Section 29 of the State Financial Corporation Act, 1951. The property in question was attached and possession was taken over by respondent No.1. The Judgment rendered in the said case further makes it evident that the respondent No.1 had made efforts to put the property to sale by auction, but seven such attempts had failed either on account of non-availability of purchaser or on account of postponement of the auction on the request of the respondent No.3 and, thereafter, on November 23, 2005 the appellant, i.e., L.K. Trust had made an offer of Rs. 12.99 crores for the property in question, which offer was considered by the Board of Directors of the respondent No.1 Company on December 5, 2005 and the Board had resolved to accept the offer on certain conditions. The judgment in the said case further shows that the respondent No.3 herein was informed of the private offer made by the appellant and was called upon to get a better offer, if possible, within three days, but the letter of the respondent No.1 dated December 5, 2005 to this effect was perhaps received late by the respondent No.3, i.e., on December 13, 2005 and, therefore, the prayer made by the respondent No.3 seeking twelve months time to arrange a better buyer was not accepted by the respondent No.1. It is evident from the judgment that on December 12, 2005 the offer of the appellant was accepted by respondent No.1 and the same was communicated to the appellant incorporating the relevant conditions for the sale and on December 29, 2005 the respondent No.1 had informed the respondent No.3 about the same to which the respondent No.3 had objected by saying that the price was ridiculously low. On January 23, 2006, the respondent No.3 herein had filed Civil Writ Petition No. 19 of 2006 before the High Court claiming the relief which is referred to earlier. The High Court had dismissed the Writ Petition holding that the respondent No.1 had already entered into an agreement with the appellant for the sale of the assets for a sum of Rs. 12.99 crores and, therefore, there was no question of the same being cancelled or set aside since it represented a concluded contract between the parties. This Court after hearing the learned counsel for the parties expressed the view that at

the instance of the respondent No.3 herein the court should not interfere in the exercise of its discretion under Article 136 of the Constitution because an offer had been made by the appellant herein and accepted by the respondent No.1. Though it was pointed out on behalf of the respondent No.3 to the Court that the cheques which had been issued by the appellant to the respondent No.1 had not been honoured by the Bank, but this Court had expressed the view that even if that be so, it was for respondent No.1 to consider what action it should take in such an event, and ultimately if the respondent No.1 finds that the appellant is not in a position to fulfill its commitment and pay the price offered within the time granted by the respondent No.1, it was open to the respondent No. 1 to proceed to consider other options. In the said matter, this Court expressed an opinion that it was expected of the respondent No.1 to act fairly and in accordance with law but as long as it acts within the parameters of law and its actions were not found to be arbitrary or unreasonable, it was entitled to take a decision which was in its interest. While disposing of the Special Leave Petition, it was observed in the judgment that if the appellant made the payment as promised within such time as might be granted by respondent No.1 and fulfilled the conditions of sale, that might be the end of the matter, but if it failed to do so it was always open to the respondent No.1 to take necessary steps to safeguard its interests, which included inter alia the consideration of other offers made by the other parties. After making above stated observations, this Court had dismissed the special leave petition. If this Court had intended that on mere payment by the appellant of the amounts, the first respondent had nothing further to do except to convey the property to the appellant, it would have so directed. However, this Court had carefully avoided passing any such mandatory order and used the word 'may' and left the matter to the discretion of the respondent No. 1 to take a decision in what it considered to be in its best interest as a public corporation. Further, while deciding the said Special Leave Petition, this Court was never called upon to consider and in fact did not

consider the effect of Clause 16 of the General Terms and Conditions, which were expressly accepted by the appellant. This becomes evident if one looks at the resolution dated December 5, 2005 passed by the respondent No. 1 read with the Agenda Note. As per Clause 16 of General Terms and Conditions the respondent No. 1 was to execute transfer documents only after entire offered amount was received. Further the transfer documents were only to be as per the draft to be prepared by the respondent No. 1 and the appellant was required to execute transfer documents within thirty days of communication from the respondent No. 1 asking for such execution. By the said Clause, the appellant was informed that the equity of redemption was existing in favour of the respondent No. 3 and the same would be extinguished only on execution of Deed of Conveyance. The appellant having accepted Clause 16 of the General Terms and Conditions is not justified at all to contend that the sale of mortgaged property had concluded in its favour and that the respondent No. 3 had lost its right to redeem the mortgaged property.

16. A fair and reasonable reading of the judgment delivered by this Court on August 24, 2006 in Special Leave Petition (Civil) No.4957 of 2006 makes it evident that in fact this Court did not record any finding that a concluded contract had come into existence between the present appellant and the respondent No. 1 herein. This Court noticed that on December 12, 2005 the offer made by the appellant was accepted by the respondent No.1 herein and the same was communicated to the appellant incorporating the relevant conditions for the sale. It is nobody's case that those conditions, which were stipulated, were complied with by the appellant nor any such finding was recorded by this Court. What is relevant to notice is that in the operative part of the judgment, this Court observed that if the respondent No.3 herein, i.e., the appellant makes the payment as promised within such time as might be granted by respondent No.1 and fulfills the conditions of sale, that might be the end of the matter which means that at the time when the

judgment was delivered, this Court proceeded on the footing that there was no concluded contract between the appellant and the respondent No. 1. Further what is relevant to notice is that it was stipulated by this Court that if the appellant failed to do so it was always open to the Respondent No.1 to take necessary steps to safeguard the interests which included inter alia the consideration of other offers made by the other parties. Such weighty observations would not have been made by this Court if this Court, in the said matter, had come to the conclusion that there was a concluded contract of sale between the appellant and the respondent No. 1.

17. A reasonable reading of the judgment delivered by this Court mentioned above, makes it more than clear that this Court had never recorded any finding to the effect that sale of the property mortgaged by respondent No.3 herein was concluded between the appellant and the respondent No.1 herein and the Court was essentially concerned with exercise of discretion under Article 136 of the Constitution. Further the question whether the respondent No.3 herein had subsisting right to redeem the property was never gone into by the Court in the said special leave petition because it was never raised either before the High Court or before this Court in the said matter. Thus this Court does not find any merits in the first contention and, therefore, the same is hereby rejected.

18. As this Court has come to the conclusion that there was no concluded contract of sale of the mortgaged property in favour the appellant of by the respondent No.1, the question arises as to whether the right to redeem the mortgaged property conferred by Section 60 of the Transfer of Property Act upon the mortgager, i.e., respondent No.3 can be exercised or not. It is argued on behalf of the appellant that both the High Court of Bombay as well as this Court in the previous round of litigation had found that upon continued default on the part of respondent No.3 in making payment of amount of loan, its properties mortgaged with respondent No.1, were attached

and possession thereof was taken over legally in an action under Section 29 of the State Financial Corporation Act, 1951, and, therefore, the right to redeem the mortgaged property available to the respondent No.3 was clearly lost. The learned counsel for the appellant contended that the respondent No.3 had never sought to exercise its right to redeem the mortgaged property before action under Section 29 of the State Financial Corporation Act, 1951 was taken or even thereafter till it lost upto this Court on August 24, 2006 when Special Leave Petition (Civil) No.4957 of 2006 was dismissed and, therefore the exercise of right to redeem, which stood extinguished, was not only malafide but also to defeat the judgment of this Court. According to the learned counsel for the appellant, the first proviso to Section 60 of the Transfer of Property Act 1882 applies with great vigour to the facts of the case, clearly disentitling the respondent No.1 to apply for redemption of mortgaged properties on August 25, 2006 or thereafter and said right of redemption stood foreclosed, both by the acts of the parties and by a decree of the Court. What was stressed was that non-execution of Conveyance Deed by the respondent No.1 in favour of the appellant was illegal and thus, the respondent No.1 was estopped from taking advantage of its own wrong. It was stressed that, in fact, no right to redeem the property was available to the Respondent No.3.

19. As against this it was argued by the learned counsel for the other side that in Writ Petition No.19 of 2006 from which Special Leave Petition (Civil) No.4957 of 2006 arose, the issue of right of redemption was never raised nor discussed nor gone into and, therefore, it is wrong to contend that the right of the respondent No. 3 to redeem the disputed properties stood extinguished. According to the learned counsel for the respondent Nos.3 and 4 the Special Leave Petition (Civil) No. 4957 of 2006 filed by the Respondent No.3 against the order of High Court dated February 22, 2006 was dismissed with observation :-

"leaving the decision to the discretion of EDC to act within parameters of law in the best interest of EDC, in a non-arbitrary and fair manner".

There was not even a whisper in the said order prohibiting either exercise of Right of Redemption by Respondent No.3 or consideration thereof by Respondent No.1 in terms of Section 60 of the Transfer of Property Act and therefore the superior right to redeem the mortgaged property recognized in catena of the reported decisions of this Court was rightly considered by the respondent No.1. The learned counsel for the appellant had placed reliance on decision in *Mohanlal Goenka vs. Benoy Krishna Mukherjee and others* (1953) SCR 377, to contend that right not agitated despite being available in earlier proceedings cannot be permitted to be raised in subsequent proceedings. In reply to this, it was argued on behalf of Respondent Nos.3 and 4 that the ratio laid down in the said judgment would not apply to the facts of present case in as much as in the earlier Writ Petition No.19 of 2006, the issue of Right of Redemption could not have been agitated because it was neither available nor raised nor adjudicated and hence the said right was not extinguished. The learned counsel for the Respondent Nos. 3 and 4 had explained that the principle of law stated in *Mohanlal Goenka's* case (supra) would apply only if issue in both the proceedings were the same and adjudicated in both the proceedings giving rise to the grievance of res judicata.

20. On behalf of the respondent No.1, its learned counsel had placed reliance on *Narandas Karsandas Vs. S.A. Kamtam,* (1977) 3 SCC 247 to plead that in India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished and an agreement to sell, does not, of itself, create any interest in, or charge on the property, as a result of which there is no equity or right in property created in favour of the purchaser by the

contract between the mortgagee and the proposed purchaser. What was asserted on behalf of the respondent No.1 was that the mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed and until the sale is complete by registration, the mortgagor does not lose his right of redemption just because the property was put to auction or proposed sale by private negotiation was in pipe line.

21. On analysis of arguments advanced at the Bar, this Court finds that the proposition that in India it is only on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption stands extinguished is well settled. Further it is not the case of the appellant that a registered Sale Deed had been executed between the appellant-trust and the respondent No. 1 pursuant to the Resolution passed by the respondent No. 1 and, therefore, in terms of Section 54 of the Transfer of Property Act 1882 no title relating to the disputed property had passed to the appellant at all.

22. What is ruled in *Narandas Karsandas* (Supra) is that in India, there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser and in view of the fact that only on execution of conveyance, ownership passes from one party to another, it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. In this case, the respondent Housing Society, the mortgagor, had taken loan from the co-respondent Finance Society and mortgaged the property to it under an English mortgage. On default, the mortgagee exercised its right under the mortgage to sell the property without intervention of Court and after notice, put the property to sale by public auction. The appellant auction purchaser paid the sums due. Before the sale was completed by registration etc. the mortgagor sought to exercise his right of redemption by tendering the amount due. The appellant had

based his case on the plea that in such a situation the mortgagee acts as agent of the mortgagor and hence binds him. Rejecting the appeal, this Court has held that the right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties or by decree of a court. What is held by this Court is that, in India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished but the conferment of power to sell the mortgaged property without intervention of the Court, in a mortgage deed, in itself, will not deprive the mortgagor of his right of redemption. This Court in the said case further explained that the extinction of the right of redemption has to be subsequent to the deed conferring such power and the right to redemption is not extinguished at the expiry of the period. This Court emphasized in the said decision that the equity of redemption is not extinguished by mere contract for sale. The decision rendered by Three Judge Bench has been followed in case of *Gajraj Jain vs. State of Bihar and others* (2004) 7 SCC 151. Dealing with a case of sale under Section 29 of the State Financial Corporation Act, it is held therein that the action of the State Financial Corporation in handing over the estates to the respondent No. 4 therein under down payment of Rs.28.85 lakhs, did not prevent the appellant from exercising the right of redemption. The pertinent observations made by this Court in para 15 of the reported decision are as follows: -

> "Under Section 60 of the T.P. Act, equity of redemption existed in favour of the Company. A mere agreement of sale of assets cannot extinguish the equity of redemption, it is only on execution of conveyance that the mortgagor's right of redemption will be extinguished."

Applying the principles of law laid down by this Court in the abovementioned two decisions, to the facts of the present case it will have to be held that no transfer of mortgaged property

had taken place in favour of the appellant and, therefore, the statutory right of redemption available to the respondent No. 3 was never lost. The record of the case indicates that the matter had rested at the level of passing some resolution by the respondent No. 1 Company in favour of the appellant and nothing more than that. If the appellant was keen to complete its title over the suit properties, nothing prevented it from instituting appropriate proceedings to compel the respondent No. 1 to execute a sale deed in its favour and getting it registered, but admittedly no such step was taken by the appellant. The decision cited at the Bar by the learned counsel for the appellant to contend that the respondent No. 3 is precluded from asserting its rights of redemption as it was not claimed in the earlier proceedings, would not apply to the facts of this case for the relevant reasons pointed out by the learned counsel for the respondent Nos. 3 and 4 and also because vide letters dated October 9, 2006 and September 27, 2006, the respondent No. 1 had already accepted and acknowledged the right of the respondent No. 3 to redeem the mortgaged property on the payment of amount due. Further by filing affidavit, the respondent No. 2, i.e., the State Bank of India, had declared that it had accepted the proposal of the respondent No. 3 for redemption of mortgage on payment of Rs.12.87 crores to the respondent No. 1 and Rs.9.18 crores to the State Bank of India. However, after receipt of the opinion of the learned Advocate General, the respondent No. 1 had drastically changed its stand without considering the subsisting right of the respondent No. 3 to redeem the mortgaged property and was inclined to proceed with completion of sale transaction in favour of the appellant. It was at that stage that the respondent No. 3 had to file Writ Petition No. 601 of 2006 asserting its right to redeem the mortgaged property. The issues in the earlier proceedings were quite different from those raised in Writ Petition No. 601 of 2006. In fact, no relief is granted to the respondent No. 3 in Writ Petition No. 601 of 2006 and, therefore, the ratio laid down in *Mohanlal Goenka's* case (supra) would not apply to the facts of the instant case.

23. The mortgagor under Indian law is the owner who had parted with some rights of ownership and the right of redemption is the right which he exercises by virtue of his residuary ownership to resume what he has parted with. In India this right of redemption, however, is statutory one. A right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The judicial trend indicates that dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists. This right cannot be extinguished except by the act of parties or by decree of a court. As explained by this Court in *Jaya Singh D. Mhoprekar and another vs. Krishna Balaji Patil and another* (1985) 4 SCC 162, the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by contract between the parties, by a merger or by statutory provision which debars the mortgager from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper redemption is void. Having regard to the facts of the instant case, it is difficult to hold that the respondent No. 3 had lost its right to redeem the mortgaged property or that by the acts of the appellant and the respondent No. 1, the right of the respondent No. 3 to redeem the property was extinguished.

24. Applying the principles of law laid down by this Court in the above quoted decisions this Court is of the opinion that no sale worth the name of the mortgaged property had taken place in favour of the appellant because there is no agreement of sale on the record of the case nor the facts indicate that the

same was registered. Having regard to the decision of this Court mentioned above, it will have to be held that right to redeem the mortgage property which was available to the respondent No.3 had never extinguished at all and, therefore, the acceptance of proposal of the respondent No. 3 by the respondent No. 1 to permit it to redeem the property dated April 8, 2008 cannot be said to be illegal in any manner.

25. Further the contention raised by the appellant that reliance placed on Clause 16 of the General Terms and Conditions by the learned counsel for the Respondent No.1 is misconceived and untenable in view of decision of this Court in earlier round of litigation, has no substance. This Court while delivering judgment dated August 24, 2006 in Special Leave Petition (Civil) No. 4957 of 2006 was not called upon and in fact did not consider the effect of Clause 16 of the General Terms and Conditions. The record shows that Clause 16 of the General Terms and Conditions was expressly accepted by the appellant. The Resolution dated December 5, 2005 read with the Agenda Note records that the Appellant had agreed to follow the General Terms of Auction. The General Terms of Auction as contained in para 16 are as follows:-

> "16. The EDC Ltd. will execute transfer documents only after entire accepted offer amount is received. The transfer documents will be only as per the draft prepared by EDC Ltd. The successful tenderers shall necessarily execute transfer documents within 30 days from the date of communication from the EDC Ltd. requesting for such execution. It is brought to the notice of the Successful tenderer that in case of failure to execute the Deed of Assignment and Sale, the Equity of redemption exists in favour of the original mortgagor, and the same will be extinguished only on execution of Deed of Conveyance, which the successful tenderer may please take note of."

26. The record of the case shows that the actions of the Corporation that is respondent No.1 have been entirely in

accordance and consistent with the provisions of Clause 16 of the General Terms and Conditions. It is important to remember that when the appellant-trust wrote a letter dated August 24, 2006 to the respondent No.1 and asked for possession of the property and to complete other legal formalities, the Corporation had informed the appellant by its letter dated September 27, 2006 making it clear that the Corporation was in the process of proceeding further with the sale transaction. The record would indicate that the respondent No.1 had always acted consistently with Clause 16. On September 28, 2006 the respondent No.1 had informed the appellant that the borrower company had approached it for redemption of the mortgage. This was the information supplied by the respondent No.1 in terms of Clause 16 of the Terms and Conditions. On October 9, 2006 the Corporation that is respondent No.1 had informed the respondent No. 3 that they were in the process of implementing the judgment of this Court in Special Leave Petition (Civil) No.4957 of 2006 dated August 24, 2006 and, therefore, all legal formalities were required to be completed with respect to the transfer of the property in its name in accordance with the law. The resolution dated November 24, 2006 on which the learned counsel for the appellant had placed reliance makes it clear that the transactions would have to be concluded by execution of the conveyance and delivery of possession in favour of the appellant. It is not in dispute that this had never happened. The record does not indicate that the appellant had filed any proceedings either to obtain specific performance of the agreement to sell entered into between it and the respondent No. 1 nor the appellant had initiated any proceedings for obtaining possession of the property in question. If in fact the contract had been concluded between the parties as is claimed by the appellant the appellant would not have failed to obtain possession of the property after execution of registered deed in its favour. These facts, thus, indicate that there was no concluded contract between the appellant and the Respondent No.1.

27. This Court cannot ignore the fact that on September 27, 2006 the respondent No. 3 had deposited cheques of Rs.9.25 crores in favour of the first respondent and Rs.5.90 crores in favour of the respondent No. 2. The bonafide of the first respondent can be seen from the fact that these cheques were not immediately encashed, and as on January 2007, the total amount lying with the first respondent and the respondent No. 2 paid by the respondent No.3 was Rs.24.15 crores as against the redemption amount of Rs.18.40 crores. As the respondent No.3 had made payment to redeem the property which was accepted by respondent No.1 and as respondent No.1 had agreed to permit the respondent No.3 to redeem the property in question, a prayer was made to permit respondent No.3 to withdraw Writ Petition No. 601 of 2006 which can neither be regarded as arbitrary nor as illegal nor contrary to the decision of this Court dated August 24, 2006 rendered in Special Leave Petition (Civil) 4957 of 2006. Similarly, as the grievance of the respondent No.3 did not survive, the modification of the order of status quo granted earlier at the instance of the respondent No. 3 who was petitioner in the writ petition, also cannot be held to be bad in law because if the status quo order had not been modified the respondent No.1 would not have been in a position to accept the offer of respondent No.3 to permit it to redeem the property which would have been in derogation of right of the respondent No. 3 to redeem the property as recognized by Section 60 of the Transfer Property Act.

28. On over all view of the matter, this Court finds that there is no substance in the challenge to the two orders dated April 7, 2008 modifying the order of status quo and order dated April 9, 2008 permitting the Respondent No.3 to withdraw Writ Petition No. 601 of 2006 warranting inference of this Court in appeals arising by grant of special leave filed under Article 136 of the Constitution. Therefore, the two appeals which are directed against orders dated April 7, 2008 and April 9, 2008 respectively have no substance and are liable to be dismissed.

29. The Court, further, finds that the appellant-trust has filed Contempt Petition under Article 129 of the Constitution read with Order XLVII of Supreme Court Rules 1966 and Rule-3(C) and Section 2(b) read with Section 12 of the Contempt of Courts Act, 1971 against the respondents for willfully disobeying and acting against the order passed by this Court on August 24, 2006 in Special Leave Petition (Civil) No.4957 of 2006. The contention raised by the appellant is that the respondents have deliberately and willfully violated the order passed by this Court on August 24, 2006 by passing resolutions dated February 20, 2008 and April 8, 2008 passed by the Board of Directors of the respondent No.1 and, therefore, appropriate action should be initiated against the respondents. On behalf of the respondent Nos. 3 and 4 it was contended that the Contempt Petition is not maintainable in as much as this Court had not passed any direction or order that was needed to be carried out by the respondents and, therefore, the question of violation of order of this Court does not arise at all. It was pointed out by the learned counsel for the respondent Nos. 3 and 4 that some observations made by this court here and there while dismissing the Special Leave Petition cannot be construed as direction of the Court at all. It was explained by the learned counsel for the respondent Nos. 3 and 4 that this Court had neither modified the order of the High Court dated February 22, 2006 nor had given any direction to any of the parties to carry out its order or the order of the High Court but the Court had simply upheld the dismissal order passed by the High Court by dismissing Special Leave Petition. What was pointed out by the learned counsel for the respondent Nos. 3 and 4 was that contempt under the Contempt of Courts Act necessarily presupposes a clear and willful violation of a direction or order of the court or an undertaking given to a court and as those elements are missing so far as the facts of the present case are concerned the Contempt Petition filed by the Petitioner should be dismissed.

30. On consideration of rival submissions advanced at the

Bar this Court is of the view that as was rightly pointed out by the learned counsel for the respondents the exercise of right of redemption in accordance with Section 60 of the Transfer of Property Act was neither a subject matter of Writ Petition No. 19 of 2006 nor it was subject matter of Special Leave Petition (Civil) No.4957 of 2006 which is clear from the enumeration of the main points by the High Court in Writ Petition No. 19 of 2006, which was whether there was a concluded contract. This Court had never prohibited the respondent Nos. 3 and 4 from exercising right of redemption nor restrained the respondent No.1 from considering the proposal of the Respondent No.3 to permit it to redeem the disputed property and had in fact expressed strongly that the respondent No. 1 should take that action which is in its best interest.

31. Under the circumstances the passing of resolutions by the respondent No.1 company can hardly be regarded as breach of direction given by this Court. No case is made out by the petitioner either to exercise powers under Section 12 of the Contempt of Courts Act 1971 nor any case is made out to set aside the resolutions passed by the Board of Directors of the respondent No.1 company. The prayers made in the Contempt Petition therefore, cannot be granted.

32. For the foregoing reasons the appeals as well as the Contempt Petition fail and are dismissed. Having regard to the peculiar facts of the case the parties are ordered to bear their own costs.

N.J. Matters dismissed.

ABHYUDYA SANSTHA

v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 4305-06 of 2011)

MAY 12, 2011

[G.S. SINGHVI AND K.S. RADHAKRISHNAN, JJ.]

Education/Educational Institutions – Illegal admissions – Appellant-Educational Institutions filed SLP and made misleading statements before this Court that they were granted recognition by the Regional Committee of the National Council for Teacher Education (NCTE) and thereafter, obtained interim orders directing the State Government to allot students to the appellant institutions for the D.Ed course – During pendency of SLP, the Regional Committee of the NCTE refused recognition to the appellant institutions – Held: Appellants are not entitled to the relief under Article 136 – They deserve to be non-suited because they did not approach the Court with clean hands – Though the students were not party to the patently wrong and misleading statements made by the appellants, but none of the appellant institutions were granted recognition by the Regional Committee and as such the appellants could not have admitted any students – Thus, there is no valid ground much less justification to confer legitimacy upon the admission made by the appellants in a clandestine manner – Students who may have taken admission and completed the course from an institution, which had not been granted recognition, would not be able to impart value based education to the future generations of the country – Thus it is not proper to issue direction for regularising the admissions made by the appellants – The students are not eligible for the award of degree by the affiliating body – Appellants directed to pay Rs. 1 lakh each to the said students by way of compensation –

Also cost of Rs. 2 lakh imposed on each of the appellants – Costs – Compensation – National Council for Teacher Education Act, 1993 – s. 14 – National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007 – Regulations 7 and 8 – Constitution of India, 1950 – Article 136.

Constitution of India, 1950 – Article 136 – Relief under – Entitlement for – Appellant Institutions made false statement of facts for seeking relief under Article 136 and obtained interim orders on the basis of misstatements made – Held: Appellants not entitled to relief under Article 136 – Costs of Rs 2 lakhs imposed – Costs – Administration of justice – Abuse of process of court.

National Council for Teacher Education Act, 1993 – Object of enactment – Explained.

Appellant-Educational institutions applied for grant of recognition for starting D.Ed. course but in view of the recommendations made by the State Government that there was no requirement of trained teachers in the State, the Regional Committee informed the appellants that their cases would not be processed. However, other educational institutions were issued letter of intent though final recognition was not granted. The Appellate Authority dismissed the appeal filed by one of the educational institution. Meanwhile, respondent Nos. 6 and 7 filed a writ petition challenging the exercise undertaken by the Regional Committee for grant of recognition to over 290 institutions since it was granted in total disregard of the views of the State Government. The Division Bench of the High Court quashed the said recognition granted by the Regional Committee. The appellant-educational institutions filed Special Leave Petitions praying for setting aside the orders passed by the Division Bench of the High Court as also filed applications seeking permission to file Special Leave

Petitions by stating that the orders passed by the High Court would adversely affect their right to continue the D.Ed. course. In the synopsis and list of dates, the appellants made categorical statement that after following the procedure prescribed under the National Council for Teacher Education Act, 1993 and the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007, the National Council for Teacher Education (NCTE) granted permission/recognition to them for starting D.Ed. course. The Supreme Court passed interim orders directing the State Government to allot students to the appellant institutions for D. Ed course.

During the pendency of the Special Leave Petitions, the Regional Committee refused recognition to the appellants. The writ petitions as also appeal filed by the appellants were rejected. The appellant filed a writ petition before another High Court. The Single Judge of the High Court allowed the writ petition and remitted the matter to the Regional Committee for processing the applications of the appellants afresh.

The appellants contended before the Supreme Court that they were not granted recognition by the Regional Committee and none of them was eligible to admit students to D.Ed. course, but submitted that the Court may direct the Regional Committee to consider their applications for recognition and protect the students who got admission on the basis of allotment made by the State Government; and that the statements made in the synopsis and list of dates of the SLP about grant of recognition by NCTE were not deliberate and the institutions and the student may not be penalized for the lapse which inadvertently occurred at the time of drafting.

Dismissing the appeals, the Court

HELD: 1.1 The appellants deserve to be non-suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the National Council for Teacher Education Act, 1993 read with Regulations 7 and 8 of the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted application in terms of Regulation 7 and made itself available for inspection by the team constituted by the Western Regional Committee (WRC) at Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. [Para 16] [635-D-H; 636-A-B]

1.2 Although, in the absence of cogent material, it is

not possible to record a finding that the students were party to the patently wrong and misleading statement made by the appellants, the Court cannot overlook the fact that none of the appellants has been granted recognition by WRC, Bhopal and in view of the prohibition contained in Section 17A of the Act read with Regulation 8(12), the appellants could not have admitted any student. However, with a view to make business and earn profit in the name of education, the appellants successfully manipulated the judicial process for allocation of the students. Therefore, there is no valid ground much less justification to confer legitimacy upon the admission made by the appellants in a clandestine manner. Any such order by the Court would be detrimental to the national interest. The students who may have taken admission and completed the course from an institution, which had not been granted recognition, would not be able to impart value based education to the future generation of the country. Rather, they may train young minds as to how one can succeed in life by manipulations. Therefore, it is not proper to issue direction for regularising the admissions made by the appellants on the strength of the interim orders passed by this Court. [Para 17] [638-D-H]

1.3 Each of the appellants is saddled with costs of Rs.2 lakhs, which shall be deposited with the Maharashtra State Legal Services Authority within a period of three months. If the needful is not done, the Secretary, Maharashtra State Legal Services Authority shall be entitled to recover the amount of cost as arrears of land revenue. The appellants are also directed to pay Rs.1 lakh to each of the students by way of compensation in lieu of the injury inflicted upon them by way of misrepresentation about their entitlement to admit students to D.Ed. course. [Paras 18 and 21] [639-A-B-E]

1.4 None of the students, who had taken admission

on the basis of allotment made by the State Government etc., shall be eligible for the award of degree etc. by the affiliating body. If the degree has already been awarded to any such student, the same shall not be treated valid for any purpose whatsoever. [Paras 19] [639-B-C]

Hari Narain v. Badri Das **AIR 1963 SC 1558;** *G. Narayanaswamy Reddy v. Govt. of Karnataka* **(1991) 3 SCC 261: 1991 (2) SCR 563;** *Dalip Singh v. State of U.P.* **(2010) 2 SCC 114: 2009 (16) SCR 111 – referred to.**

Case Law Reference:

AIR 1963 SC 1558	**Referred to.**	**Para 16**
1991 (2) SCR 563	**Referred to.**	**Para 16**
2009 (16) SCR 111	**Referred to.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4305-4306 of 2011.

From the Judgment & Order dated 7.01.2009 & 16.1.2009 of the High Court of Judicature at Bombay Nagpur Bench, Nagpur, in Writ Petition No. 2701 of 2008 in CAW No. 52 of 2009 in Writ Petition No. 2701 of 2008.

WITH

C.A. Nos. 4307-4308, 4309-4310, 4311-4312, 4313-4314, 4315 & 4316 of 2011.

Shekhar Naphade, Ashok Srivastav, Himinder Lal, Sachin J. Patil, Arun R. Pednekar, Sunil Kumar Verma, Somanath Padhan, Anagha, S. Desai, Sudhanshu S. Choudhari, K.N. Rai, Amitesh Kumar, Sanjay V. Kharde, Chinmoy A. Khaladkar, R.K. Rathore, Rekha Pandey, S.S. Rawat, C.K. Sharma for the appearing parties.

The Judgment of the Court was delivered by

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

2. The only question which needs consideration in these appeals is whether the appellants who had not been granted recognition by the Western Regional Committee of the National Council for Teacher Education and who did not get affiliation from the examining body in accordance with the provisions of the National Council for Teacher Education Act, 1993 (for short, 'the Act') and the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007 (for short, 'the Regulations') are entitled to question the order passed by the Division Bench of the Bombay High Court, Nagpur Bench whereby recognition granted to over 290 institutions was cancelled.

3. With a view to achieve the object of planned and coordinated development for the teacher education system throughout the country and for regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith, Parliament enacted the Act for the establishment of a Council to be called the National Council for Teacher Education (for short, "the NCTE") with multifarious functions, powers and duties. Section 2(c) of the Act defines the term "Council" to mean a Council established under sub-section (1) of Section 3. Section 2(i) defines the term "recognised institution" to mean an institution recognised under Section 14. Section 2(j) defines the term "Regional Committee" to mean a Committee established under Section 20. Section 3 provides for establishment of the Council which comprises of a Chairperson, a Vice-Chairperson, a Member-Secretary, various functionaries of the Government, thirteen persons possessing experience and knowledge in the field of education or teaching, nine members representing the States and Union Territories Administration, three members of Parliament, three members to be appointed from amongst teachers of primary and secondary education and teachers of recognised institutions. Section 12 of the Act enumerates

functions of the Council. Section 14 provides for recognition of institutions offering course or training in teacher education. Section 15 lays down the procedure for obtaining permission by an existing institution for starting a new course or training. Section 16 contains a *non obstante* clause and lays down that an examining body shall not grant affiliation to any institution or hold examination for a course or training conducted by a recognised institution unless it has obtained recognition from the concerned Regional Committee under Section 14 or permission for starting a new course or training under Section 15. The mechanism for dealing with the cases involving violation of the provisions of the Act or the rules, regulations, orders made or issued thereunder or the conditions of recognition by a recognised institution finds place in Section 17. By an amendment made in July, 2006, Section 17-A was added to the Act. It lays down that no institution shall admit any student to a course or training in teacher education unless it has obtained recognition under Section 14 or permission under Section 15. Section 29 declares that the NCTE shall, in the discharge of its functions and duties under the Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time and the decision of the Central Government as to whether a question is one of policy or not shall be final. Section 31(1) empowers the Central Government to make rules for carrying out the provisions of the Act. Section 31(2) specifies the matters in respect of which the Central Government can make rules. Under Section 32(1) the Council can make regulations for implementation of the provisions of the Act subject to the rider that the regulations shall not be inconsistent with the provisions of the Act and the rules made thereunder. Section 32(2) specifies the matters on which the Council can frame regulations. Sections 12, 14 to 16 and 17-A of the Act, which have bearing on the decision of these appeals read as under:

> *"12. Functions of the Council.–* It shall be the duty of the Council to take all such steps as it may think fit for ensuring

planned and coordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may–

(a) undertake surveys and studies relating to various aspects of teacher education and publish the result thereof;

(b) make recommendations to the Central and State Governments, Universities, University Grants Commission and recognised institutions in the matter of preparation of suitable plans and programmes in the field of teacher education;

(c) coordinate and monitor teacher education and its development in the country;

(d) lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognised institutions;

(e) lay down norms for any specified category of courses or training in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

(f) lay down guidelines for compliance by recognised institutions, for starting new courses or training and for providing physical and instructional facilities, staffing pattern and staff qualifications;

(g) xxx xxx xxx

(h) xxx xxx xxx

(i) xxx xxx xxx

(j) examine and review periodically the implementation of

the norms, guidelines and standards laid down by the Council and to suitably advise the recognised institutions;

(k) xxx xxx xxx

(l) xxxxxx xxx

(m) xxx xxx xxx

(n) perform such other functions as may be entrusted to it by the Central Government.

14. Recognition of institutions offering course or training in teacher education.–(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall,–

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that if fulfils such other conditions required for proper

functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) xxx xxx xxx

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4),–

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused.

15. Permission for a new course or training by recognised institution.– (1) Where any recognised institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the recognised institution such other particulars as may be considered necessary, the Regional Committee shall,–

(a) if it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff, laboratory, and that it fulfils such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing permission to such institution, for reasons to be recorded in writing:

Provided that before passing an order refusing permission under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

(4) xxx xxx xxx

16. *Affiliating body to grant affiliation after recognition or permission by the Council.*– Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day,–

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognised institution,

unless the institution concerned has obtained recognition from the Regional Committee concerned, under section 14 or permission for a course or training under section 15.

17-A. No admission without recognition.– No institution shall admit any student to a course or training in teacher education, unless the institution concerned has obtained recognition under section 14 or permission under section 15, as the case may be."

4. In exercise of the power vested in it under Section 32, the Council has framed regulations in 1995, 2002, 2005 and 2007. Since we are concerned with the 2007 Regulations, the relevant provisions thereof are reproduced below:-

"5. Manner of making application and Time Limit

(1) An institution eligible under Regulation 4, desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE for recognition in the prescribed form in triplicate along with processing fee and requisite documents.

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

7. *Processing of Applications*

(1) The applicant institutions shall ensure submission of applications complete in all respects. However, in order to cover the inadvertent omissions or deficiencies in documents, the office of the Regional Committee shall point out the deficiencies

within 30 days of receipt of the applications, which the applicants shall remove within 90 days. No application shall be processed if the processing fees of Rs.40,000/- is not submitted and such applications would be returned to the applicant institutions.

(2) Simultaneously, on receipt of application, a written communication alongwith a copy of the application form submitted by the institution(s) shall be sent by the office of Regional Committees to the State Government/U.T. Administration concerned.

(3) On receipt of the communication, the State Government/UT Administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government/UT Administration shall provide detailed reasons/grounds thereof with necessary statistics, which shall be taken into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State Government/UT Administration within the stipulated 60 days, it shall be presumed that the State Government/UT Administration concerned has no recommendation to make.

(4) After removal of all the deficiencies and to the satisfaction of the Regional Committee concerned, the inspection of infrastructure, equipments, instructional facilities etc, of an institution shall be conducted by a team of experts called Visiting Team (VT) with a view to assessing the level of preparedness of the institution to commence the course. Inspection would be subject to the consent

of the institution and submission of the self-attested copy of the completion certificate of the building. Such inspection, as far as administratively and logistically possible, shall be in the chronological order of the date of receipt of the consent of the institution. In case the consent from more than one institution is received on the same day, alphabetical order may be followed. The inspection shall be conducted within 30 days of receipt of the consent of the institution.

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx

(8) xxx xxx xxx

(9) The institution concerned shall be informed, through a letter, of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session. The letter issued under this clause shall not be notified in the Gazette. The faculty shall be appointed on the recommendations of the Selection Committee duly constituted as per the policy of the State Govt/Central Govt/University/ UGC or the concerned affiliating body, as the case may be. The applicant institution shall submit an affidavit in the prescribed form that the Selection Committee has been constituted as stated above. A separate staff list with the details would be submitted in the prescribed form. The Regional Committee would rely on the above affidavit and the staff list before processing the case for grant of formal recognition.

(10) xxx xxx xxx

(11) The institution concerned, after appointing the requisite faculty/staff as per Regulation 7(9) above and fulfilling the conditions under Regulation 7(10) above shall formally inform the Regional Committee concerned alongwith the requisite affidavit and staff list. The Regional Committee concerned shall then issue a formal recognition order that shall be notified as per provision of the NCTE Act.

(12) xxx xxx xxx

(13) xxx xxx xxx

8. Conditions for grant of recognition

(1) An institution must fulfill all the prescribed conditions related to norms and standards as prescribed by the NCTE for conducting the course or training in teacher education. These norms, inter alia, cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc.

(2) In the first instance, an institution shall be considered for grant of recognition for only one course for the basic unit as prescribed in the norms & standards for the particular teacher education programme. An institution can apply for one basic unit of an additional course from the subsequent academic session. However, application for not more than one additional course can be made in a year.

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) No institution shall be granted recognition under these regulations unless it is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government/Govt institutions for a period of not less than 30 years. In cases where under relevant State/UT laws the maximum permissible lease period is less than 30 years, the State Government/UT Administration law shall prevail. However, no building could be taken on lease for running any teacher training course.

(8) xxx xxx xxx

(9) xxx xxx xxx

(10) At the time of inspection, the building of the institution shall be complete in the form of a permanent structure on the land possessed by the institution in terms of Regulation 8(7), equipped with all necessary amenities and fulfilling all such requirements as prescribed in the norms and standards. The applicant institution shall produce the original completion certificate, approved building plan in proof of the completion of building and built up area and other documents to the Visiting Team for verification. No temporary structure/asbestos roofing shall be allowed.

(11) xxx xxx xxx

(12) An institution shall make admission only after it obtains order of recognition from the Regional Committee concerned under Regulation 7(11), and affiliation from the examining body.

(13) to (16) xxx xxx xxx"

5. Vide letter dated 2.2.1996, the NCTE issued guidelines for ensuring that the training institutions are established keeping in view the requirement of trained teachers in different States and U.T. These guidelines read as under:

"1. The establishment of teacher training institutions by the Government, private managements or any other agencies should largely be determined by assessed need for trained teachers. This need should take into consideration the supply of trained teachers from existing institutions, the requirement of such teachers in relation to enrolment projections at various stages, the attrition rates among trained teachers due to superannuation, change of occupation, death, etc. and the number of trained teachers on the live register of the employment exchanges seeking employment and the possibility of their deployment. The States having more than the required number of trained teachers may not encourage opening of new institutions for teacher education or to increase the intake.

2. The States having shortage of trained teachers may encourage establishment of new institutions for teacher education and to increase intake capacity for various levels of teacher education institutions keeping in view the requirements of teachers estimated for the next 10-15 years.

3. Preference might be given to institutions which tend to emphasise the preparation of teachers for subjects (such as Science, Mathematics, English, etc.) for which trained teachers have been in short supply in relation to requirement of schools.

4. Apart from the usual courses for teacher preparation, institutions which propose to concern themselves with new emerging specialities (e.g. computer education, use of

electronic media, guidance and counselling, etc.) should receive priority. Provisions for these should, however, be made only after ensuring that requisite manpower, equipment and infrastructure are available. These considerations will also be kept in view by the institution intending to provide for optional subjects to be chosen by students such as guidance and counselling, special education, etc.

5. With a view to ensuring supply of qualified and trained teachers for such specialities such as education of the disabled, non-formal education, education of adults, pre-school education, vocational education, etc. special efforts and incentives may be provided to motivate private managements/voluntary organisations for establishment of institutions, which lay emphasis on these areas.

6. With a view to promoting professional commitment among prospective teachers, institutions which can ensure adequate residential facilities for the Principal and staff of the institutions as well as hostel facilities for substantial proportion of its enrolment should be encouraged.

7. Considering that certain areas (tribal, hilly regions, etc.) have found it difficult to attain qualified and trained teachers, it would be desirable to encourage establishment of training institutions in those areas.

8. Institutions should be allowed to come into existence only if the sponsors are able to ensure that they have adequate material and manpower resources in terms, for instance, of qualified teachers and other staff, adequate buildings and other infrastructure (laboratory, library, etc.), a reserve fund and operating funds to meet the day-to-day requirements of the institutions, including payment of salaries, provision of equipment, etc. Laboratories, teaching science methodologies and practicals should have adequate gas plants, proper fittings and regular

supply of water, electricity, etc. They should also have adequate arrangements. Capabilities of the institution for fulfilling norms prepared by NCTE may be kept in view.

9. In the establishment of an institution preference needs to be given to locations which have a large catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and undertake practice teaching. A training institution which has a demonstration school where innovative and experimental approaches can be demonstrated could be given preference."

6. For facilitating grant of recognition for establishment of teacher training institutions in different parts of the country, four Regional Committees including the Western Regional Committee at Bhopal (for short, 'WRC, Bhopal') were set up by the NCTE. In 2006-2007, WRC, Bhopal granted recognition/permission to large number of colleges/institutions to start B.Ed./D.Ed. courses in the four States falling within its jurisdiction, i.e. Gujarat, Madhya Pradesh, Maharashtra and Goa. On receipt of complaints that grave irregularities were committed by WRC, Bhopal in granting recognition/permission, the Central Government (Ministry of Human Resource Development) in exercise of the power vested in it under Section 29 of the Act issued order dated 21.8.2007 and directed WRC, Bhopal not to grant recognition to any institution/course till a comprehensive review was undertaken. On 23.8.2007, the Central Government constituted three member Committee headed by Ms. Anita Kaul, Joint Secretary, Ministry of Human Resource Development to conduct an in-depth inquiry into the working of WRC, Bhopal. In its report, the Committee highlighted the irregularities committed by WRC, Bhopal in granting recognition to various institutions in the States of Maharashtra, Madhya Pradesh and Gujarat without taking into consideration the views of the concerned State Governments. After considering the report of the Committee,

the Central Government issued the following directions to the NCTE:

"(a) The WRC, Bhopal will process all pending applications ensuring, however, that it scrupulously takes into account the views of the State Government on the issue of sanction or rejection of applications for recognition. In case, WRC, Bhopal differs with the views of the State Government, it shall record specific reasons in writing in such case and submit a special report to NCTE headquarters;

(b) NCTE shall expedite the study on the demand and supply of teachers/teaching capacity specially for the State of Maharashtra, Gujarat, Madhya Pradesh and Chhattisgarh and;

(c) The recommendations in respect of amendments to NCTE Act and its Regulations shall be carefully examined in consultation with Ministry of Law."

7. The aforesaid directions were considered in the 100th meeting of WRC, Bhopal and the following norms were laid down for considering the recommendations of the State Government:

"(a) If there is any positive recommendation from the State Government, recognition/permission will be granted as per the NCTE Regulations:

(b) If the Government has not communicated any positive or negative remarks within 60 days from the issuance of the letter from the WRC to the concerned Government, cases will be considered on merit basis:

(c) In case of the negative recommendation without any justification, cases will be considered on merit basis;

(d) If the State Government's negative recommendations are there in respect of a particular institution with

justification and in the opinion of the Committee the justification is genuine, the cases will be rejected. The intimation of such cases will be sent to the NCTE headquarters.

(e) If the WRC differs with the negative reasons/opinion of the State Government, cases will be forwarded to the NCTE headquarters."

8. The appellant institutions submitted applications in 2006 and 2007 for grant of recognition for starting D.Ed course. The establishments of the appellants were inspected in March, May, June and July 2008. After considering the inspection reports, WRC, Bhopal issued letters to the appellants requiring them to give clarification on some issues. The matter was again considered in the meetings of WRC, Bhopal held in September/October 2008 in the light of the directives issued by the Central Government and the appellants were informed that their cases will not be processed. This was done in the back-drop of the recommendations made by the State Government that there was no requirement of trained teachers in the State. In the cases of Rajarshi Sahoo Chatrapati Education Society, Jagruti Shikshan Sanstha and Navyuvak Shikshan Mandal, letters of intent were issued, but final recognition was not granted under Section 14 of the Act read with Regulation 8(12) of 2007 Regulations. The appeal filed by Navyuvak Sikshan Mandal under Section 18 of the Act was dismissed by the appellate Authority.

9. In the meanwhile, respondent Nos.6 and 7 filed writ petition questioning the exercise undertaken by WRC, Bhopal for grant of recognition to over 290 institutions. They alleged that recognition has been granted in total disregard of the provisions of the Act and the Regulations and that the views of the State Government were completely ignored. The Division Bench of the High Court, after an in-depth examination of the record produced before it and the relevant statutory provisions, quashed the recognitions granted by WRC, Bhopal.

10. Although, the appellants were not at all affected by the order of the Division Bench of the High Court because they had not been granted recognition by WRC, Bhopal, they filed special leave petitions and prayed for setting aside orders dated 7.1.2009 and 16.1.2009 passed by the Division Bench of the High Court. They also filed applications for permission to file special leave petitions by stating that the orders passed by the High Court would adversely affect their right to continue the D.Ed. course. The appellants pleaded that the High Court could not have quashed the recognition granted by WRC, Bhopal without hearing the affected persons and without examining the issue of *locus standi* of the writ petitioners. They also claimed that infrastructure has been created by investing huge amount and cancellation of recognition will cause irreparable loss to them. In the synopsis and list of dates, all the appellants made categorical statement that after following the procedure prescribed under the Act and the Regulations, the NCTE granted permission/recognition to them for starting D.Ed. course.

11. Since the Court was not apprised of the true status of the applications filed by the appellants for grant of recognition and patently wrong and misleading statements were made that they have been duly recognised by the NCTE, this Court entertained the special leave petitions along with large number of other similar cases filed by those who had been granted recognition by WRC, Bhopal, issued notices and passed order of *status quo*. Later on, further interim orders were passed directing the State Government to allot students to the appellants for D. Ed course.

12. In the case of Abhyudya Sanstha, some interesting developments took place during the pendency of the special leave petition. By an order dated 26.4.2009/3.5.2010, WRC, Bhopal refused recognition to the appellant. The Writ Petition filed by the institute was allowed by the Division Bench of the High Court and WRC, Bhopal was directed to reconsider the

appellant's plea for recognition. After remand, WRC, Bhopal reconsidered the appellant's application and rejected the same vide order dated 3.5.2010. The appeal preferred against that order was dismissed by the competent authority. This time, the appellant did not approach the Bombay High Court. Instead, it filed Writ Petition No. 6784 of 2010 in the Delhi High Court. By an order dated 17.1.2011, the learned Single Judge allowed the writ petition and remitted the matter to WRC, Bhopal for processing the applications of the appellant afresh. These additional facts clearly demonstrate that on the date of filing the special leave petition, appellant Abhyudya Sanstha did not have recognition in terms of Section 14 read with Regulation 7(11). The position of the other appellants is no better. Three of them got letters of intent but none was granted recognition. We have no doubt that if the appellants had not misrepresented the facts and made wrong statement on the issue of their recognition by WRC, Bhopal, this Court would not have entertained the special leave petition, what to say of passing interim orders.

13. At the hearing, Shri Shekhar Naphade and Shri Ashok Srivastava, learned senior counsel appearing for some of the appellants fairly stated that their clients were not granted recognition by WRC, Bhopal and none of them was eligible to admit the students to D. Ed. course, but submitted that the Court may direct WRC, Bhopal to reconsider their applications for recognition and protect the students who got admission on the basis of allotment made by the State Government so that they may not face difficulty in getting employment on the basis of the degrees etc. awarded by the affiliating body. Learned senior counsel submitted that the statements made in the synopsis and list of dates of the special leave petitions about grant of recognition by NCTE were not deliberate and the institutions and the students may not be penalized for the lapse, which inadvertently occurred at the time of drafting the petitions. Shri Ashok Srivastava, learned senior counsel stated that his client has not admitted any student on the strength of the interim order passed by this Court.

14. Shri Amitesh Kumar, learned counsel for the NCTE submitted that the Court may not issue any direction for regularisation of admissions made by the appellants because none of them had been granted recognition by WRC, Bhopal. Learned counsel argued that in the absence of recognition by the competent authority, the appellants are not entitled to conduct any teacher training course and, therefore, the students admitted by them should not be allowed to reap the benefits of illegal admissions.

15. We have considered the respective submissions and carefully examined the records.

16. In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants

is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents. In *Hari Narain v. Badri Das* AIR 1963 SC 1558, *G. Narayanaswamy Reddy v. Govt. of Karnataka* (1991) 3 SCC 261 and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In *Hari Narain v. Badri Das* (supra), the Court revoked the leave granted to the appellant and observed:

> "It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

In *G. Narayanaswamy Reddy v. Govt. of Karnataka* (supra), the Court noted that the appellant had concealed the fact that the award could not be made by the Land Acquisition Officer within the time prescribed under Section 11A of the

Land Acquisition Act because of the stay order passed by the High Court and observed:

> "…… Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter-affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

In *Dalip Singh v. State of U.P.* (2010) 2 SCC 114, this Court noticed the progressive decline in the values of life and observed:

> "For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

> In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

17. The question which remains to be considered is whether the Court should direct regularisation of the admission of the students, who were allotted to the appellants by the State Government etc. pursuant to the directions given by this Court. Although, in the absence of cogent material, it is not possible to record a finding that the students were party to the patently wrong and misleading statement made by the appellants, the Court cannot overlook the fact that none of the appellants has been granted recognition by WRC, Bhopal and in view of the prohibition contained in Section 17A of the Act read with Regulation 8(12), the appellants could not have admitted any student. However, with a view to make business and earn profit in the name of education, the appellants successfully manipulated the judicial process for allocation of the students. Therefore, there is no valid ground much less justification to confer legitimacy upon the admission made by the appellants in a clandestine manner. Any such order by the Court will be detrimental to the national interest. The students who may have taken admission and completed the course from an institution, which had not been granted recognition, will not be able to impart value based education to the future generation of the country. Rather, they may train young minds as to how one can succeed in life by manipulations. Therefore, we do not consider it proper to issue direction for regularising the admissions made by the appellants on the strength of the interim orders passed by this Court.

18. In the result, the appeals are dismissed. Each of the appellants is saddled with costs of Rs.2 lacs, which shall be deposited with the Maharashtra State Legal Services Authority within a period of three months. If the needful is not done, the Secretary, Maharashtra State Legal Services Authority shall be entitled to recover the amount of cost as arrears of land revenue.

19. We also declare that none of the students, who had taken admission on the basis of allotment made by the State Government etc., shall be eligible for the award of degree etc. by the affiliating body. If the degree has already been awarded to any such student, the same shall not be treated valid for any purpose whatsoever.

20. WRC, Bhopal shall publish a list of the students, who were admitted by the appellants pursuant to the interim orders passed by this Court and forward the same to the Education Department of the Government of Maharashtra, which shall circulate the same to all government and aided institutions so that they may not employ the holders of such degrees.

21. The appellants are directed to pay Rs.1 lac to each of the students by way of compensation in lieu of the injury inflicted upon them by way of misrepresentation about their entitlement to admit students to D.Ed. course.

N.J. Appeals dismissed.

KODIKUNNIL SURESH @ J. MONIAN
v.
N.S. SAJI KUMAR, ETC. ETC.
(Civil Appeal Nos.6391-93 of 2010)

MAY 12, 2011

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Representation of People Act, 1951: s.100(1)(a) – Election of appellant to the House of People from the Mavelikkara Parliamentary Constituency reserved for the Scheduled Castes – Challenged on the ground that the appellant was a Christian and not a Scheduled Caste and therefore, not qualified to be chosen to fill a seat in the House of People u/s.4(a) of the Act – High Court declared his election void u/s.100(1)(a) of the Act – On appeal, held: The father of the appellant originally was a member of the Cheramar caste which was admittedly a Scheduled Caste in the State of Kerala – His father due to poverty had availed various reliefs from Christian Missionaries and was known as 'Joseph' – On conversion to Christianity, the father of the appellant ceased to be a member of the Cheramar caste – However in 1978, appellant underwent an expiatory ceremony and reconverted himself to Hinduism and was thereafter accepted as a member of Cheramar caste – Evidence clearly showed that the appellant had not only unequivocally expressed the intention of reconverting to Hinduism in 1978, but also conducted himself since 1978 in a manner true to the faith of Hindu religion by marrying a Hindu in accordance with the ceremonies of the Hindu religion and had been visiting Hindu temples for worship of different idols and had in fact abjured the Christian religion – Appellant had reconverted to Hinduism in 1978 after fully realizing the religious significance and social consequences of his decision to reconvert to Hinduism – Therefore conversion of appellant at the age of 16 years was not invalid conversion

to Hinduism – Appellant was actively working for the upliftment of the Cheramar community and was accepted and admitted into the fold of Hindu Cheramar Community by its members who were Cheramar Hindus – In four earlier elections, appellant got elected from the Adoor Parliamentary Constituency reserved for Scheduled Caste – All these circumstances clearly established that the appellant after his reconversion to Hinduism in 1978 was accepted by the members of the Cheramar caste – Accordingly his election was not void u/ss.100 (1)(a) and 100 (1)(d)(i) of the Act.

Evidence Act, 1872: ss.3, 35 – Applicability of provisions of the Act to the Representation of People Act, 1951 – Discussed – Representation of People Act, 1951 – s.87.

The appellant was elected to the House of People from the Mavelikkara Parliamentary Constituency reserved for the Scheduled Castes. The election of the appellant was challenged by two voters and a defeated candidate of the said Constituency on the ground that the appellant was a Christian and under the Constitution (Scheduled Castes) Order, 1950 only a Hindu can be a Scheduled Caste and not being a Scheduled Caste, he was not qualified to be chosen to fill a seat in the House of People under Section 4(a) of the Representation of People Act, 1951 and, therefore, his election was void under Section 100(1)(a) of the Act. The defence of the appellant was that his parents were Hindus and only due to poverty, they had availed various reliefs from Christian Missionaries and that is why his father was known as 'Joseph' by the Christian Missionaries. His further case was that in 1978, he had undergone an expiatory ceremony and had reconverted himself to Hinduism and was thereafter accepted as a member of Cheramar caste. The High Court declared the election of the appellant void under Sections 100 (1)(a) and 100 (1)(d)(i) of the Act. It held that the appellant was born to Christian parents and that

when the appellant undertook the expiatory ceremony in 1978 to convert himself to Hinduism, he had not attained the age of discretion as he was under 18 years of age. It further held that though the appellant married a Hindu and he professed Hindu religion, there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar Caste after his re-conversion to Hinduism. Relying on the decisions of the Supreme Court that without acceptance by the Scheduled Caste community after re-conversion, the reconvert does not get back to his original caste, the High Court held that the appellant after his re-conversion did not become a member of the Cheramar Caste and, therefore, he was not qualified to contest from the Mavelikkara reserved constituency and his nomination was improperly accepted and, therefore, his election was void. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1.1. Sub-section (2) of Section 87 of the Representation of People Act, 1951 states that the provisions of the Indian Evidence Act, 1872 shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition. Section 3 of the Indian Evidence Act states that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Section 35 of the Indian Evidence Act states that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the

country in which such book, register or record is kept, is itself a relevant fact. [Para 8] [657-C-G]

P.C. Purushotham Reddiar v. S. Perumal **(1972) 1 SCC 9: 1972 (2) SCR 646;** *Birad Mall Singhvi v. Anand Purohit* **1988 (supp.) SCC 604 – referred to.**

1.2. Exhibit P-9 was part of the School Admission Register of the Government Higher Secondary School and was proved through its Head Mistress. This document indicated that the name of the father of the appellant was 'Joseph' which was a Christian name and the religion of the appellant was Christian. Exhibit P-10 was part of the Admission Register of Laxmi Vilasom High School proved through its Head Master (PW-6). This document showed that the appellant was admitted to this School on 05.05.1975 into Standard VIII and his name was entered as Monian J. (Joseph) and mother's name was shown as Thakkamma T. and religion of the appellant was shown as Christian. Exhibit P-4 was his School Leaving Certificate issued by the Head Master in which the name of the appellant was shown as Monian J. (Joseph) and his religion was shown as Christian. In the affidavit filed before the High Court, the appellant had stated that in Exhibit P9, his father's name was Joseph as his father was called 'Joseph' by Christian Missionaries because his father was visiting Christian Missionaries to avail help and actually name of his father was Kunjan and he continued to be a Hindu and his alleged conversion was only nominal. The appellant explained in his cross-examination that when he was admitted in the School for the first time, his father had gone for work and his friend Thomas had taken him to School and his name was shown by Thomas as Joseph as his father was called by the Missionaries as 'Joseph',. The residents of a village have familiarity with the religion of the co-villagers and the information furnished by them has probative value and

can be considered by the Court. Thomas, who was a friend of the father of the appellant, obviously must be familiar with the religion of the father of the appellant as well as of the appellant during his childhood. The entry in Ext. P-9 with regard to the Christian name of the father of the appellant and the Christian religion of the appellant was admittedly made on the basis of the information of Thomas. The entry in Ext. P-9 regarding the religion of the appellant having been made on the information of Thomas in 1967 during the childhood of the appellant several decades before the appellant contested the election must be taken to be a very relevant circumstance of great probative value for coming to the conclusion that the appellant was a Christian during his childhood. The entries in Ext. P-10 also indicated the religion of the appellant as Christian. The entry relating to the religion of the appellant could have been corrected by the mother of the appellant shown in Ext.P-10 as his parent if the entry was not correct. The entries in the School Leaving Certificate (Exhibit P-4) issued in 1978 were on the basis of information in Exhibit P-10 and these also indicated that the appellant was a Christian. This entry relating to the religion of the appellant could also have been corrected by his mother in 1978 if his religion was not Christian. In Exhibit R-10, a certificate issued by the Kerala Hindu Mission on 25.05.1978 with regard to the conversion of the appellant to Hinduism, the appellant was described as a Cheramar Christian upto the age of 16 years. If he was not a Christian till the age of 16 years, question of his conversion to Hindu religion in 1978 would not have arisen. On consideration of all these facts and circumstances, the High Court was right in coming to the conclusion that the fact that the appellant was born to Christian parents was not seriously disputed by the appellant. [Paras 7-9] [656-A-H; 657-A; 658-C-H; 659-A-D]

Desh Raj v. Bodh Raj **(2008) 2 SCC 186: 2007 (12)**

SCR 757 – relied on.

M. Chandra v. M. Thangamuthu **2010 (9) SCALE 145 – held inapplicable.**

2. It is on the facts of each case that the Court has to decide whether the child had attained sufficient maturity to understand the religious significance and the social consequences of his decision to reconvert to the Hindu religion. The evidence of the appellant (RW-1), President of the Kerala Hindu Mission (RW-3) and the Certificate issued by the Kerala Hindu Mission on 25.05.1978 (Ext. R-10) clearly established that the appellant had on his own volition decided to reconvert to Hinduism. Ext. R-10 was followed by the Gazette Notification (Ext. R-9). These two documents were clear proof of the declaration of the intention of the appellant to reconvert himself to Hinduism from Christianity. This declaration of intention of the appellant was also accompanied by conduct unequivocally expressing that the appellant has in fact reconverted himself to Hinduism. The appellant also produced before the High Court a certificate of marriage which was marked as Ext. R-14. In Ext. R-14, the date of marriage of the appellant was shown as 30.06.1994 and the name of the appellant was shown as Kodikunnil Suresh and the wife of the appellant was shown as Bindu Sekhar. The appellant had stated in his affidavit before the High Court that Bindu was a member of Scheduled Caste and was a Hindu and that during the marriage there was tying of Tahali and that he garlanded the bride in the marriage ceremony and his wife also garlanded him. He also stated that there was exchange of rings and he gave pudava to her and the form of the marriage was that of the Cheramar community. He further stated in the affidavit that he worshipped Dharma Sastha in Sabarimala and that he also goes for worship to Pazhavangadi Ganapathi

Temple. RW-4, who was a voter of Adoor Parliamentary Constituency and who had been the Head Master of the Kulthupuzha Government High School and the Deputy Director of Education, Kollam, was examined before the High Court and he stated that he was invited for the marriage of the appellant and the marriage was performed following the ceremonies of Hindu religion. Nothing was brought out in the cross-examination of the appellant for the Court not to rely on his evidence that he has been visiting the temples for worship. Consideration of the evidence led before the High Court clearly showed that the appellant had not only unequivocally expressed the intention of reconverting to Hinduism in 1978, but also conducted himself since 1978 in a manner true to the faith of Hindu religion by marrying a Hindu in accordance with the ceremonies of the Hindu religion and had been visiting Hindu temples for worship of different idols and had in fact abjured the Christian religion. In other words, the appellant had reconverted to Hinduism in 1978 after fully realizing the religious significance and social consequences of his decision to reconvert to Hinduism. The High Court, therefore, was not right in holding that the conversion of the appellant under Ext. R-9 and R-10 at the age of 16 years was not a valid conversion to Hinduism. [Paras 12, 13] [662-C-D; 663-E-H; 664-A-H; 665-A-C]

3. A dominant factor to determine the revival of the caste of a convert from Christianity to his old religion would be that in cases of election to the State Assemblies or the Parliament where under the Presidential Order a particular constituency is reserved for a member of the scheduled caste or tribe and the electorate gives a majority verdict in his favour, then this would be doubtless proof positive of the fact that his community has accepted him back to his old fold and this would result in a revival of the original caste to which the

candidate belonged. The father of the appellant originally was a member of the Cheramar caste which was admittedly a Scheduled Caste in the State of Kerala. On conversion to Christianity, the father of the appellant had ceased to be a member of the Cheramar caste. This was because on conversion to Christianity, a person ceases to belong to his original caste. In 1978 the appellant reconverted into Hinduism and continued to be a Hindu thereafter. The appellant has stated in his affidavit (examination-in-chief) before the High Court that in 1979 he was actively working for the upliftment of the Cheramar community and the Kerala Cheramar Sangham issued a certificate which stated that being a descendant of Scheduled Caste convert and by the conversion, the appellant was accepted and admitted into the fold of Hindu Cheramar Community by its members who were Cheramar Hindus and by this fact he has become a member of Cheramar Community which is recognized as a Scheduled Caste. This certificate dated 25.10.1979 was issued ten years prior to 1989 when the appellant for the first time contested from the Adoor Parliamentary Constituency reserved for the Scheduled Caste. In the years 1989, 1991, 1996 and 1999, the appellant contested and got elected from the Adoor Parliamentary Constituency reserved for Scheduled Caste. In between, in the year 1994, the appellant got married to Bindu and his affidavit (examination-in-chief) before the High Court stated that the marriage was performed in accordance with the form of Cheramar community. All these circumstances clearly established that the appellant after his reconversion to Hinduism in 1978 was accepted by the members of the Cheramar caste. [Paras 19, 20] [669-G-H; 670-A-G]

4. The Cheramar community and the Pulayan community appear to be two distinct castes as per Entry 54 in Part VIII of the Schedule to the Constitution

(Scheduled Castes) Order, 1950. From the written statements of the appellant and from his evidence, however, it appears that the appellant entertained a belief that the Cheramar caste and the Pulayan caste are one and the same caste. Perhaps, because of this belief he married Bindu who belonged to the Pulayan caste. The fact, however, remained that the appellant had declared himself to be belonging to the Cheramar caste in his nomination form and there was no declaration by him that he belonged to the Pulayan caste. The Returning Officer relying on the certificate Ext. P-2 issued by the Tehsildar, Nedumangad came to the conclusion that the appellant belonged to Cheramar caste and had accordingly accepted his nomination. The said findings of the Returning Officer would show that he was of the view that the distinction between Hindu Cheramar and Hindu Pulaya was very thin and the local usage had confused even the experts and that both were Scheduled Castes and the areas which required a thorough enquiry by experts and examination of witnesses on both sides were also required which he was not supposed to do so as the Returning Officer. The evidence would further show that ultimately the Returning Officer relied on the certificate of Tehsildar, Nedumangad, according to which the appellant belonged to the Hindu Cheramar caste and decided that the appellant was competent to contest the election from the reserved constituency and accordingly accepted his nomination. The appellant was required to plead and lead evidence that he was a member of the Cheramar caste and after his reconversion he was accepted by the members of the Cheramar caste. So long as he has pleaded and adduced reliable evidence to show that he was originally a member of the Cheramar caste and after his conversion has been accepted back as a member of the Cheramar caste, the court cannot throw out his case only on the ground that he, like the Returning Officer, did not know the thin distinction

between the Cheramar and Pulayan castes. The findings of the High Court, therefore, that there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar caste after his reconversion to Hinduism was contrary to the evidence on record. [Para 21] [670-G-H; 671-A-H; 672-A-E]

C.M. Arumugam v. S. Rajgopal and others **(1976) 1 SCC 863: 1976 (3) SCR 82;** *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju and others* **(2006) 1 SCC 212: 2005 (4) Suppl. SCR 821 – held inapplicable.**

5. The case of the appellant was that in four earlier elections the voters of a constituency reserved for Scheduled Castes have elected him from the constituency and this conduct of the voters show that the members of the Scheduled Castes have accepted him back to the fold of his original cast, namely, the Cheramar community. The fact that the appellant has been elected four times from the Adoor Parliamentary Constituency reserved for the Scheduled Caste is a very strong circumstance to establish that he has been accepted by the members of his caste after his reconversion to Hinduism. The appellant was qualified under Section 4(a) of the Act to be chosen to fill the seat in the House of People from Mavelikkara Parliamentary Constituency reserved for the Scheduled Castes and that his nomination was not improperly accepted by the Returning Officer and accordingly his election was not void under Section 100 (1)(a) and 100 (1)(d)(i) of the Act. [Paras 22, 23] [673-A-F]

Ajit Datt v *Ethel Walters & Ors.* **AIR 2001 Allahabad 109;** *Aravamudha Iyenger v. Ramaswami Bhattar & Anr*. **AIR 1952 Madras 245;** *Kailash Sonkar v. Smt. Maya Devi* **(1984) 2 SCC 91: 1984 (2) SCR 176;** *S. Anbalagan v. B. Devarajan & Ors*. **(1984) 2 SCC 112: 1984 (1) SCR 973;** *S. Nazeer*

Ahmed v. State Bank of Mysore & Ors. **(2007) 11 SCC 75: 2007 (1) SCR 843;** *Perumal Nadar (dead) by LRs. v. Ponnuswami* **1970 (1) SCC 605: 1971 (1) SCR 49;** *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram & Ors.* **(1954) SCR 817;** *S. Rajagopal* v. *C.M. Armugam & Ors.* **1969 (1) SCR 254 – referred to.**

Case Law Reference:

2010 (9) SCALE 145	**held inapplicable**	**Para 5**
1972 (2) SCR 646	**referred to**	**Para 6**
1988 (supp.) SCC 604	**referred to**	**Para 8**
2007 (12) SCR 757	**relied on**	**Para 8**
AIR 1952 Madras 245	**referred to**	**Para 9, 11, 12**
1984 (2) SCR 176	**referred to**	**Para 9, 11,12,14,19**
1984 (1) SCR 973	**referred to**	**Para 9, 14, 19**
2007 (1) SCR 843	**referred to**	**Para 11**
1971 (1) SCR 49	**referred to**	**Para 11**
(1954) SCR 817	**referred to**	**Para 12**
1976 (3) SCR 82	**held inapplicable**	**Para 15, 17,18,22**
2005 (4) SUPPL. SCR 821	**held inapplicable**	**Para 15, 22**
1969 (1) SCR 254	**referred to**	**Para 16, 17,18,20**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6391-6393 of 2010.

From the Judgment & Order dated 26.7.2010 of the High Court of Kerala in E.P. Nos. 3 of 2009 and 8 of 2009.

P.P. Rao, Abhimanyu Bhandari, Anubhav Singhvi, S. Udaya Kumar Sagar Bina Madhavan, Vinita Sasidharan, Pankaj Singh, Vincent De Paul Apeksha S., Purushottam Sharma Tripathi, Filza Moonis, Utsav Sidhu (for Lawyer's Knit & Co) for the Appellant.

V. Giri, K. Rajeev, Mohammed Sadique, B.V. Deepak, C. Rajendran, A. Raghunath for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal under Section 116A of the Representation of the People Act, 1951 (for short 'the Act') against the common order dated 26.07.2010 of the Kerala High Court in Election Petition Nos. 3 of 2009, 7 of 2009 and 8 of 2009 declaring the election of the appellant to the House of People from the Mavelikkara Parliamentary Constituency reserved for the Scheduled Castes void under Section 100 (1)(a) and (d) (i) of the Act.

2. The facts very briefly are that No.16 Mavelikkara Parliamentary Constituency is reserved for the Scheduled Castes. Section 4(a) of the Act provides that a person shall not be qualified to be chosen to fill a seat in the House of the People unless in the case of a seat reserved for the Scheduled Castes in any State, he is a member of any of the Scheduled Castes, whether of that State or of any other State and is an elector for any Parliamentary Constituency. For elections to the Mavelikkara reserved constituency in the year 2009, the appellant filed his nominations before the Returning Officer on 23.03.2009 declaring in the nomination papers that he belongs to the Hindu Cheramar Caste and filed alongwith the nomination papers a caste certificate dated 12.03.2009 issued by the Tehsildar, Nedumangad that the Caste Cheramar has been declared as a Scheduled Caste in relation to the State

of Kerala in Entry 54 in Part VIII of the Schedule to the Constitution (Scheduled Castes) Order, 1950. Objections were filed before the Returning Officer contending that the appellant was not a member of the Scheduled Caste and instead he was a Christian. The Returning Officer after examining the nomination papers of the appellant rejected the objections and accepted the nomination papers of the appellant under Section 36 of the Act. Polling in the constituency took place on 16.04.2009 and after counting, the result of the election was declared on 16.05.2009. The appellant secured 3,97,211 votes and the appellant was declared elected by a margin of 48,048 votes over the defeated candidate who secured 3,49,163 votes.

3. The election of the appellant was challenged by two voters of the Mavelikkara Parliamentary Constituency in Election Petition Nos. 3 of 2009 and 8 of 2009 and by the defeated candidate in Election Petition No. 7 of 2009. The ground of challenge in Election Petition Nos. 3 of 2009 and 8 of 2009 was that the appellant was a Christian and under the Constitution (Scheduled Castes) Order, 1950 only a Hindu can be a Scheduled Caste and not being a Scheduled Caste, he was not qualified to be chosen to fill a seat in the House of the People under Section 4(a) of the Act and accordingly his election was void under Section 100 (1) (a) of the Act. In Election Petition No. 7 of 2009 filed by the defeated candidate, besides the aforesaid grounds, an additional ground was taken that the nomination of the appellant was improperly accepted and that the election of the appellant was void under Section 100(1)(d)(i) of the Act, inasmuch as the result of the election so far as it concerned the returned candidate had been materially affected by the improper acceptance of the nomination of the appellant. The appellant pleaded in his written statements filed in the three cases that his father and mother were both Hindus, but due to their poverty they had availed various reliefs from Christian Missionaries and that is why his father was known as Joseph. His further case was that in 1978 he had undergone an expiatory ceremony and had reconverted

himself to Hinduism and had also been accepted as a member of the Cheramar caste and he was therefore qualified to contest the election from the Mavelikkara Parliamentary Constituency reserved for Scheduled Castes. The High Court framed issues in the three cases, examined witnesses and admitted documents and on consideration of the oral testimony and documentary evidence declared the election of the appellant void under Sections 100 (1)(a) and 100 (1)(d)(i) of the Act by the impugned order.

4. The findings recorded by the High Court in the impugned order are that the appellant was born to Christian parents and due to conversion to Christianity the parents of the appellant had lost their caste because Christianity did not admit any differentiation on the basis of castes. The High Court further held that when the appellant undertook the expiatory ceremony in 1978 to convert himself to Hinduism, he had not attained the age of discretion as he was under 18 years of age. The High Court, however, held that though the appellant married a Hindu and he professed Hindu religion from the time of his admission in the law college at Thiruvananthapuram, there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar Caste after his re-conversion to Hinduism. Relying on the decisions of this Court that without acceptance by the Scheduled Caste community after re-conversion, the reconvert does not get back to his original caste, held that the appellant after his re-conversion did not become a member of the Cheramar Caste and hence he was not qualified to contest from the Mavelikkara reserved constituency and his nomination was improperly accepted and his election was void.

5. Mr. P. P. Rao, learned counsel for the appellant, submitted that although the appellant pleaded in his written statements and led evidence to show that his father Kunjan and his mother Thankamma were Hindus, the High Court unfortunately has observed in the impugned order that the fact

that his father was converted to Christian religion was not seriously disputed at the time of recording the evidence. He submitted that in his written statements filed in the three cases the appellant has denied that his parents were Christian and has explained that his father came to be called as 'Joseph' by the Christian Missionaries to whom his father went for help. He submitted that the name of the mother of the appellant was Thankamma, which is not a Christian name. The case of the appellant was that his parents continued to profess and practice Hinduism. He submitted that in *Ajit Datt* v *Ethel Walters & Ors.* [AIR 2001 Allahabad 109] the Allahabad High Court has taken the view that without baptism there can be no conversion. He submitted that no documentary evidence had been produced by the respondents to establish that the father of the appellant was baptised and inducted into the Christian religion. He argued that no clergyman or pastor or Christian priest or any person from a Church has been examined to establish that the father of the appellant was converted to Christian religion by baptism. He referred to the evidence of PW-1 N.S. Saji Kumar, the petitioner in Election Petition No.3 of 2009, to show that he had no knowledge about the family of the appellant at all and had not made any inquiry to find out the religion of the father of the appellant. He also referred to the evidence of PW-2 P.K. Padmakaran, the petitioner in Election Petition No.8 of 2009, to show that he had not gone to Church to find out whether the father of the appellant was Christian and all that he has said in his evidence is that the appellant was born as a Christian. He submitted that similarly PW-3 K. Prakash Babu, the Chief Election Agent of the defeated candidate, has merely stated in his evidence that when the appellant was born, his father was a Christian. He submitted that the entire case of the three Election Petitioners appears to be based on the entries in the School Admission Register (Exhibit P-9) in which the religion of the appellant is mentioned as Christian, but the said entries were made on the basis of the information furnished by Thomas, who did not really know that the religion of the father of the appellant was Hinduism and not Christianity. He cited *M.*

Chandra v. *M. Thangamuthu* [2010 (9) SCALE 145] in which this Court has held that the burden of proving that the returned candidate was a Christian and did not belong to a Scheduled Caste as per the Presidential Order is on the election petitioner. He also cited an unreported decision of this Court delivered on 30.04.2009 in *Ranjana v. State of Maharashtra* by which the case was remanded to the High Court as there was no evidence to establish that the parents of the returned candidate had converted to Christianity before the returned candidate was born.

6. Mr. K. K. Venugopal, learned counsel appearing for the respondent in Civil Appeal No.6392 of 2010, on the other hand, submitted that there was sufficient evidence before the High Court to establish that the parents of the appellant were Christian. In this connection, he referred to Exhibits P4, P9 and P10 to show that the religion of the appellant was Christianity and not Hinduism as per his school records and School Leaving Certificate. He submitted that the documents Exhibits P4, P9 and P10 once admitted and marked as Exhibits, the contents of these Exhibits are also admitted in evidence. He cited the decision of this Court in *P.C. Purushotham Reddiar* v. *S. Perumal* [(1972) 1 SCC 9] for the proposition that once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. Mr. Venugopal submitted that if the case of the appellant was that the entry in the School Admission Register (Exhibit P-9) relating to the religion of the appellant was made by Thomas who did not actually know the religion of the father of the appellant, the appellant should have examined Thomas in support of his case, but the appellant has not examined Thomas in course of trial. He submitted that finding of the High Court that the appellant was born to Christian parents was, therefore, correct. Mr. V. Giri, learned counsel for the respondent in Civil Appeal No.6391 of 2010, and Mr. C. Rajendran, learned counsel for the respondent in Civil Appeal No.6393 of 2010, adopted the arguments of Mr. Venugopal.

7. We may now look at the evidence on record. Exhibit P-9 is part of the School Admission Register of the Government Higher Secondary School and has been proved through its Head Mistress. Exhibit P-9 indicates that the name of the father of the appellant was 'Joseph' which was a Christian name and the religion of the appellant was Christian and he was admitted to the School on 07.06.1967. The School had standards I to VII and the appellant left the School on 05.05.1975. Exhibit P-10 is part of the Admission Register of Laxmi Vilasom High School, Pothencode, proved through its Head Master (PW-6). Exhibit P-10 shows that the appellant was admitted to this School on 05.05.1975 into Standard VIII and his name was entered as Monian J. (Joseph) and mother's name was shown as Thakkamma T. and religion of the appellant was shown as Christian. The appellant left the School on 28.02.1978. Exhibit P-4 is his School Leaving Certificate issued by the Head Master, Laxmi Vilasom High School, Pothencode, in which the name of the appellant has been shown as Monian J. (Joseph) and his religion has been shown as Christian and the mother of the appellant is shown as Thakkamma T. This School Leaving Certificate was issued after the appellant completed his Standard X in the School in 1977-78. This School Leaving Certificate has been produced by PW-1, N.S. Saji Kumar, and is the same as Exhibit R-2 produced by the appellant. The appellant in his evidence (affidavit filed before the High Court in Election Petition No.7 of 2009) has stated in para 5 that in Exhibits P-4, P-9 and P-10 and Exhibit R-2, his religion is shown as Christian, but he did not profess Christian religion at any point of time. In para 8 of the affidavit, he has stated that in Exhibit P9 his father's name is Joseph and his father was called 'Joseph' by Christian Missionaries because his father was visiting Christian Missionaries to avail help and his father was actually Kunjan and continued to be a Hindu and his alleged conversion was only nominal. The appellant has explained in his cross-examination that when he was admitted in the School for the first time his father had gone for work and his friend Thomas had taken him to School and as his father

was called by the Missionaries as 'Joseph', his name was shown by Thomas as Joseph. The appellant has stated in his affidavit that he decided to get himself converted to Hinduism in 1978 and got himself converted as a Hindu on 25.05.1978 and the Kerala Hindu Mission has issued a certificate (Exhibit R-10) in proof of such conversion and his name has been shown therein as Suresh J.

8. Hence, this Court has to decide which of the two versions is proved: whether the appellant was born to Christian parents and was Christian during his childhood or whether he was born to Hindu parents and was Hindu during his childhood. Sub-section (2) of Section 87 of the Act states that the provisions of the Indian Evidence Act, 1872 shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition. Thus, we have to be guided by the relevant provisions of the Indian Evidence Act to decide an issue of fact arising in an election trial under the Act. Section 3 of the Indian Evidence Act states that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Section 35 of the Indian Evidence Act states that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact. Relying on Section 35 of the Indian Evidence Act, this Court has held in *Birad Mall Singhvi* v. *Anand Purohit* [1988 (supp.) SCC 604] that the entry contained in the Admission Form or in the Scholar's Register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned and if the entry is made on the basis of the information given by a stranger or by someone else who

had no special means of knowledge of the entry, such an entry will have no evidentiary value. In the present case, on the other hand, we are called upon to decide not the date of birth but the religion of a candidate in an election. In *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186] where the caste of the candidate in an election was in issue, this Court held that the residents of a village have more familiarity with the 'caste' of a co-villager than the date of birth of the co-villager and relied upon the evidence of the co-villagers to record a finding on the caste of the candidate. It can similarly be said that the residents of a village have familiarity with the religion of the co-villagers and the information furnished by them have probative value and can be considered by the Court.

9. Thomas, who was a friend of the father of the appellant, obviously must be familiar with the religion of the father of the appellant as well as of the appellant during his childhood. The entry in Ext. P-9 which is part of the School Admission Register of the Government Higher Secondary School with regard to the Christian name of the father of the appellant and the Christian religion of the appellant had been admittedly made on the basis of the information of Thomas. If the appellant's case is that Thomas had no knowledge of the religion of the appellant and his father, he should have examined Thomas as a witness or should have explained why he was not examined. The entry in Ext. P-9 regarding the religion of the appellant having been made on the information of Thomas in 1967 during the childhood of the appellant several decades before the appellant contested the election must be taken to be a very relevant circumstance of great probative value for coming to the conclusion that the appellant was a Christian during his childhood. The entries in Ext. P-10 which is part of the Laxmi Vilasom High School, Pothencode, have been made in 1975 on the basis of the transfer certificate obtained from his previous school and these also indicate the religion of the appellant as Christian. The entry relating to the religion of the appellant could have been corrected by the mother of the

appellant who has been shown in Ext.P-10 as his parent if the entry was not correct. The entries in the School Leaving Certificate (Exhibit P-4) issued in 1978 are on the basis of information in Exhibit P-10 and these also indicate that the appellant was a Christian. This entry relating to the religion of the appellant could also have been corrected by his mother in 1978 if his religion was not Christian. In Exhibit R-10, a certificate issued by the Kerala Hindu Mission on 25.05.1978 with regard to the conversion of the appellant to Hinduism, moreover, the appellant has been described as a Cheramar Christian upto the age of 16 years. If he was not a Christian till the age of 16 years, where was the need of his converting to Hindu religion in 1978? On consideration of all these facts and circumstances which have come into evidence, the High Court, in our considered opinion, was right in coming to the conclusion that the fact that the appellant was born to Christian parents has not been seriously disputed by the appellant. The decisions of this Court in *M. Chandra* v. *M. Thangamuthu* (supra) and in *Ranjana v. State of Maharashtra* (supra) cited by Mr. Rao have no application to the facts of the present case where the evidence clearly proves that the appellant was born to Christian parents and that the appellant was a Christian during his childhood upto the age of 16 years.

10. Mr. Rao next contended that the finding of the High Court that when the appellant undertook the expiatory ceremony in 1978 to reconvert himself to Hinduism, he had not attained the age of discretion as he was under 18 years of age is not correct. He relied on Section 2(o) of the Children Act, 1960 to submit that a boy who is 16 years is no longer a child. He relied on the decision of the Madras High Court in *Aravamudha Iyenger* v. *Ramaswami Bhattar & Anr*. [AIR 1952 Madras 245] wherein it has been held that under the Hindu Law minority comes to an end on the completion of the 16th year. He submitted that this Court has held in *Kailash Sonkar* v. *Smt. Maya Devi* [(1984) 2 SCC 91] that a member of the Scheduled Caste, who is converted into Christianity and after she attains

the age of discretion, can decide of her own volition to re-embrace Hinduism. He cited the decision of this Court in *S. Anbalagan* v. *B. Devarajan & Ors*. [(1984) 2 SCC 112] in which this Court observed that the precedents, particularly those from South India, clearly establish that no particular ceremony is prescribed for re-conversion to Hinduism of a person who had earlier embraced another religion and unless the practice of the caste makes it necessary, no expiatory rites need be performed. He submitted that the appellant was more than 16 years of age when he undertook *Shudhi* Ceremony in 1978 for reconversion and it will be clear from Ext. R-10, the certificate issued by the Kerala Hindu Mission on 25.05.1978, and Ext. R-9, the notification issued in the Kerala Gazette on 21.11.1978 that he reconverted to Hinduism in 1978. He argued that the evidence of appellant before the High Court and the evidence of RW-4 would show that the appellant had in fact abjured the Christian religion and was professing the Hindu religion and his marriage was performed following the ceremonies of Hindu religion with a Hindu named Bindu. He submitted that in the Admission Register of the Law College, Thiruvananthapuram (Ext. R-6) the religion of the appellant has been shown to be Hindu religion and the date of admission of the appellant is shown as 09.10.1984. He submitted that after considering such evidence, the High Court has in fact held that the appellant has been professing Hinduism at least from the date of his admission to the Law College, Thiruvananthapuram.

11. In reply, Mr. Venugopal relying on this Court's decision in *S. Nazeer Ahmed* v. *State Bank of Mysore & Ors*. [(2007) 11 SCC 75] submitted that the respondents before this Court are entitled to support the impugned judgment of the High Court by challenging any finding that might have been rendered by the High Court against the respondents in the impugned judgment. He submitted that the respondents are therefore entitled to challenge the finding of the High Court in the impugned judgment that the appellant had been professing Hinduism at least from the date of admission in the law college

in 1978. He vehemently argued that the appellant has not pleaded in his written statements filed before the High Court that he was a Christian during his childhood and he converted himself to Hinduism on attaining majority and his plea in the written statements was that his parents were Hindu and that he was a Hindu even during his childhood and therefore he cannot be allowed to contend that his parents were Christian and during his childhood he was a Christian and on attaining majority he re-converted himself into Hinduism by abjuring a Christian religion. He submitted that in *Perumal Nadar (dead) by LRs*. v. *Ponnuswami* [1970 (1) SCC 605] this Court has held that a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism but a *bona fide* intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion and no formal ceremony of purification or expiation is necessary to effectuate conversion. He submitted that in *Kailash Sonkar* v. *Smt. Maya Devi* (supra) this Court has held that the main test to determine whether there has been reconversion is that there should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it and reconversion should not be only a ruse or a pretext or a cover to gain mundane worldly benefits. He argued that in the facts of the present case, no evidence has been adduced to show that the appellant abjured Christian religion and reconverted himself into Hindu and the evidence only shows that the appellant went through a formal reconversion to Hindu religion only with a view to avail the benefits of reservation. Mr. Giri and Mr. Rajendran adopted these contentions of Mr. Venugopal.

12. We have considered the submissions of the learned counsel for the parties and we have found that in *Kailash Sonkar* v. *Smt. Maya Devi* (supra) this Court has held that even where a person has been a Christian during his childhood, after he attains the age of discretion, he may decide of his own

volition to re-embrace Hinduism and the test in such a case would be that such person had a genuine intention of reconverting to Hinduism and to abjure Christianity and completely dissociate himself from it. In the aforesaid judgment this Court has not specifically held as to what would be the age of discretion of a person willing to reconvert himself to Hinduism. In *Aravamudha Iyenger* v. *Ramaswami Bhattar & Anr*. (supra) the Madras High Court has taken a view that minority as per Hindu law comes to an end on completion of 16 years of age and this rule applies to males and females. This view, however, was expressed by the Madras High Court in the context of the Hindu Law relating to adoption and not in the context of reconversion and therefore does not apply to the facts of this case. In our considered opinion, it is on the facts of each case that the Court has to decide whether the child had attained sufficient maturity to understand the religious significance and the social consequences of this decision to reconvert to the Hindu religion. To quote Vivian Bose, J. from his judgment delivered for the Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram & Ors.* (1954 SCR 817) at page 837 cited by Mr. Giri:

> "*What we have to determine are the social and political consequences of such conversions and that, we feel, must be decided in a common sense practical way rather than on theoretical and theocratic grounds*."

13. We find that the appellant has pleaded in his written statements that in May 1978 he underwent ceremonies and he was given a *Shudhi* Certificate by the Kerala Hindu Mission and he got rid of Christianity by reconverting to Hinduism. Mr. Venugopal is thus not right in his submission that the appellant has not taken a plea of reconversion from Christianity to Hinduism in his written statements. The appellant has stated in his evidence (affidavit before the High Court) that he decided to get himself converted to Hinduism in the year 1978 and accordingly on 25.05.1978, he approached the Kerala Hindu

Mission and reconverted to Hinduism and changed his name as Suresh J. and published the fact of his conversion into Hinduism in the notification dated 21.11.1978 of the Kerala Gazette. The notification dated 21.11.1978 has been produced by him as Ext. R-9 and Certificate No.107365 dated 25.05.1978 relating to the conversion of the appellant issued by the Kerala Hindu Mission has been produced before the High Court and marked as Ext. R-10. The President of the Kerala Hindu Mission (RW-3) has been examined before the High Court and he has said that Ext. R-10 was issued by the Kerala Hindu Mission and its counterfoil receipt is in the receipt book produced by him. RW-3 has identified the signature of the Secretary of the Kerala Hindu Mission, Mr. Sudhakaran, in Ext. R-10. RW-3 has also stated before the Court that a person to be converted must first go to Hindu temple and perform the ceremonies and thereafter has to appear before the Kerala Hindu Mission alongwith receipt and the Kerala Hindu Mission confirms the performance of ceremonies from the temple over phone and then issues a conversion certificate. RW-3 has also stated that before issuing a certificate, the Kerala Hindu Mission ascertains whether the person to be converted is willing to be converted and is having belief in Hinduism and only thereafter permits the conversion. The evidence of the appellant (RW-1), President of the Kerala Hindu Mission (RW-3) and the Certificate issued by the Kerala Hindu Mission on 25.05.1978 (Ext. R-10) clearly establish that the appellant had on his own volition decided to reconvert to Hinduism. We also find that Ext. R-10 was followed by the Gazette Notification (Ext. R-9). These two documents are clear proof of the declaration of the intention of the appellant to reconvert himself to Hinduism from Christianity. This declaration of intention of the appellant has also been accompanied by conduct unequivocally expressing that the appellant has in fact reconverted himself to Hinduism. The appellant has produced before the High Court a certificate of marriage issued under the Kerala Registration of Marriages (Common) Rules, 2008, which is marked as Ext. R-14 and in Ext. R-14, the date of marriage of the appellant is shown as

30.06.1994 and the name of the appellant is shown as Kodikunnil Suresh and the wife of the appellant is shown as Bindu Sekhar. The appellant has stated in his affidavit before the High Court that Bindu is a member of Scheduled Caste and is a Hindu and that during the marriage there was tying of Tahali and that he garlanded the bride in the marriage ceremony and his wife also garlanded him. He has also stated that there was exchange of rings and he gave pudava to her and the form of the marriage was that of the Cheramar community. He has further stated in the affidavit that he worshipped Dharma Sastha in Sabarimala and that he also goes for worship to Pazhavangadi Ganapathi Temple and he has two children, elder one is named Aravind Suresh and younger one is named Gayathri Suresh and that Ezhuthiniruthu of the elder and the younger one took place at Mookambika Temple. RW-4, who is a voter of Adoor Parliamentary Constituency and who had been the Head Master of the Kulthupuzha Government High School and the Deputy Director of Education, Kollam, has been examined before the High Court and he has stated that he was invited for the marriage of the appellant at the Subramaniam Hall of Trivandrum Club and the marriage was performed following the ceremonies of Hindu religion and after lighting the lamp in front of Nirapara, the bride and the bridegroom were made to sit there and the marriage was performed under the guidance of Sri. Krishnan Nair of Kottarakkara and that the appellant had tied the *Thali* and the bride and bridegroom exchanged garlands. Nothing also has been brought out in the cross-examination of either the appellant or RW-4 to disbelieve their evidence. Nothing has been brought out in the cross-examination of the appellant for the Court not to rely on his evidence that he has been visiting the temples for worship. On a consideration of the evidence led before the High Court, we are thus of the opinion that the appellant had not only unequivocally expressed the intention of reconverting to Hinduism in 1978, but also conducted himself since 1978 in a manner true to the faith of Hindu religion by marrying a Hindu in accordance with the ceremonies of the Hindu religion and

had been visiting Hindu temples for worship of different idols and had in fact abjured the Christian religion. In other words, the appellant had reconverted to Hinduism in 1978 after fully realizing the religious significance and social consequences of his decision to reconvert to Hinduism. The High Court, therefore, was not right in holding that the conversion of the appellant under Ext. R-9 and R-10 at the age of 16 years was not a valid conversion to Hinduism. In fact, the High Court has realized the difficulty in the aforesaid finding and has at the same time rendered a contradictory finding that the respondent has been professing Hindu religion at least from the time of his admission to the law college, Thiruvananthpuram.

14. Mr. Rao finally challenged the findings of the High Court that there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar caste or the Pulayan caste after his reconversion to Hinduism. He submitted that the appellant had himself stated on oath before the High Court that he belongs to Cheramar caste and that the form of his marriage with Bindu was the one to which the Cheramar community adheres. He submitted that the Kerala Cheramar Sangham had issued a certificate dated 25.10.1979 produced before the High Court as Exhibit R-17 which would show that the appellant was accepted and taken into the fold of Hindu Cheramar community by its members. He referred to the evidence of RW-7, the Ex-Secretary of Kerala Cheramar Sangham, who has identified the signature of Sri Rajaretnam the President of the Kerala Cheramar Sangham in Exhibit R-17. He submitted that in Kerala the Cheramar caste and the Pulayan caste are actually one and the same caste. He referred to the evidence of RW-5, the General Secretary of Kerala Pulayan Mahasabha, that the appellant participated in a rally of Kerala Pulayan Mahasabha at Eranakulam in February, 2008. He submitted that the Returning Officer in his proceedings dated 31.03.2009 has considered the caste certificate dated 12.03.2009 issued by the Tehsildar, Nedumangad, certifying that the appellant belongs to the Hindu

Cheramar caste and has accepted the declaration of the appellant in the nomination papers that he belongs to the Cheramar caste. The certificate issued by the Tehsildar, Nedumangad, has also been exhibited as Exhibit P-2. He also relied on the findings of PW-8, Tehsildar, Kotarakkara that persons, who are known as Cheramar in Kollam, are known as Pulayan in Kotrakkara. He argued that the appellant has been elected from the Adoor reserved constituency in the years 1989, 1991, 1996 and 1999 and this shows that he has been accepted as a member of the Scheduled Caste by the voters of the reserved constituency. He cited the decision of this Court in *S. Anbalagan* v. *B. Devarajan & Ors*. (supra) and *Kailash Sonkar* v. *Smt. Maya Devi* (supra) wherein the circumstance that the voters of the Rasipuram Parliamentary Constituency reserved for the Scheduled Castes elected a candidate to the Lok Sabha has been treated as an outstanding circumstance to prove acceptance of that candidate by the Scheduled Caste community. He submitted that the High Court was, therefore, not at all right in recording the finding that the appellant who was professing Hindu religion had not been accepted by the members of the Cheramar caste or the Pulayan caste.

15. In reply, Mr. Venugopal submitted that the fact that the appellant was elected from a reserved constituency in the earlier elections cannot prevent the disqualification from being established in a subsequent election as each election results in a fresh cause of action. He cited the decisions of this Court in *C.M. Arumugam* v. *S. Rajgopal and others* [(1976) 1 SCC 863] and *Satrucharla Vijaya Rama Raju* v. *Nimmaka Jaya Raju and others* [(2006) 1 SCC 212] in which it has been held that every election furnishes a fresh cause of action for a challenge to that election and adjudication on a prior election petition cannot be conclusive in a subsequent proceeding. According to him, therefore, the fact that the appellant on five earlier elections had been elected from a constituency reserved for Scheduled Caste is not a bar to the challenge to his election in 2009 from a constituency reserved for Scheduled Caste on

the ground that he was not a member of the Scheduled Castes. He submitted that in *C.M. Arumugam* v. *S. Rajgopal and others* (supra) this Court considered whether in fact S. Rajgopal was accepted as a member of Adi Dravida caste after his reconversion to Hinduism and after considering the various circumstances detailed in para 18 of the judgment as reported in the SCC came to the conclusion that after his reconversion to Hinduism, S. Rajgopal was recognized and accepted as a member of Adi Dravida caste by the other members of that community. He vehemently argued that in the facts of the present case there is no circumstance to show that the appellant, if at all has been reconverted to Hinduism, was accepted by the Cheramar caste.

16. Mr. Giri, learned counsel for respondent in Civil Appeal No.6391 of 2010, adopted the arguments of Mr. Venugopal and further submitted that in the Constitution (Scheduled Castes Order, 1950, Part VIII) relating to State of Kerala, in Entry 54, Pulayan and Cheramar castes have been shown as two separate castes. He submitted that Pulayan and Cheramar castes are thus two separate and distinct castes and onus is on the appellant to show that after his reconversion he was accepted by either the Pulayan caste or the Cheramar caste. He argued that the pleadings of the appellant and the evidence produced by him would show that the appellant was not clear as to which of the two castes he was accepted. He cited the decision in *S. Rajagopal* v. *C.M. Armugam & Ors.* [1969 (1) SCR 254] in which the law relating to acceptance of a person by members of caste to which the appellant originally belonged after his reconversion to Hinduism has been laid down.

17. Mr. C. Rajendran, learned counsel for the respondent in Civil Appeal No.6393 of 2010, relied on the decisions of this Court in *S. Rajagopal* v. *C.M. Armugam & Ors.* (supra) cited by Mr. Giri and *C.M. Arumugam* v. *S. Rajgopal & Ors.* (supra) cited by Mr. Venugopal and submitted that the appellant has not been able to prove the kind of circumstances mentioned in

the aforesaid decisions to show that he had been accepted into the fold of Cheramar caste after his reconversion to Hinduism.

18. We have perused the decisions of this Court cited by the learned counsel for the parties on the acceptance of the reconvert by the members of the original caste of the reconvert. In *S. Rajagopal* v. *C.M. Armugam & Ors.* (supra) this Court agreed with the High Court that Rajagopal, on conversion to Christianity, ceased to belong to Adi Dravida caste but held that if the members of the caste accept the reconversion of a person as a member of their caste, it should be held that he does become the member of that case, even though he may have lost membership of that caste on conversion to another religion. In the aforesaid decision, this Court, however, held that Rajgopal though married to a member of the Adi Dravida caste, his marriage was not performed according to the rites observed by members of that caste and the marriage not being according to the system prevalent in the caste itself, that marriage cannot therefore be proof of admission of Rajgopal in the caste by members of the caste in general. This Court further found in the aforesaid case that no other evidence was given to show that at any subsequent stage any step was taken by the members of the caste indicating that Rajgopal was being accepted as a member of that caste. In *C.M. Arumugam* v. *S. Rajgopal & Ors.* (supra), this Court noted that in its earlier decision in *S. Rajagopal* v. *C.M. Armugam and others* (supra) Rajgopal had not produced evidence to show that after his reconversion to Hinduism, any step had been taken by the members of Adi Dravida caste indicating that he was being accepted as a member of that caste. This Court, however, found in this later case of *C.M. Arumugam* v. *S. Rajgopal & Ors.* (supra) that there were several circumstances to show that Rajgopal was accepted as Adi Dravida Hindu and these circumstances were: he had been invited to lay the foundation stone for the construction of a new wall of the temple at Jambakullam, which was essentially a temple of Adi Dravida Hindus; he was requested to participate in Margazhi Thiruppavai celebration

at the Kannabhiran temple, which was also a temple essentially managed by the Adi Dravida Hindus; he was invited to preside at the Adi Krittikai festival at Mariamman temple where the devotees are Adi Dravidas or to start the procession of the deity at such festival; the children of Rajgopal were registered in the school as Adi Dravida Hindus and even he himself issued a certificate stating that his son was a Scheduled Caste Adi Dravida Hindu; he participated in the All India Scheduled Castes Conference attended largely by Adi Dravida Hindus. Considering all these circumstances, this Court held that Rajgopal after his reconversion to Hinduism was recognized and accepted as a member of Adi Dravida caste by the other members of that caste.

19. We further find that in *Kailash Sonkar* v. *Smt. Maya Devi* (supra), this Court observed that a dominant factor to determine the revival of the caste of a convert from Christianity to his old religion would be that in cases of election to the State Assemblies or the Parliament where under the Presidential Order a particular constituency is reserved for a member of the scheduled caste or tribe and the electorate gives a majority verdict in his favour, then this would be doubtless proof positive of the fact that his community has accepted him back to his old fold and this would result in a revival of the original caste to which the candidate belonged. Similarly, in *S. Anbalagan* v. *B. Devarajan & Ors*. (supra) this Court observed that the fact that the voters of the Rasipuram Parliamentary Constituency reserved for the Scheduled Castes accepted his candidature for the reserved seat and elected him to the Lok Sabha twice was an outstanding circumstance to show that he belongs to Adi Dravida caste.

20. In the light of the aforesaid decisions of this Court, we may now examine the facts of the present case. The father of the appellant, it is not disputed, originally was a member of the Cheramar caste which was admittedly a Scheduled Caste in the State of Kerala. On conversion to Christianity, the father of

the appellant had ceased to be a member of the Cheramar caste. This is because on conversion to Christianity, a person ceases to belong to his original caste as has been held by this Court in *S. Rajagopal* v. *C.M. Armugam and others* (supra). We have already held that in 1978 the appellant reconverted into Hinduism and continued to be a Hindu thereafter. The appellant has stated in para 13 of his affidavit (examination-in-chief) before the High Court that in 1979 he was actively working for the upliftment of the Cheramar community and the Kerala Cheramar Sangham issued a certificate dated 25.10.1979 produced and marked before the High Court as Exhibit R-17. This certificate has been signed by S. Rajaretnam, the then President of the Kerala Cheramar Sangham, and it states that being a descendant of Scheduled Caste convert and by the conversion the appellant is accepted and admitted into the fold of Hindu Cheramar Community by its members who are Cheramar Hindus and by this fact has become a member of Cheramar Community which is recognized as a Scheduled Caste. This certificate dated 25.10.1979 has been issued ten years prior to 1989 when the appellant for the first time contested from the Adoor Parliamentary Constituency reserved for the Scheduled Caste. In the years 1989, 1991, 1996 and 1999, the appellant contested and got elected from the Adoor Parliamentary Constituency reserved for Scheduled Caste. In between, in the year 1994, the appellant got married to Bindu and his affidavit (examination-in-chief) before the High Court states that the marriage was performed in accordance with the form of Cheramar community. All these circumstances clearly establish that the appellant after his reconversion to Hinduism in 1978 had been accepted by the members of the Cheramar caste.

21. The Cheramar community and the Pulayan community, however, appear to be two distinct castes as per Entry 54 in Part VIII of the Schedule to the Constitution (Scheduled Castes) Order, 1950 as has been contended by Mr. Giri. From the written statements of the appellant and from his evidence,

however, it appears that the appellant entertains a belief that the Cheramar caste and the Pulayan caste are one and the same caste. Perhaps, because of this belief he has married Bindu who belongs to the Pulayan caste. The fact, however, remains that the appellant has declared himself to be belonging to the Cheramar caste in his nomination form and there was no declaration by him that he belongs to the Pulayan caste. The Returning Officer relying on the certificate Ext. P-2 issued by the Tehsildar, Nedumangad dated 12.03.2009 had come to the conclusion that the appellant belongs to Cheramar caste and had accordingly accepted his nomination. The relevant findings of the Returning Officer in the proceedings dated 31.03.2009 (Ex.P-3) are quoted here:

> "The distinction between Hindu Cheramar and Hindu Pulaya is very thin and the local usage confuses even experts. Both are scheduled castes and these areas which require a thorough enquiry by experts and examination of witnesses on both sides are also required which I was not supposed to do so as the Returning Officer. These questions can be enquired into and decided only by a court of competent jurisdiction perhaps in an election petition. If the nomination of a candidate is refused on grounds not established ignoring an authoritative evidence he will be prejudiced in exercising his constitutional right to contest an election and to establish his claim before a court of law. If he is not eligible the other candidates have a remedy by way of election petition which will settle the issue finally. Therefore, I rely on the certificate of the Tahsildar, Nedumangadu and decide that the candidate is competent to contest in the election from the reserved constituency. The nomination satisfies all the legal requirements and it is valid in law. In the circumstance the nomination is accepted."

The aforesaid findings of the Returning Officer would show that he was of the view that the distinction between Hindu

Cheramar and Hindu Pulaya was very thin and the local usage confuses even the experts and that both were Scheduled Castes and the areas which require a thorough enquiry by experts and examination of witnesses on both sides are also required which he was not supposed to do so as the Returning Officer. The evidence would further show that ultimately the Returning Officer relied on the certificate of Tehsildar, Nedumangad, according to which the appellant belongs to the Hindu Cheramar caste and decided that the appellant was competent to contest the election from the reserved constituency and accordingly accepted his nomination. According to us, the appellant was required to plead and lead evidence that he was a member of the Cheramar caste and after his reconversion he was accepted by the members of the Cheramar caste. So long as he has pleaded and adduced reliable evidence to show that he was originally a member of the Cheramar caste and after his conversion has been accepted back as a member of the Cheramar caste, the court cannot throw out his case only on the ground that he, like the Returning Officer, did not know the thin distinction between the Cheramar and Pulayan castes. The findings of the High Court, therefore, that there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar caste after his reconversion to Hinduism was contrary to the evidence on record.

22. In the decisions of this Court in *C.M. Arumugam* v. *S. Rajgopal and others* (supra) and *Satrucharla Vijaya Rama Raju* v. *Nimmaka Jaya Raju and others* (supra) cited by Mr. Venugopal, this Court has held that every election petition furnishes a fresh cause of action for a challenge to that election and adjudication on a prior election petition cannot be conclusive in a subsequent proceeding. These decisions have no application to the facts of the present case. It is not the case of the appellant that any decision in an election petition has been rendered by the court that the appellant was a member of the Scheduled Caste and was therefore qualified to contest

the election for a constituency reserved for Scheduled Caste and that such earlier decision of the Court constitutes *res judicata* on this issue. The case of the appellant is that in four earlier elections the voters of a constituency reserved for Scheduled Castes have elected him from the constituency and this conduct of the voters show that the members of the Scheduled Castes have accepted him back to the fold of his original cast, namely, the Cheramar community. The fact that the appellant has been elected four times from the Adoor Parliamentary Constituency reserved for the Scheduled Caste is a very strong circumstance to establish that he has been accepted by the members of his caste after his reconversion to Hinduism.

23. In the result, we set aside the impugned order of the High Court and hold that the appellant was qualified under Section 4(a) of the Act to be chosen to fill the seat in the House of People from Mavelikkara Parliamentary Constituency reserved for the Scheduled Castes and that his nomination was not improperly accepted by the Returning Officer and accordingly his election was not void under Section 100 (1)(a) and 100 (1)(d)(i) of the Act. The appeals are allowed and the three Election Petitions of the respondents are dismissed. The appellant will be entitled to the amount deposited by the respondents under Section 117 of the Act as security deposit towards the costs. The substance of this decision will be intimated to the Election Commission and the Speaker of the House of the People in accordance with Section 116-C (2) of the Act.

D.G. Appeals allowed.

RUCHI MAJOO

v.

SANJEEV MAJOO

(Civil Appeal No. 4435 of 2011)

MAY 13, 2011

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

Guardian and Wards Act, 1890: s.9 – Jurisdiction of the court to entertain claim for grant of custody of a minor – Held: Any challenge to the jurisdiction of the court as regards the custody of the minor has to be seen in the context of the averments made in the pleadings of the parties and the requirement of s.9 – Bare reading of s.9 shows that the solitary test for determining the jurisdiction of the court u/s.9 of the Act is the 'ordinary residence' of the minor – The expression used is "where the minor ordinarily resides" – Whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact – In the instant case, the correspondence exchanged between the parents of the minor clearly showed that the minor was ordinarily residing with the mother-appellant in Delhi and was admitted to a school and studying for the past three years – The father-respondent continued to support that decision even when he was far away from any duress and coercion alleged by him till the time he suddenly changed his mind and started accusing the appellant of abduction – High Court failed to notice these aspects and fell in error in accepting the version of the respondent and dismissing the application filed by the appellant for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same – Jurisdiction.

Jurisdiction: Parens Patraie jurisdiction – Jurisdiction of the court to entertain claim for grant of custody of a minor – Recognition of decrees and orders passed by foreign courts

– Held: Courts in India are bound to determine the validity of foreign decrees and orders keeping in view the provisions of s.13 of the Code of Civil Procedure 1908 as amended by the Amendment Act of 1999 and 2002 – The duty of Court exercising its Parens Patraie jurisdiction as in cases involving custody of minor children is onerous – Welfare of the minor in such cases being the paramount consideration, the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully – Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the Indian courts to shut out an independent consideration of the matter – Objectivity and not abject surrender is the mantra in such cases – That would not, however, mean that the order passed by a foreign court is not even a factor to be kept in view – Code of Civil Procedure 1908 – s.13.

Doctrines/Principles: Principle of comity of courts – Held: The principle of 'comity of courts' ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy – This is all the more so where the courts in India is dealing with matters concerning the interest and welfare of minors including their custody – Interest and welfare of the minor being paramount, a competent court in India is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication – In the instant case, the respondent-father's case that the minor was removed from the jurisdiction of the American Courts in contravention of the orders passed by them, was not factually correct – There were no proceedings between the parties in any Court in America before they came to India with the minor – Such proceedings were instituted by the respondent only after he had agreed to leave the appellant and the minor behind in India, for the former to explore career options and the latter to get admitted to a school – The charge of abduction contrary to a valid order granting custody was, therefore, untenable – Moreover, the

minor has been living in India and pursuing his studies in a reputed school in Delhi for nearly three years– He appeared to be happy with his studies and school and did not evince any interest in returning to his school in America – Dismissal of the application for custody in disregard of the attendant circumstances was not a proper exercise of discretion by the High Court – Interest of the minor shall be better served if he continued in the custody of his mother – High Court was not right in declining exercise of jurisdiction on the principle of comity of Courts – Code of Civil Procedure 1908 – s.13.

Child welfare: Visitation rights to non-custodial parent – Held: An interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality – In the instant case, the minor seemed to have been thoroughly antagonized against the respondent-father – For 11 years old boy, a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father – This approach and attitude on the part of the appellant or her parents is not correct – It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life – Role of the father in his upbringing and grooming to face the realities of life cannot be undermined – It is in that view important for the child's healthy growth that the father is granted visitation rights that will enable the two to stay in touch and share moments of joy, learning and happiness with each other – Trial Court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter.

Code of Criminal Procedure, 1973: s.482 – Quashing of proceedings – Petition for quashing the FIR registered against respondent-husband and three others for offences punishable u/ss.498A, 406 read with s.34 IPC – High Court quashing the FIR against in-laws on the ground that the appellant-

complainant was a citizen of USA and had all along lived in USA with her son and husband, away from her in laws – Held: No reason to interfere with the orders passed by the High Court – Penal Code, 1860 – ss.498A, 406 r.w. s.34.

Words and phrases: Word 'ordinary', 'resides', 'ordinarily resides' – Meaning of.

The appellant-mother obtained an order dated 4th April, 2009 passed by the ADJ at Delhi in a petition filed under Sections 7, 8, 10, 11 of the Guardians and Wards Act granting interim custody of her minor son to her. Aggrieved, the respondent-father filed a petition under Article 227 of the Constitution of India before the High Court of Delhi.

The High Court allowed the petition and dismissed the custody case filed by the appellant primarily on the ground that the Court at Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing in Delhi, a condition which was precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of child ought to have been agitated and decided by the Court in America not only because that Court had already passed an order to that effect in favour of the respondent, but also because all the three parties namely, the parents of the minor and the minor himself were American citizens.

The questions which arose for consideration in these appeals were whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same; whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and; whether the order granting interim custody to the mother of the minor called for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

Disposing of the appeals, the Court

HELD: 1.1. There is no gainsaying that any challenge to the jurisdiction of the court as regards the custody of the minor will have to be seen in the context of the averments made in the pleadings of the parties and the requirement of Section 9 of the Guardian and Wards Act, 1890. The appellant-mother had in her petition filed under the Guardian and Wards Act, 1890 invoked the jurisdiction of the Court at Delhi, on the assertion that the minor was, on the date of the presentation of the petition for custody ordinarily residing at 73 Anand Lok, August Kranti Marg, New Delhi. The petition enumerated at length the alleged acts of mental and physical cruelty of the respondent-husband towards the appellant, including his alleged addiction to pornographic films, internet sex and adulterous behavior during the couple's stay in America. It traced the sequence of events that brought them to India for a vacation and the alleged misdemeanor of the respondent that led to the appellant taking decision to stay back in India instead of returning to United States as originally planned. The appellant further alleged that she had informed the respondent about a petition under the Guardian and Wards Act being ready for presentation before the Guardian Court at Delhi, whereupon the respondent was alleged to have agreed to the appellant staying back in Delhi to explore career options and to the minor continuing to stay with her. The respondent eventually returned to America around 20th July, 2008, whereafter he is alleged to have started threatening the appellant that unless the latter returned to America with the minor, he would have the child removed and put in the custody of the respondent's parents at Udaipur. Apprehending that the respondent may involve the appellant in some false litigation in America and asserting that she was fit to be given the custody of the minor being his mother and natural guardian, the appellant sought the

intervention of this Court and her appointment as sole guardian of the minor. [Paras 5-7] [692-E-H; 693-A-B-F-H; 694-A]

1.2. Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub-section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. A bare reading of Section 9 shows that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There were serious disputes on those aspects. The expression 'ordinarily resident' has been used in different contexts and statutes and has often come up for interpretation. Liberal interpretation is the first and the foremost rule of interpretation. The word 'ordinary' is defined by the Black's Law Dictionary as regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances. The word 'reside' has been explained as live; dwell; abide; sojourn; stay; remain; lodge. [Paras 13, 14 and 15] [697-B-C; E-H; 698-A-C]

Black's Law Dictionary **– referred to.**

1.3. It is evident from the statement and the pleadings of the parties that the question whether the decision to allow the appellant and the minor son to stay back in Delhi instead of returning to America was a voluntary decision as claimed by the appellant or a decision taken by the respondent under duress as alleged by him was a seriously disputed question of facts, a satisfactory answer to which could be given either by the District Court where the custody case was filed or by the High Court only after the parties had been given opportunity to adduce evidence in support of their respective versions. [Para 24] [702-E-F]

Mrs. Annie Besant v. Narayaniah **AIR 1914 PC 41;** *Mst. Jagir Kaur and Anr. v. Jaswant Singh* **AIR 1963 SC 1521: 1964 SCR 73;** *Kuldip Nayar & Ors. v. Union of India & Ors.* **2006 (7) SCC 1: 2006 (5) Suppl. SCR 1;** *Bhagyalakshmi and Anr. v. K.N. Narayana Rao* **AIR 1983 Mad 9;** *Aparna Banerjee v. Tapan Banerjee* **AIR 1986 P&H 113;** *Ram Sarup v. Chimman Lal and Ors.* **AIR 1952 All 79;** *Smt. Vimla Devi v. Smt. Maya Devi & Ors.* **AIR 1981 Raj. 211;** *In re: Dr. Giovanni Marco Muzzu and etc. etc.* **AIR 1983 Bom. 24 – referred to.**

1.4. The e-mails exchanged between the parties, copies whereof were on record. The first of these E-mails was dated 17th July, 2008 sent by the respondent to his friend in America pointing out that the appellant was staying back in India with the minor for the present. On 21st July, 2008 i.e. a day after the respondent reached America the appellant sent him an E-mail which clearly indicated that the minor was admitted to a school in Delhi and by which the respondent was asked to send American school's record for that purpose. It is difficult to appreciate how the respondent could in the light of these communications still argue that the decision to allow the appellant and the minor son to stay back in India was taken under any coercion or duress. It is also difficult

to appreciate how the respondent could change his mind so soon after the said E-mails and rush to a Court in U.S. for custody of the minor accusing the appellant of illegal abduction, a charge which was belied by his letter dated 19th July, 2008 and the E-mails. The fact remained that the minor was ordinarily residing with the appellant and was admitted to a school and studying for the past nearly three years. The unilateral reversal of a decision by one of the two parents could not change the fact situation as to the minor being an ordinary resident of Delhi, when the decision was taken jointly by both the parents. The High Court was not right in holding that the respondent's version regarding the letter in question having been obtained under threat and coercion was acceptable. The High Court appeared to be of the view that if the letter had not been written under duress and coercion there was no reason for the respondent to move a guardianship petition before U.S. Court. The question whether or not the letter was obtained under duress and coercion could not be decided only on the basis of the institution of proceedings by the respondent in the U.S. Court. If the letter was under duress and coercion, there was no reason why the respondent should not have repudiated the same no sooner he landed in America and the alleged duress and coercion had ceased. Far from doing so the respondent continued to support that decision even when he was far away from any duress and coercion alleged by him till the time he suddenly changed his mind and started accusing the appellant of abduction. The High Court failed to notice these aspects and fell in error in accepting the version of the respondent and dismissing the application filed by the appellant. In the circumstances the High Court was not justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same. [Paras 26, 27, 31 and 32] [703-E-F; 704-C-D; 706-A-H; 707-A-D]

2.1. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in India are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its *Parens Patraie* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case. [Para 33] [707-E-H; 708-A-B]

Smt. Satya v. Shri Teja Singh **(1975) 1 SCC 120: 1975 (2) SCR 97;** *Dhanwanti Joshi v. Madhav Unde* **1998(1) SCC 112: 1997 (5) Suppl. SCR 30;** *Sarita Sharma v. Sushil Sharma* **(2000) 3 SCC 14: 2000 (1) SCR 915;** *V. Ravi Chandran (Dr.) (2) v. Union of India and Ors.* **(2010) 1 SCC 174: 2009 (15) SCR 960;** *Shilpa Aggarwal (Ms.) v. AviralMittal & Anr.* **(2010) 1 SCC 591: 2009 (16) SCR 287;** *Smt. Surinder*

Kaur Sandhu v. Harbax Singh Sandhu and Anr. **(1984) 3 SCC 698: 1984 (3) SCR 422;** *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr.* **(1987) 1 SCC 42: 1987 (1) SCR 175 – referred to.**

McKee v. KcKee **1951(1) All ER 942;** *J v. C* **1969(1) All ER 788 – referred to.**

2.2. In cases arising out of proceedings under the Guardian and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the Court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardian and Wards Act on the other. No matter a Court is exercising powers under the Guardian and Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate orders provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act. The issue whether the Court should hold a summary or a detailed enquiry would arise only if the Court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the Court competent to entertain the same. A Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings. [Paras 40, 41] [713-F-H; 714-G-H; 715-A-B]

Dhanwanti Joshi v. Madhav Unde **(1998) 1 SCC 112: 1997 (5) Suppl. SCR 30 – referred to.**

2.3. The Court at Delhi was in the facts and circumstances of the case competent to entertain the application filed by the appellant. The High Court was not right in relying upon the principle of comity of courts and dismissing the application. The first and foremost reason is that 'comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Secondly, the respondent's case that the minor was removed from the jurisdiction of the American Courts in contravention of the orders passed by them, is not factually correct. There were no proceedings between the parties in any Court in America before they came to India with the minor. Such proceedings were instituted by the respondent only after he had agreed to leave the appellant and the minor behind in India, for the former to explore career options and the latter to get admitted to a school. The charge of abduction contrary to a valid order granting custody was, therefore, untenable. Thirdly, the minor has been living in India and pursuing his studies in a reputed school in Delhi for nearly three years now. In the course of the hearing of the case, the judges interacted with the minor in chambers. He appeared to be happy with his studies and school and did not evince any interest in returning to his school in America. His concern was more related to the abduction charge and consequent harassment being faced by his mother and maternal grandparents. The minor appeared to be settled

in his environment including his school studies and friends. He also held the respondent responsible for the troubles which his mother was undergoing and was quite critical about the respondent getting married to another woman. Fourthly, because even the respondent did not grudge the appellant getting custody of the minor, provided she returns to America with the minor. In the light of all these circumstances, repatriation of the minor to the United States, on the principle of 'comity of courts' does not appear to be an acceptable option worthy of being exercised at this stage. Dismissal of the application for custody in disregard of the attendant circumstances was not a proper exercise of discretion by the High Court. Interest of the minor shall be better served if he continued in the custody of his mother the appellant in this appeal, especially when the respondent has contracted a second marriage and did not appear to be keen for having actual custody of the minor. The High Court was not right in declining exercise of jurisdiction on the principle of comity of Courts. [Paras 42- 45, 47] [715-C-H; 716-F-H; 717-A-C]

3.1. The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course the court ought to have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality. Even the respondent did not claim such rights in his application or in the proceedings before the High Court. The respondent's apprehensions about his safety, if he were to visit India in order to meet the child and associate with him may not be entirely out of place but that does not mean that the courts below could not grant redress

against the same. One of these apprehensions is that the respondent may be involved in a false case under Section 498A and 406 of the IPC or provisions like the Prohibition of Dowry Act 1961. A case FIR was, in fact, registered against the respondent, which was quashed by the High Court. The appeal against the said order was dismissed, which must effectively give a quietus to that controversy, and allay the apprehension of the respondent. [Para 48] [717-D-H; 718-A]

3.2. The course of an interactive session with the minor showed that the minor was thoroughly antagonized against the respondent father. He held him responsible for his inability to travel to Malaysia, with his grandparents because if he does so, both the mother and her parents will be arrested on the charge of abduction of the minor. He also held the respondent responsible for his grandparent's skin problems and other worries. He wanted to stay only in India and wanted to be left alone by the respondent. He was reluctantly agreeable to meeting and associating with the respondent provided the respondent has the red corner notice withdrawn so that he and his grandparents can travel abroad. [Para 49] [718-B-E]

3.3. For a boy so young in years, these and other expressions suggesting a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated. What the appellant ought to appreciate is that feeding the minor with such dislike and despire for his father does not serve his interest or his growth as a normal child. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to

face the realities of life be undermined. It is in that view important for the child's healthy growth that the father is granted visitation rights that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications. The appellant has been according to the respondent persistently preventing even telephonic contact between the father and the son. May be the son has been so poisoned against him that he does not evince any interest in the father. Be that as it may telephonic contact shall not be prevented by the appellant for any reason whatsoever and shall be encouraged at all reasonable time. Video conferencing may also be possible between the two which too shall not only be permitted but encouraged by the appellant. Besides, the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parents or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial Court after verifying the convenience of both the parties in this regard. The trial Court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter. [Para 50] [718-E-H; 719-A-E]

3.4. For the vacations in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one week initially and for longer periods in later years, subject to the respondent getting the itinerary in this regard approved from the Guardian and Wards Court. The respondent shall also be free to take the minor out of Delhi subject

to the same condition. The respondent shall for that purpose be given the temporary custody of the minor in presence of the trial court, on any working day on the application of the respondent. Return of the minor to the appellant shall also be accordingly before the trial court on a date to be fixed by the court for that purpose. These directions are subject to the condition that the respondent does not remove the child from the jurisdiction of this Court pending final disposal of the application for grant of custody by the Guardian and Wards Court, Delhi. within the broad parameters of the directions regarding visitation rights of the respondent, the parties shall be free to seek further directions from the Court seized of the guardianship proceedings; to take care of any difficulties that may arise in the actual implementation of this order. [Para 51] [719-F-H; 720-A-B]

4. In this appeal the appellant has challenged the correctness of an order passed by the High Court of Delhi, quashing the FIR registered against respondent-husband and three others for offences punishable under Sections 498A, 406 read with Section 34 IPC. The High Court has recapitulated the relevant facts and found that the appellant-complainant is a citizen of USA and had all along lived in USA with her son and husband, away from her in laws. The High Court has, on the basis of the statement made by the appellant in California Court, further found that the alleged scene of occurrence was in USA and that her in-laws had no say in the matrimonial life of the couple. The appellant had further stated that all her jewelry was lying in the couple's house in USA and no part of it was with her in-laws as was subsequently stated to be the position in the FIR lodged by the appellant. No locker number of the bank was disclosed in the FIR nor any date of the opening of locker or the jewelry items lying in it. The particulars of the bank in

which the alleged locker was taken by him were also not given in the FIR. The High Court further held that the appellant had not lodged any report although the appellant's parents in-laws were alleged to have stated that the jewelry items were not commensurate with the status of their family as early as in the year 1996. The High Court in that view held that no offence under Section 498A and 406 IPC was made out against her in-laws on the basis of the allegations made by the appellant in the FIR. In that view of the matter, there is no reason to interfere with the orders passed by the High Court. [Paras 52, 53] [720-C-H; 721-A-B]

Case Law Reference:

AIR 1914 PC 41	**referred to**	**Para 17**
1964 SCR 73	**referred to**	**Para 18**
2006 (5) Suppl. SCR 1	**referred to**	**Para 19**
AIR 1983 Mad 9	**referred to**	**Para 20**
AIR 1986 P&H 113	**referred to**	**Para 20**
AIR 1952 All 79	**referred to**	**Para 20**
AIR 1981 Raj. 211	**referred to**	**Para 20**
AIR 1983 Bom. 242	**referred to**	**Para 20**
1975 (2) SCR 97	**referred to**	**Para 34**
1997 (5) Suppl. SCR 30	**referred to**	**Para 35**
1951(1) All ER 942	**referred to**	**Para 35**
1969(1) All ER 788	**referred to**	**Para 35**
2000 (1) SCR 915	**referred to**	**Para 36**
2009 (15) SCR 960	**referred to**	**Para 37**

(2009 (16) SCR 287	**referred to**	**Para 38**
1984 (3) SCR 422	**referred to**	**Para 39**
1987 (1) SCR 175	**referred to**	**Para 39**
1997 (5) Suppl. SCR 30	**referred to**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4435 of 2003.

From the Judgment & Order dated 8.3.2010 of the High Court of Delhi at New Delhi in CM (M) No. 448 of 2009.

WITH

Crl. A.No. 1184 of 2011.

Rakesh Tiku, Sanjay Parikh, Ashok Bhan, Aashish Bhan, N.S. Arora, Samridhi Sinha, Soumya Ray, Rashmi, Anish Shah, Manoj Saxena, Anitha Shenoy for the Appellant.

Pallav Shishodia, Mukul Kumar for the Respondent

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. Conflict of laws and jurisdictions in the realm of private international law is a phenomenon that has assumed greater dimensions with the spread of Indian diasporas across the globe. A large number of our young and enterprising countrymen are today looking for opportunities abroad. While intellectual content and technical skills of these youngster find them lucrative jobs in distant lands, complete assimilation with the culture, the ways of life and the social values prevalent in such countries do not come easy. The result is that in very many cases incompatibility of temperament apart, diversity of backgrounds and inability to accept the changed lifestyle often lead to matrimonial discord that inevitably forces one or the other party to seek redress within the legal system of the country

which they have adopted in pursuit of their dreams. Experience has also shown that in a large number of cases one of the parties may return to the country of his or her origin for family support, shelter and stability. Unresolved disputes in such situations lead to legal proceedings in the country of origin as well as in the adoptive country. Once that happens issues touching the jurisdiction of the courts examining the same as also comity of nations are thrown up for adjudication.

3. The present happens to be one such case where legal proceedings have engaged the parties in a bitter battle for the custody of their only child Kush, aged about 11 years born in America hence a citizen of that country by birth. These proceedings included an action filed by the father-respondent in this appeal, before the American Court seeking divorce from the respondent-wife and also custody of master Kush. An order passed by the Superior court of California, County of Ventura in America eventually led to the issue of a red corner notice based on allegations of child abduction levelled against the mother who like the father of the minor child is a person of Indian origin currently living with her parents in Delhi. The mother took refuge under an order dated 4th April, 2009 passed by the Addl. District Court at Delhi in a petition filed under Sections 7, 8, 10, 11 of the Guardians and Wards Act granting interim custody of the minor to her. Aggrieved by the said order the father of the minor filed a petition under Article 227 of the Constitution of India before the High Court of Delhi. By the order impugned in this appeal the High Court allowed that petition, set aside the order passed by the District Court and dismissed the custody case filed by the mother primarily on the ground that the Court at Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing at Delhi - a condition precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of child ought to be agitated and decided by the Court in America not only because that Court had already passed an order to that effect in favour of the father, but also because all the three

parties namely, the parents of the minor and the minor himself were American citizens. The High Court buttressed its decision on the principle of comity of courts and certain observations made by this Court in some of the decided cases to which we shall presently refer.

4. Three questions fall for determination in the above backdrop. These are (i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and (iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court. We shall deal with the questions ad seriatim:

Re: Question No.1

5. There is no gainsaying that any challenge to the jurisdiction of the court will have to be seen in the context of the averments made in the pleadings of the parties and the requirement of Section 9 of the Guardian and Wards Act, 1890. A closer look at the pleadings of the parties is, therefore, necessary before we advert to the legal requirement that must be satisfied for the Court to exercise its powers under the Act mentioned above.

6. The appellant-mother had in her petition filed under the Guardian and Wards Act, 1890 invoked the jurisdiction of the Court at Delhi, on the assertion that the minor was, on the date of the presentation of the petition for custody ordinarily residing at 73 Anand Lok, August Kranti Marg, New Delhi. The petition enumerated at length the alleged acts of mental and physical cruelty of the respondent- husband towards the appellant, including his alleged addiction to pornographic films, internet sex and adulterous behavior during the couple's stay in America. It traced the sequence of events that brought them to

India for a vacation and the alleged misdemeanor of the respondent that led to the appellant taking a decision to past company and to stay back in India instead of returning to United States as originally planned. In para (xxxviii) of the petition, the appellant said :

> "That the petitioner in no certain terms told the respondent that considering his past conduct which was cruel, inhuman and insulting as well as humiliating, the petitioner has no plans to be with the respondent and wanted to stay away from him. The petitioner even proposed that since there was no (sic) possibility for them to stay together as husband and wife and as a result of which the petitioner has decided to settle in India for the time being, therefore some interim arrangement could be worked out. The arrangement which was proposed by the petitioner was that the petitioner will stay with her son for the time being in India and make best arrangements for his schooling. The petitioner had also conveyed to the respondent that since he wanted to have visitation rights, therefore, he must also contribute towards the upbringing of the child in India. It was further suggested that some cooling off period should be there so that the matrimonial disputes could be sorted out subsequently."

7. The appellant further alleged that she had informed the respondent about a petition under the Guardian and Wards Act being ready for presentation before the Guardian Court at Delhi, whereupon the respondent is alleged to have agreed to the appellant staying back in Delhi to explore career options and to the minor continuing to stay with her. The respondent eventually returned to America around 20th July, 2008, whereafter he is alleged to have started threatening the appellant that unless the later returned to America with the minor, he would have the child removed and put in the custody of the respondent's parents at Udaipur. Apprehending that the respondent may involve the appellant in some false litigation

in America and asserting that she was fit to be given the custody of the minor being his mother and natural guardian, the appellant sought the intervention of this Court and her appointment as sole guardian of the minor.

8. Shortly after the presentation of the main petition, an application under Section 12 of the Guardian and Wards Act read with Section 151 of the Civil Procedure Code was filed by the appellant praying for an ex-parte interim order restraining the respondent and/or any one on his behalf from taking away and/or physically removing the minor from her custody and for an order granting interim custody of the minor to the appellant till further orders. The application set out the circumstances in brief that compelled the appellant to seek urgent interim directions from the court and referred to an e-mail received from the father of the minor by the Delhi Public School (International) at R.K. Puram, where the minor is studying, accusing the mother of abducting the minor child and asking the school authorities to refuse admission to him. The application also referred to an e-mail which the Principal of the school had in turn sent to the appellant and the order which the US Court had passed granting custody of minor child to the respondent. The appellant alleged that the US Court had no jurisdiction in the matter and that the order passed by that Court was liable to be ignored. On the presentation of the above application the Guardian Court passed an ex-parte interim order on 16th September, 2008 directing that the respondent shall not interfere with the appellant's custody of the minor child till the next date of hearing.

9. The respondent entered appearance in the above proceedings and filed an application for dismissal of the petition on the ground that the court at Delhi had no jurisdiction to entertain the same. In the application the respondent denied all the allegations and averments suggesting habitual internet sex, womanizing, dowry demand and sexual or behavioural perversity alleged against him. The respondent also alleged that

the family had planned a vacation-cum-family visit to India and booked return air tickets to be in America on 20th July, 2008. The respondent's version was that the appellant along with the respondent and their minor son, Kush had stayed with the parents of the appellant at Delhi till 5th July, 2008. Thereafter, they were supposed to visit Udaipur but since the appellant insisted that she would stay at Delhi and assured to send Kush after sometime to Udaipur, the respondent left for Udaipur where he received a legal notice on behalf of the appellant making false and imaginary allegations. On receipt of the notice the respondent returned to Delhi to sort out the matter. During the mediation the respondent was allegedly subjected to enormous cruelty, pressure and threat of proceedings under Section 498A IPC so as to obstruct his departure scheduled on 20th July, 2008. The respondent alleged that since any delay in his departure could cost him a comfortable job in United States, he felt coerced to put in writing a tentative arrangement on the ground of appellant trying "career option of Dental medicine at Delhi" and master Kush being allowed to study at Delhi for the year 2008. This letter was, according to the respondent, written under deceit, pressure, threat and coercion. At any rate the letter constituted his consent to an arrangement, which according to him stood withdrawn because of his subsequent conduct. It was alleged that neither the appellant nor Kush could be ordinarily resident of Delhi so as to confer jurisdiction upon the Delhi Court. Several other allegations were also made in the application including the assertion that the interim order of custody and summons issued by the Superior Court of California, County of Ventura were served by e-mail on the appellant as also on Advocate, Mr. Purbali Bora despite which the appellant avoided personal service of the summon on the false pretext that she did not stay at 73 Anand Lok, New Delhi.

10. It was, according to the respondent, curious that instead of returning to USA to submit to the jurisdiction of competent court at the place where both the petitioner and respondent have

a house to reside, jobs to work and social roots and where Kush also normally resided, has friends and school, the appellant wife had persisted to stay in India and approach and seek legal redress. It was further stated that the proceedings initiated by the appellant on or about 28th August, 2008, with allegations and averments that were ex-facie false and exaggerated, were not maintainable in view of the proceedings before the Court in America and the order passed therein. It was also alleged that in terms of the protective custody warrant order issued on 9th September, 2008, by the Superior Court of California, County of Ventura, the appellant had been directed to appear before the US Courts which the appellant was evading to obey and that despite having information about the proceedings in the US Court she had obtained an ex-parte order without informing the respondent in advance.

11. The respondent also enumerated the circumstances which according to him demonstrated that he is more suitable to get the custody of Master Kush in comparison to the appellant-mother of the child. The respondent husband accordingly prayed for dismissal of the petition filed by the appellant-wife and vacation of the ad-interim order dated 4th April, 2009 passed by the Guardian Court at Delhi.

12. The Guardian and Wards Court upon consideration of the matter dismissed the application filed by the respondent holding that the material on record sufficiently showed that the respondent-husband had consented to the arrangement whereby the appellant-wife was to continue living in Delhi in order to explore career options in dental medicine and that the minor was to remain in the custody of his mother and was to be admitted to a School in Delhi. The Court further held that since there were serious allegations regarding the conduct of the respondent-husband and his habits, the question whether the interest of minor would be served better by his mother as a guardian had to be looked into. It is in the light of the above averments that the question whether the Courts at Delhi have

the jurisdiction to entertain a petition for custody of the minor shall have to be answered.

13. Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub-Section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says :

> "9. *Court having jurisdiction to entertain application* – (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides."

14. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in Section 9(1) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise

the expression. The word 'ordinary' has been defined by the Black's Law Dictionary as follows:

> *"Ordinary* (*Adj*.) :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

15. The word 'reside' has been explained similarly as under:

> **"Reside**: live, dwell, abide, sojourn, stay, remain, lodge. (*Western- Knapp Engineering Co. V. Gillbank*, C.C.A. Cal., 129 F2d 135, 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (*State ex rel. Bowden v. Jensen Mo*., 359 S.W.2d 343, 349.)"

16. In Websters dictionary also the word 'reside' finds a similar meaning, which may be gainfully extracted:

> "1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with *in*. 3. To be vested: with *in*"

17. In *Mrs. Annie Besant v. Narayaniah* AIR 1914 PC 41 the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council observed:

"The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district.

It is in their Lordship's opinion impossible to hold that the infants who had months previously left India with a view to being educated in England and going to University had acquired their ordinary residence in the district of Chingleput."

18. In *Mst. Jagir Kaur and Anr. v. Jaswant Singh* AIR 1963 SC 1521, this Court was dealing with a case under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words:

".....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases there on, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....."

19. In *Kuldip Nayar & Ors. v. Union of India & Ors.* 2006 (7) SCC 1, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

"243. Lexicon refers to *Cicutti* v. *Suffolk County Council (1980) 3 All ER 689* to denote that the word "ordinarily" is

primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.

244. The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question."

20. Reference may be made to *Bhagyalakshmi and Anr. v. K.N. Narayana Rao* AIR 1983 Mad 9, *Aparna Banerjee v. Tapan Banerjee* AIR 1986 P&H 113, *Ram Sarup v. Chimman Lal and Ors.* AIR 1952 All 79, *Smt. Vimla Devi v. Smt. Maya Devi & Ors.* AIR 1981 Raj. 211, and in re: *Dr. Giovanni Marco Muzzu and etc. etc.* AIR 1983 Bom. 242, in which the High Courts have dealt with the meaning and purport of the expressions like 'ordinary resident' and 'ordinarily resides' and taken the view that the question whether one is ordinarily

residing at a given place depends so much on the intention to make that place ones ordinary abode.

21. Let us now in the light of the above, look at the rival versions of the parties before us, to determine whether the Court at Delhi has the jurisdiction to entertain the proceedings for custody of master Kush. As seen earlier, the case of the appellant mother is that Kush is ordinarily residing with her in Delhi. In support of that assertion she has among other circumstances placed reliance upon the letter which the respondent, father of the minor child wrote to the appellant on 19th July, 2008. The letter is to the following effect:

"Ruchi,

As you wish to stay in India with Kush and try career option of Dental medicine at Delhi, I give my whole-hearted support and request you to put Kush in an Indo-American school or equivalent at Delhi this year.

Please let me know the expenses involved for education of Kush and I would like to bear completely.

Sd/- Sanjeev

July 19, 2008"

22. The appellant's case is that although the couple and their son had initially planned to return to U.S.A. that decision was taken with the mutual consent of the parties changed to allow the appellant to stay back in India and to explore career options here. Master Kush was also according to that decision of his parents, to stay back and be admitted to a school in Delhi. The decision on both counts, was free from any duress whatsoever, and had the effect of shifting the "ordinary residence" of the appellant and her son Kush from the place they were living in America to Delhi. Not only this the respondent father of the minor, had upon his return to America sent E-mails, reiterating the decision and offering his full support

to the appellant. This is according to the appellant clear from the text of the E-mails exchanged between the parties and which are self-explanatory as to the context in which they are sent.

23. The respondent's case on the contrary is that he was coerced to put in writing a tentative arrangement on the ground of appellant trying career options in dental medicine at Delhi and minor Kush allowed to stay at Delhi for the year 2008. This letter was, according to the respondent, obtained under deceit, pressure, threat and coercion. In his application challenging the jurisdiction of the Delhi Court the respondent further stated that even if it be assumed that the appellant and Kush had stayed back in India with the permission of the respondent, the same stood withdrawn. To the same effect was the stand taken by the respondent in his petition under Article 227 filed before this Court.

24. It is evident from the statement and the pleadings of the parties that the question whether the decision to allow the appellant and Kush to stay back in Delhi instead of returning to America was a voluntary decision as claimed by the appellant or a decision taken by the respondent under duress as alleged by him was a seriously disputed question of facts, a satisfactory answer to which could be given either by the District Court where the custody case was filed or by the High Court only after the parties had been given opportunity to adduce evidence in support of their respective versions.

25. In the light of the above, we asked Mr. Pallav Shishodia, learned senior counsel for the respondent whether the respondent would adduce evidence to substantiate his charge of duress and coercion as vitiating circumstances for the Court to exclude the letter in question from consideration. Mr. Shishodia argued on instructions that the respondent had no intention of leading any evidence in support of his case that the letter was obtained under duress. In fairness to him we must mention that he beseeched us to decide the question regarding jurisdiction of the Court on the available material without

remanding the matter to the Trial Court for recording of evidence from either party. Mr. Shishodia also give us an impression as though any remand on the question of duress and coercion would be futile because the respondent father was not willing to go beyond what he has already done in pursuit of his claim to the custody of the minor. In that view of the matter, therefore, we are not remanding the case for recording of evidence as we were at one stage of hearing thought of doing. We are instead taking a final view on the question of jurisdiction of the Delhi Court, to entertain the application on the basis of the available material. This material comprises the letter dated 19th July, 2008 written by the respondent and referred to by us earlier and the e-mails exchanged between the parties. That the letter in question was written by the respondent is not in dispute. What is argued is that the letter was written under duress and coercion. There is nothing before us to substantiate that allegation, and in the face of Mr. Shishodia's categoric statement that the respondent does not wish to adduce any evidence to prove his charge of coercion and duress, we have no option except to hold that the said charge remains unproved.

26. More importantly the E-mails exchanged between the parties, copies whereof have been placed on record, completely disprove the respondent's case of any coercion or duress. The first of these E-mails is dated the 17th July, 2008 sent by the respondent to his friend in America, pointing out that the appellant was staying back in India with the minor for the present. The text of the E-mail is as under:

"Hi Joanne,

Hope all is well.

I got your voicemail, actually we recently changed our service provider for home phone, please see below our updated contact information.

Home-9187071716

Sanjay mobile – 8054100872, this works in India

Ruchi's mobile remains the same, however it will not work since we are currently in India. I will be back in LA on Jul 2-, however Ruchi wants to stay in Delhi alongwith Kush for now.

Regards,

Sanjeev"

27. On 21st July, 2008 i.e. a day after the respondent reached America the appellant sent him an e-mail which clearly indicates that the minor was being admitted to a school in Delhi and by which the respondent was asked to send American School's record for that purpose. The e-mail is to the following effect.

"Sanjeev

Also please call up Red Oak elementary and inform them that Kush will be starting American schooling in India for now and request personal recommendation from Mrs. Merfield and Mrs. Johnson, they know Kush v well..Also we need 2 yrs of official school records (one from sumac and other from red oak) Please send $$ asap. I will find if they have a direct deposit at school, to make it easy on u..thanks

Ruchi"

28. In response to the above, the respondent sent an E-mail which does not in the least, give an impression that the decision to allow master Kush to stay back in Delhi and to get admitted to a School here was taken under any kind of duress or coercion as is now claimed. The E-mail is to the following effect:

'Hi Ruchi,

I checked out website for both American and British schools, the fees for these schools is extremely high

between $ 20000 - $ 25000 per annum, this will deduct from Kush's college fund which I have worked hard to create. Also realize that if we take out $ 25,000 from his college fund now, we loose the effect of compounding when he needs $ for college 11 years from now. $ 25000 now will be worth $ 60000-70000 11 yrs from now. I really and honestly feel that we should not deplete Kush's college fund so much at grade 2m rather leave most of it for higher education. Also I see a benefit for him to get into a logical high equality English medium school, he can learn a bit of Hindi. I would be happy to talk to Kush and make sure he is comfortable. Let me know your thoughts."

29. Equally important is another E-mail which the respondent sent to the appellant regarding surrender of the appellant's car and payment of the outstanding lease money, a circumstance that shows that the parties were ad-idem on the question of the appellant winding up her affairs in America.

"Hi Ruchi,

I checked with Acura regarding breaking your lease, they said that you can surrender the car to them for repossession and then they will try to sell it in private action. You will then need to pay the difference between money raised from private auction and pay off amount. Also this repossession will damage your credit history. Let me know your thoughts.

Hope you are feeling better.

Sanjeev"

30. Two more E-mails one dated 24.7.2008 and the other dated 19.8.2008 exchanged between the parties on the above subject also bear relevance to the issue at hand and may be extracted:

"Hi Ruchi,

I did more digging for you on this.

See below information from a broker who may be able to help transfer the lease to another buyer in exchange for the fees mentioned. Let me know how you want to proceed.

Sanjeev"

"Hi Sanjeev

Please proceed with the plan, sell my acura with least damages…this seems like a better option.

Thanks,

Ruchi"

31. It is difficult to appreciate how the respondent could in the light of the above communications still argue that the decision to allow the appellant and master Kush to stay back in India was taken under any coercion or duress. It is also difficult to appreciate how the respondent could change his mind so soon after the above E-mails and rush to a Court in U.S. for custody of the minor accusing the appellant of illegal abduction, a charge which is belied by his letter dated 19th July, 2008 and the E-mails extracted above. The fact remains that Kush was ordinarily residing with the appellant his mother and has been admitted to a school, where he has been studying for the past nearly three years. The unilateral reversal of a decision by one of the two parents could not change the fact situation as to the minor being an ordinary resident of Delhi, when the decision was taken jointly by both the parents.

32. In the light of what we have stated above, the High Court was not, in our opinion, right in holding that the respondent's version regarding the letter in question having been obtained under threat and coercion was acceptable. The High Court appeared to be of the view that if the letter had not been written under duress and coercion there was no reason

for the respondent to move a guardianship petition before U.S. Court. That reasoning has not appealed to us. The question whether or not the letter was obtained under duress and coercion could not be decided only on the basis of the institution of proceedings by the respondent in the U.S. Court. If the letter was under duress and coercion, there was no reason why the respondent should not have repudiated the same no sooner he landed in America and the alleged duress and coercion had ceased. Far from doing so the respondent continued to support that decision even when he was far away from any duress and coercion alleged by him till the time he suddenly changed his mind and started accusing the appellant of abduction. The High Court failed to notice these aspects and fell in error in accepting the version of the respondent and dismissing the application filed by the appellant. In the circumstances we answer question no.1 in the negative.

Re: Question No.2

33. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its Parens Patraie jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider

the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.

34. A survey of law on the subject would, in that view, be necessary and can start with a reference to the decision of this Court in *Smt. Satya V. Shri Teja Singh,* (1975) 1 SCC 120. That was a case in which the validity of a decree for divorce obtained by the husband from a Court in the State of Naveda (USA) fell for examination. This Court held that the answer to the question depended upon the Rules of private International Law. Since no system of Private International Law existed that could claim universal recognition, the Indian Courts had to decide the issue regarding the validity of the decree in accordance with the Indian law. Rules of Private International Law followed by other countries could not be adopted mechanically, especially when principles underlying such rules varied greatly and were moulded by the distinctive social, political and economic conditions obtaining in different countries. This Court also traced the development of law in America and England and concluded that while British Parliament had found a solution to the vexed questions of recognition of decrees granted by foreign courts by enacting "The recognition of Divorces and Legal Separations Act, 1971" our Parliament had yet to do so. In the facts and circumstances of that case the Court held that the husband was not domiciled in Naveda and that his brief stay in that State did not confer any jurisdiction upon the Naveda Court to grant a decree dissolving the marriage, he being no more than a bird of passage who had resorted to the proceedings there solely to find jurisdiction and obtain a decree for divorce by misrepresenting the facts as regards his domicile in that State.

This Court while refusing to recognize the decree observed:

> "True that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile, a brief residence may not negative it. But residence for a particular purpose falls to answer the qualitative test for, the purpose being accomplished the residence would cease. The residence must answer "a qualitative as well as a quantitative test", that is, the two elements of *factum et animus* must concur. The respondent went to Naveda forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domiciliary assertion was dry. *Thus the decree of the Naveda Court lacks jurisdiction. It can receive no recognition in our courts."*
>
> (emphasis ours)

35. In *Dhanwanti Joshi v. Madhav Unde* 1998(1) SCC 112, one of the questions that fell for consideration was whether the bringing away of a child to India by his mother contrary to an order of US Court would have any bearing on the decision of the Courts in India while deciding about the custody and the welfare of the child. Relying upon *McKee v. KcKee,* 1951 AC 352: 1951(1) All ER 942 and *J v. C* 1970 AC 668:1969(1) All ER 788, this Court held that it was the duty of the Courts in the country to which a child is removed to consider the question of custody, having regard to the welfare of the child. In doing so, the order passed by the foreign court would yield to the welfare of the child and that Comity of Courts simply demanded consideration of any such order issued by foreign courts and not necessarily their enforcement. This court further held that the conduct of a summary or elaborate inquiry on the question of custody by the Court in the country to which the child has been removed will depend upon the facts and circumstance of each case. For instance summary jurisdiction is exercised only if the court to which the child had been removed is moved

promptly and quickly, for in that event, the Judge may well be persuaded to hold that it would be better for the child that the merits of the case are investigated in a court in his native country, on the expectation that an early decision in the native country would be in the interests of the child before the child could develop roots in the country to which he had been removed. So also the conduct of an elaborate inquiry may depend upon the time that had elapsed between the removal of the child and the institution of the proceedings for custody. This would mean that longer the time gap, the lesser the inclination of the Court to go for a summary inquiry. The court rejected the prayer for returning the child to the country from where he had been removed and observed:

> **"31.** The facts of the case are that when the respondent moved the courts in India and in the proceedings of 1986 for habeas corpus and under Guardians and Wards Act, the courts in India thought it best in the interests of the child to allow it to continue with the mother in India, and those orders have also become final. The Indian courts in 1993 or 1997, when the child had lived with his mother for nearly 12 years, or more, would not exercise a summary jurisdiction to return the child to USA on the ground that its removal from USA in 1984 was contrary to orders of US courts."

36. We must at this stage refer to two other decisions of this Court, reliance upon which was placed by the learned counsel for the parties. In *Sarita Sharma v. Sushil Sharma* (2000) 3 SCC 14 this Court was dealing with an appeal arising out of a habeas corpus petition filed before the High Court of Delhi in respect of two minor children aged 3 years and 7 years respectively. It was alleged that the children were in illegal custody of Sarita Sharma their mother. The High Court had allowed the petition and directed the mother to restore the custody of the children to Sushil Sharma who was in turn permitted to take the children to U.S.A. without any hindrance.

One of the contentions that was urged before this Court was that the removal of children from U.S.A. to India was against the orders passed by the American Court, which orders had granted to the father the custody of the minor children. Allowing the appeal and setting aside the judgment of the High Court, this Court held that the order passed by the U.S. courts constituted but one of the factors which could not override the consideration of welfare of the minor children. Considering the fact that the husband was staying with his mother aged about 80 years and that there was no one else in the family to lookafter the children, this Court held that it was not in the interest of the children to be put in the custody of the father who was addicted to excessive alcohol. Even this case arose out of a writ petition and not a petition under the Guardians and Wards Act.

37. In *V. Ravi Chandran (Dr.) (2) v. Union of India and Ors.* (2010) 1 SCC 174 also this Court was dealing with a habeas corpus petition filed directly before it under Article 32 of the Constitution. This Court held that while dealing with a case of custody of children removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider whether the court could conduct an elaborate enquiry on the question of custody or deal with the matter summarily and order the parent to return the custody of the child to the country from which he/she was removed, leaving all aspects relating to child's welfare to be investigated by Court in his own country. This Court held that in case an elaborate enquiry was considered appropriate, the order passed by a foreign court may be given due weight depending upon the circumstances of each case in which such an order had been passed. Having said so, this Court directed the child to be sent back to U.S. and issued incidental directions in that regard.

38. In *Shilpa Aggarwal (Ms.) v. Aviral Mittal & Anr.* (2010)

1 SCC 591 this Court followed the same line of reasoning. That was also a case arising out of a habeas corpus petition before the High Court of Delhi filed by the father of the child. The High Court had directed the return of the child to England to join the proceedings before the courts of England and Wales failing which the child had to be handed over to the petitioner-father to be taken to England as a measure of interim custody leaving it for the court in that country to determine which parent would be best suited to have the custody of the child. That direction was upheld by this Court with the observation that since the question as to what is in the interest of the minor had to be considered by the court in U.K. in terms of the order passed by the High Court directing return of the child to the jurisdiction of the said court did not call for any interference.

39. We do not propose to burden this judgment by referring to a long line of other decisions which have been delivered on the subject, for they do not in our opinion state the law differently from what has been stated in the decisions already referred to by us. What, however, needs to be stated for the sake of a clear understanding of the legal position is that the cases to which we have drawn attention, as indeed any other case raising the question of jurisdiction of the court to determine mutual rights and obligation of the parties, including the question whether a court otherwise competent to entertain the proceedings concerning the custody of the minor, ought to hold a summary or a detailed enquiry into the matter and whether it ought to decline jurisdiction on the principle of comity of nations or the test of the closest contact evolved by this Court in *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr.* (1984) 3 SCC 698 have arisen either out of writ proceedings filed by the aggrieved party in the High Court or this Court or out of proceedings under the Guardian & Wards Act. Decisions rendered by this Court in *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr.* (1987) 1 SCC 42, *Sarita Sharma's* case (supra), *V. Ravi Chandran's* case (supra), *Shilpa Aggarwal's* case (supra) arose out of proceedings in the nature of habeas

corpus. The rest had their origin in custody proceedings launched under the Guardian & Wards Act. Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detenue is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in *Ravi Chandran's & Shilpa Agarwal's* cases (supra) or refuse to do so as was the position in *Sarita Sharma's* case (supra). What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction.

40. In cases arising out of proceedings under the Guardian & Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the Court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardian & Wards Act on the other. Having said that we must make it clear that no matter a Court is exercising powers under the Guardian & Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate orders provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act. This is clear from the decision of this Court in *Dhanwanti Joshi v. Madhav*

Unde (1998) 1 SCC 112, which arose out of proceedings under the Guardian & Wards Act. The following passage is in this regard apposite:

> "We may here state that this Court in *Elizabeth Dinshaw* v. *Arvand M. Dinshaw (1987) 1 SCC 42* while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, — which were independently considered — it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to *H. (infants), Re (1966) 1 ALL ER 886* which case, as pointed out by us above has been explained in *L. Re (1974) 1 All ER 913, CA* as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in *McKee* v. *McKee (1951) 1 All ER 942* and *J* v. *C (1969) 1 All ER 788* and the distinction between summary and elaborate inquiries as stated in *L. (infants), Re (1974) 1 All ER 913, CA* are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 — even assuming that the earlier orders passed in India do not operate as constructive res judicata."

41. It does not require much persuasion for us to hold that the issue whether the Court should hold a summary or a detailed enquiry would arise only if the Court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the Court competent to

entertain the same. A Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings.

42. We have while dealing with question No.1 above held that the Court at Delhi was in the facts and circumstances of the case competent to entertain the application filed by the appellant. What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that 'comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Decisions of this Court in *Dhanwanti Joshi, and Sarita Sharma's* cases, (supra) clearly support that proposition.

43. Secondly, the respondent's case that the minor was removed from the jurisdiction of the American Courts in contravention of the orders passed by them, is not factually correct. Unlike *V. Ravi Chandran's* case (supra), where the minor was removed in violation of an order passed by the American Court there were no proceedings between the parties in any Court in America before they came to India with the minor. Such proceedings were instituted by the respondent only

after he had agreed to leave the appellant and the minor behind in India, for the former to explore career options and the latter to get admitted to a school. The charge of abduction contrary to a valid order granting custody is, therefore, untenable.

44. Thirdly, because the minor has been living in India and pursuing his studies in a reputed school in Delhi for nearly three years now. In the course of the hearing of the case, we had an occasion to interact with the minor in our chambers. He appears to be happy with his studies and school and does not evince any interest in returning to his school in America. His concern was more related to the abduction charge and consequent harassment being faced by his mother and maternal grandparents. We shall advert to this aspect a little later, but for the present we only need to mention that the minor appears to be settled in his environment including his school studies and friends. He also holds the respondent responsible for the troubles which his mother is undergoing and is quite critical about the respondent getting married to another woman.

45. Fourthly, because even the respondent does not grudge the appellant getting custody of the minor, provided she returns to America with the minor. Mr. Shishodia was asking to make a solemn statement that the respondent would not, oppose the appellant's prayer for the custody of the minor, before the American Court. All that the respondent wants is that the minor is brought up and educated in America, instead of India, as the minor would benefit from the same.

46. The appellant was not willing to accept that proposal, for according to her she has no intentions of returning to that country in the foreseeable future especially after she has had a very traumatic period on account of matrimonial discord with the respondent. Besides, the offer was according to the appellant, only meant to score a point more than giving any real benefit to the minor.

47. In the light of all these circumstances, repatriation of

the minor to the United States, on the principle of 'comity of courts' does not appear to us to be an acceptable option worthy of being exercised at this stage. Dismissal of the application for custody in disregard of the attendant circumstances referred to above was not in our view a proper exercise of discretion by the High Court. Interest of the minor shall be better served if he continued in the custody of his mother the appellant in this appeal, especially when the respondent has contracted a second marriage and did not appear to be keen for having actual custody of the minor. Question No.2 is also for the above reasons answered in the negative.

Re. Question No.3

48. The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course the court ought to have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality. It is noteworthy that even the respondent did not claim such rights in his application or in the proceedings before the High Court. Indeed Mr. Shishodia expressed serious apprehensions about the safety of his client, if he were to visit India in order to meet the child and associate with him. Some of these apprehensions may not be entirely out of place but that does not mean that the courts below could not grant redress against the same. One of these apprehensions is that the respondent may be involved in a false case under Section 498A & 406 of the IPC or provisions like the Prohibition of Dowry Act 1961. A case FIR No.97 dated 7.7.2009 has, in fact, been registered against the respondent, which has been quashed by the High Court by its order dated 22nd September, 2010 passed in Crl. M.C. No.3329 of 2009. We have by our order of even date dismissed an appeal against the said order, which must effectively give a quietus to that controversy, and

allay the apprehension of the respondent. Not only that we are inclined to issue further directions to ensure that the respondent does not have any legal or other impediment in exercising his visitation rights.

49. The question then is what should the visitation rights be and how should the same be exercised. But before we examine that aspect, we may advert to the need for the visitation rights of the father to be recognised in the peculiar circumstances of this case. From what we gathered in the course of an interactive session with the minor, we concluded that the minor has been thoroughly antagonized against the respondent father. He held him responsible for his inability to travel to Malaysia, with his grandparents because if he does so, both the mother and her parents will be arrested on the charge of abduction of the minor. He also held the respondent responsible for his grandparent's skin problems and other worries. He wanted to stay only in India and wanted to be left alone by the respondent. He was reluctantly agreeable to meeting and associating with the respondent provided the respondent has the red corner notice withdrawn so that he and his grandparents can travel abroad.

50. For a boy so young in years, these and other expressions suggesting a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated. What the appellant ought to appreciate is that feeding the minor with such dislike and despire for his father does not serve his interest or his growth as a normal child. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights; that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since

the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications. The appellant has been according to the respondent persistently preventing even telephonic contact between the father and the son. May be the son has been so poisoned against him that he does not evince any interest in the father. Be that as it may telephonic contact shall not be prevented by the appellant for any reason whatsoever and shall be encouraged at all reasonable time. Video conferencing may also be possible between the two which too shall not only be permitted but encouraged by the appellant.

Besides, the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parents or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial Court after verifying the convenience of both the parties in this regard. The trial Court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter.

51. For the vacations in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one week initially and for longer periods in later years, subject to the respondent getting the itinerary in this regard approved from the Guardian & Wards Court. The respondent shall also be free to take the minor out of Delhi subject to the same condition. The respondent shall for that purpose be given the temporary custody of the minor in presence of the trial court, on any working day on the application of the respondent. Return of the minor to the appellant shall also be accordingly before the trial court on a date to be fixed by the court for that purpose. The above directions are subject to the condition that the respondent does not remove the child from the jurisdiction of this Court pending final disposal of the application for grant of custody by the Guardian and Wards

Court, Delhi. We make it clear that within the broad parameters of the directions regarding visitation rights of the respondent, the parties shall be free to seek further directions from the Court seized of the guardianship proceedings; to take care of any difficulties that may arise in the actual implementation of this order.

CRIMINAL APPEAL NO. 1184 OF 2011

(Arising out of SLP (Crl.) No.10362 of 2010)

52. In this appeal the appellant has challenged the correctness of an order dated 22nd September, 2010 passed by the High Court of Delhi, quashing FIR No.97 of 2009 registered against respondent-husband and three others in Police Station, Crime against Women Cell, Nanakpura, New Delhi, for offences punishable under Sections 498A, 406 read with Section 34 IPC. The High Court has recapitulated the relevant facts and found that the appellant-complainant is a citizen of USA and had all along lived in USA with her son and husband, away from her in laws. The High Court has, on the basis of the statement made by the appellant in California Court, further found that the alleged scene of occurrence was in USA and that her in-laws had no say in the matrimonial life of the couple. The appellant had further stated that all her jewelry was lying in the couple's house in USA and no part of it was with her in-laws as was subsequently stated to be the position in the FIR lodged by the appellant. No locker number of the bank was disclosed in the FIR nor any date of the opening of locker or the jewelry items lying in it. The particulars of the bank in which the alleged locker was taken by him were also not given in the FIR. The High Court further held that the appellant had not lodged any report although the appellant's parents in-laws were alleged to have stated that the jewelry items were not commensurate with the status of their family as early as in the year 1996. The High Court in that view held that no offence under Section 498A and 406 IPC, was made out against her in-laws on the basis of the allegations made by the appellant in the FIR.

53. Having heard learned counsel for the parties we are of the opinion that in the light of the findings recorded by the High Court the correctness whereof were not disputed before us, the High Court was justified in quashing the FIR filed by the appellant. In fairness to the learned counsel, we must mention that although a feeble attempt was made during the course of hearing to assail the order passed by the High Court, that pursuit was soon given up by him. In that view of the matter we see no reason to interfere with the orders passed by the High Court in Crl. M.C. No.3329 of 2009.

54. In the result

(i) Civil Appeal is allowed and order dated 8th March, 2010 passed by the High Court hereby set aside. Consequently, proceedings in G.P. No.361/2001 filed by the appellant shall go on and be disposed of on the merits as expeditiously as possible.

(ii) Order granting interim custody of minor Kush with appellant is resultantly affirmed subject to the grant of visitation right to the father as indicated in body of the order.

(iii) The observations made in this order shall not prejudice the cases of the parties before the trial Court and shall be understood to have been made only for purposes of this appeal except in so far as the question of jurisdiction of the trial Court is concerned which aspect shall be taken to have been finally decided by this Court.

(iv) All authorities statutory or otherwise shall act in aid of the directions given hereinabove.

(v) Criminal Appeal No. 1184 of 2011, (Arising out of SLP (Crl.) No.10362 of 2010) is dismissed.

(vi) The parties are left to bear their own costs in this Court and the Courts below.

D.G. Appeals disposed of.

KRISHAN LAL GERA
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 4924 of 2011)

JULY 4, 2011

[R.V. RAVEENDRAN AND H. L. GOKHALE, JJ.]

Public Interest Litigation:

Writ petition before High Court – Challenging the lease deed granted in respect of the premises of a Stadium in favour of a recreation club for non-sports commercial activities – Dismissed by High Court holding that no public interest was involved in the writ petition – HELD: There have been several irregularities by the District Administration (District Sports Council) in granting arbitrarily a largesse to DCA Club etc., in the form of a long term lease at an annual rent of Rs.1/- for use of a Sports Stadium, for non-sports commercial activities – The matter required consideration – The High Court failed to exercise its jurisdiction – Whenever nepotism, favouritism and unwarranted government largesse to private interests, threaten to frustrate schemes for public benefit, it is the duty of High Courts to strike at such action – The questions enumerated in the judgment are required to be addressed by the High Court – PIL remanded to High Court to dispose of the matter in accordance with law with reference to the issues enumerated in the judgment and the issues that may arise during hearing by the High Court.

Sports:

Sports complex/Sports stadium – Use of premises – HELD: No part of the stadia or sports grounds can be carved out for non-sport or commercial activities to be run by recreational clubs or by private entrepreneurs – A sports

complex/sports stadium cannot be converted into a recreation club – Creating a sports ground, encouraging sports is a part of human resource development which is the function of the State.

Sports Stadia – Maintenance and optimum use of – HELD: The country requires world class infrastructure to train potential athletes and sportspersons – It is not sufficient if infrastructure is created, but such infrastructure and facilities should be properly maintained and optimum utilization of the infrastructure should be ensured – Persons experienced in sports administration and sportspersons should manage the stadia and not the Managing Committees of recreational clubs – Development of sports infrastructure means to ensure continuous and effective use of those facilities and adequate maintenance and upkeep – There should be a comprehensive plan for optimum use of the facilities already available so that they are accessible to sportspersons.

A writ petition was filed before the High Court as a public interest litigation stating that the District Sports Council, Faridabad, by lease deed dated 26.8.1998, granted a lease of the Kapil Pavilion i.e. South Pavilion Building of Nahar Singh Stadium at Faridabad, measuring 784 sq.yds. as well as the open area in front of the South Pavilion measuring 5713 sq. yds. comprising the cricket practice pitches, Badminton Courts, Lawn Tennis Courts, Swimming Pool and a large vacant ground, in all 6497 sq.yds in favour of respondent no. 4, the District Cricket Association Club (DCA Club), for a period of 99 years on a token annual rent of Re. 1/-; that on 15.12.2003, the DCA Club, granted a licence in regard to the lawn area in front of the Kapil Pavilion to 'Modern Tent House' on a monthly rent of Rs.15,000/- with a ten percent increase every two years. The said agreement stated that the "period of hiring" was six years, and the purpose was to host 'parties'. It was alleged by the petitioner, *inter alia,*

that instead of using the leased premises which was part of the stadium complex, for sports and sports related activities, it was being used for illegal activities; that though clause 10 of the lease deed in favour of the DCA Club barred subletting or transfer of the premises, the premises had been sub-let to the Modern Tent House under the guise of a licence; that the licensee, the Modern Tent House, constructed several permanent structures including pandals and rooms in violation of the lease terms; that Modern Tent House was permitted to use the entire open area of 5713 sq. yds, instead of only the lawn area to the South of the Pavilion; that the swimming pool had been given on a fifteen year lease to M-n-M Pool and Spa Services at a throwaway rent. The appellant, therefore, prayed for directions to respondents 1 to 3, namely, the State of Haryana, the Deputy Commissioner, Faridabad and Faridabad Municipal Corporation to: (a) cancel the sub-lease/licence of Kapil Pavilion and the open area in front of it under the Deed dated 15.12.2003 and also cancel the sub-lease/licence of the swimming pool under contract dated 22.5.2004; (b) to stop the usage of premises for purposes of private functions and illegal activities etc.; (c) to dissolve the DCA Club (fourth respondent) and take action against its members and recover the loss of revenue from them. The Division Bench of the High Court dismissed the petition stating that no public interest was involved in the petition. Aggrieved, the writ petitioner filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. Although, this Court, on 30.11.2009 had restrained the respondents from further leasing the premises, yet, the DCA Club had, in clear violation of the said order, entered into an MOU dated 30.6.2010 with Hotel Raj Mahal Regency and entrusted the Kapil Pavillion and the open area in front of it for five years to

Hotel Rajmahal Regency, "for managing the Bar and Restaurant and provide tentage, and holding parties/ functions on the lawns and manage the other activities like Gymnasium, Billiards and Tennis etc". Hotel Rajmahal Regency is required to pay to DCA Club Rs.35,000/- plus taxes per every "big function" using the party lawn apart from Rs.25000/- towards average monthly electricity charges. [para 10-11] [734-F-H; 735-A-D]

1.2. The instant case indicates the common malaise found in various parts of the country in regard to sports stadia and sports facilities – firstly, inadequate and inappropriate use; secondly, poor maintenance; thirdly, lack of access to students, public, athletes and sports persons. A huge tract of valuable land belonging to the local authority was earmarked exclusively for sports activities by constructing a stadium. The pavilions were intended to be used for sports related activities. Unfortunately, the District Sports Council instead of encouraging sports and developing the entire area into a thriving and vibrant stadium for various sports and sportsmen, has pushed sports activities into the background by converting the pavilion into a club with a bar room, restaurant, card room and developing the open space meant for sports activities into a party lawn for functions/marriages. The stadium is meant for improving and developing sports and sports persons. But slowly and steadily these are ignored by stating that the funds are not available for maintenance or people are not coming to use the facilities. In no time, an exclusive recreational club is established for those in power, those who have access to power and those who can afford to pay hefty sums to access the facilities by way of membership. Thus valuable state resources meant for the general public, for the poor and the needy who require the facilities to improve themselves, are denied access

and the entire facility becomes the domain of a chosen few. [para 14-15] [736-D-H; 737-F-H; 738-A-B]

1.3. Creating a sports ground, encouraging sports is a part of human resource development which is the function of the State. No part of the stadia or sports grounds can be carved out for non-sport or commercial activities to be run by recreational club or by private entrepreneurs. A sports complex/sports stadium belonging to the government with special infrastructure created for sports, athletes and sportspersons, cannot be converted into a recreation club. The State and its instrumentalities should wake up to their responsibilities in regard to the citizens and youth of this country, in regard to human resources development. The country requires world class infrastructure to train potential athletes and sportspersons. It is not sufficient if infrastructure is created, but such infrastructure and facilities should be properly maintained and optimum utilization of the infrastructure should be ensured. Persons experienced in sports administration and sportspersons should manage the stadia and not the Managing Committee of the recreational clubs. [para 15-17] [738-C-H; 739-A-G-H; 740-A-C]

1.4. Development of sports infrastructure means to ensure continuous and effective use of the facilities and provide adequate maintenance and upkeep. There should be a comprehensive plan for optimum utilization of the facilities already available so that they are accessible to sportspersons. The government cannot allow sports facilities and sports bodies to be hijacked by persons totally unconnected with sports for private gain or for benefit of an exclusive few. State of Haryana prides itself in giving importance to sports. The Court hopes that the state administration realizes the needs of the society and the need for improving sports as an integral part of human resources development.

Participation in sports and sport competitions builds patriotism and national pride, apart from other benefits. [para 19] [741-C-F]

2.1. If a chunk of a Government stadium, being prime land in the heart of the city meant for developing sports and athletics is misused or illegally allowed to go into private hands, it cannot be said that no public interest is involved. While the High Courts are not expected to take policy decisions in regard to sports administration and infrastructure, nor are they expected to supervise the running of the sports stadia, they are bound to interfere and protect public interest when blatant misuse is brought to their notice. The High Court should direct the authorities concerned to perform their duties and take action in regard to the irregularities, omissions and negligence, so that the interest of the public, particularly, human resource development, could be protected. Whenever nepotism, favouritism and unwarranted government largesse to private interests, threaten to frustrate schemes for public benefit, it is the duty of High Courts to strike at such action. In the instant case, there have been several irregularities by the District Administration (District Sports Council) in granting arbitrarily a largesse to DCA Club etc., in the form of a long term lease at an annual rent of Rs.1/-, and use of a Sports Stadium, for non-sports commercial activities. The matter required consideration. Unfortunately, the High Court chose to dismiss the petition *in limine* and thereby failed to exercise its jurisdiction. [para 13, 15 and 19] [736-B-C; 737-F; 740-G-H; 741-A-B]

2.2. The following questions require to be addressed in regard to the instant case:

<u>Specific Issues</u>

(i) What is the basis for giving a virtual largesse

of a huge property by the District Sports Council, Faridabad, to DCA Club at a paltry rent of Re. 1/- per annum, without inviting tenders, without ensuring exclusive use for sports?

(ii) When the lease deed categorically states that the lessee shall not carry out any additions and alterations to the building and shall not sublet or transfer its rights and the building shall not be used for any purpose other than the purpose for which the lease was granted, why action has not been taken against DCA Club for the violations of all these conditions, as admittedly DCA Club has granted licences which virtually amounts to sub-leases in regard to the leased premises, allowed constructions to be put up and allowed premises to be used for purposes other than the purpose for which it was leased.

(iii) Whether the entire stadium, in particular the Cricket Stadium, football ground, basketball ground, athletic tracks, swimming pool, badminton and lawn tennis courts are accessible to the public or only to the members of the club and if so on what conditions?

(iv) What is the amount by the DCA Club in allegedly assisting in maintaining the stadia, athletic tracks and other sports areas?

(v) Whether leases and sub-leases can be granted without any financial benefit to the owner of the stadium complex and without any open competitive bidding?

(vi) What steps are taken to ensure that the entire stadium is used only for sports and sports related activities with access to all persons interested in sports by giving primacy to the sports in the stadium?

(vii) Whether the lease in favour of DCA Club requires to be cancelled/revoked/terminated for breaches?

General Issues

(viii) What steps are to be taken to ensure that there is no diversion of the stadia and sports facilities for non sports activities, recreational activities and private commercial activities.

(ix) Whether there is any misuse or diversion to unauthorized used, in respect of other stadia and sports facilities/complexes in the state and whether there is any policy guidelines to prevent their misuse or diversion to unrelated use?

As the High Court has not considered these aspects and the matter requires monitoring and appropriate directions, it is necessary to remand the matter to the High Court. Therefore, the order of the High Court is set aside, and the PIL is remanded to it with a request to deal with and dispose of the matter in accordance with law, in particular with reference to the issues enumerated in the previous para and other issues that may arise during hearing by the High Court. [para 21-22] [745-D-H; 746-A-H; 747-A-B]

Jayalalitha v. Government of Tamil Nadu **1999 (1) SCC 53 – cited.**

Case Law Reference:

1999 (1) SCC 53 cited para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4924 of 2011.

From the Judgment & Order dated 29.1.2007 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 14181 of 2006.

Neeraj Kumar Jain, Dinesh Kumar Garg, Abhishek Garg, Dhananjay Garg, Ritu Puri, B.S. Billowrig, Umang Shankar, Sanjay Singh, Ugra Shankar Prasad, T.V. George, Manjit Singh, Dr. S.K. Verma for the appearing parties.

The Judgment of the Court was delivered by

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

2. Nahar Singh Stadium at Faridabad is stated to be situated in a land measuring about 38 acres belonging to Faridabad Municipal Corporation. The stadium was constructed and was maintained by the District Administration through the District Sports Council. It consisted of a Cricket Stadium with North and South Pavilions, a football ground, a basket ball ground and an athletics ground and large vacant grounds. The cricket stadium has been the venue for some occasional Ranji Trophy matches, Dileep Trophy and Irani Trophy matches and occasional One Day Internationals (ODIs.). It is stated that the District Sports Council and the District Cricket Association which occasionally used the Cricket Stadium, found it difficult to maintain the stadium complex on account of the infrequent use of the stadium facilities and frequent vandalism by miscreants and anti social elements. As a result the dressing rooms and toilets required frequent renovation before every match. Electric fixtures and sanitary fittings which were being frequently stolen had to be replaced repeatedly.

3. In this background, the District Cricket Association ('DCA' for short) on 31.12.1997 decided to form a club that could generate income for the District Cricket Association, so that the Association could have the funds to maintain the cricket stadium including the cricket ground, main pitches, practice pitches, dressing rooms and the Hostel of Haryana Cricket Nursery, in a proper manner. It was decided that the existing members of the District Cricket Association would be its founding members and the club would cater to the requirements of the citizens of NIT area of Faridabad, by providing facilities like lawn tennis, badminton, table tennis, billiards, swimming pool, gymnasium and a card-room, T.V. lounge and a Bar and Restaurant. In pursuance of it, the DCA Club was registered as a society under the Societies Registration Act, 1860 on 29.4.1998 with the Registrar of Firms and Societies, Haryana. The main aims and objects of the DCA Club under its Memorandum of Association were inter alia to (i) promote sports, cultural, literary and recreational activities for its members and foster the spirit of brotherhood and fraternity; (ii) undertake activities relating to promotion of sports in all fields with special emphasis on cricket, (iii) encourage and help upcoming sports persons of Haryana. It provided for Chief Patrons/several Patrons and three categories of members (i) Honorary Members (eminent personalities), (ii) Foundation Members (with voting rights), and (iii) Associate Members (without voting rights). The President of the DCA was to be the President and the Senior Vice Presidents and Vice Presidents of DCA were to be the Senior Vice Presidents and Vice-Presidents of the DCA Club.

4. On the request of DCA club (fourth respondent), the District Sports Council, Faridabad, under lease deed dated 26.8.1998 granted a lease of the Kapil Pavilion (that is South Pavilion Building measuring 784 sq.yds. as well as the open area in front of the South Pavilion measuring 5713 sq. yds.) in all 6497 sq.yds, for a period of 99 years, in favour of DCA Club on a token annual rent of Re. one per year. The lease was for

the purpose of establishing, running and maintaining a club and related activities which were lawfully permissible. The lease deed cast the following obligations upon the lessee :

(i) The lessee shall not carry out any additions and alterations in the building except construction of play fields in the open area and any portion covered under the stadium stairs opening in the open area earmarked in the Schedule without the permission of the President, District Sports Council in writing. (vide clause 6)

(ii) The lessee shall not sublet or transfer his rights under this lease. (vide clause 10)

(iii) The building and the land attached to the building shall not be used for any other purpose except the purpose for which lease has been made and for no other purpose. (vide clause 11)

The lease deed contains certain inconsistent clauses. The preamble states that "the lessor has agreed *to grant the lessee a temporary use and occupation* of the said building for establishing, running and maintaining a club". Clause (1) stated that lease was *"for a period of ninety nine years".* Clause (4) stated that the "lease is *irrevocable unless it is terminated by the lessor on breach of the conditions* or term of the lease by the lessee".

5. It is not in dispute that the 'open area' of 5713 sq.yds. (situated to the South and East of the South Pavilion) leased to DCA club comprises the cricket practice pitches, Badminton Courts, Lawn Tennis Courts, Swimming Pool (situated to the East of the Pavilion) and a large vacant ground (situated to the South of the Pavilion).

6. Though the object of establishing the DCA club was to run a club and provide funds to DCA to maintain the cricket stadium, contrary to the terms of the lease, on 15.12.2003, the

DCA Club granted a licence in regard to the lawn area (that is the open space to the South of the Pavilion without specifying the exact extent) in front of the Kapil Pavilion to 'Modern Tent House' on a monthly rent of Rs.15,000 with a ten percent increase every two years. The said agreement stated that the "period of hiring" was six years, and the purpose was to host 'parties'. Though the agreement purports to be a licence, the terms make it clear that it is in fact a lease.

7. The appellant herein filed a public interest litigation in the year 2006 before the Punjab & Haryana High Court, alleging that instead of using the leased premises which is part of the stadium complex, for sports and sports related activities, it was being used for illegal activities; that the club had become an adda (den) of gamblers; that though clause 10 of the lease deed in favour of the club barred subletting or transfer of the premises in violation thereof, the premises had been sub-let to the Modern Tent House under the guise of a licence; that the licensee Modern Tent House in violation of the lease terms constructed several permanent structures including pandals and rooms (for godown, generator etc.) and the entire area is in bad shape because of the lack of maintenance; and that Modern Tent House was permitted to use the entire open area of 5713 sq.yds, instead of only the lawn area to the South of the Pavilion. It was next alleged that the swimming pool constructed by the DCA Club had been given on a fifteen year lease to M-n-M Pool and Spa Services at a throwaway rent on 22.5.2004, implying that other amounts were received by the committee members, which was not being accounted. It was alleged that the funds were misused by the corrupt members of the Executive Committee who were least interested in fulfilling the objects of the club. The appellant therefore prayed for a direction to respondents 1 to 3 (State of Haryana, Deputy Commissioner, Faridabad and Faridabad Municipal Corporation) to (a) cancel the sub-lease/licence of Kapil Pavilion and the open area in front of it under the Deed dated 15.12.2003 and also cancel the sub-lease/licence of the

swimming pool under contract dated 22.5.2004; (b) to stop the usage of premises for purposes of private functions, gambling and illegal activities etc.; (c) to dissolve the DCA Club (fourth respondent) and take action against its members and recover the loss of revenue from them and other consequential reliefs.

8. The petition was resisted by respondents on several grounds. They denied the allegation that any illegal activities were carried on in the premises. It was pointed out that the reliefs have been sought in regard to the portions given to Modern Tent House and M-n-M Pool and Spa Services without impleading them as parties; and that the pool had been given to said M-n-M Pool and Spa Services on build, operate and transfer contract.

9. A Division Bench of the High Court which heard the petition, dismissed the petition by a single line order on 29.1.2007 : "No public interest is involved in this petition. Dismissed." Aggrieved thereby, the appellant has filed this appeal. Relying upon the decision in *Jayalalitha v. Government of Tamil Nadu* [1999 (1) SCC 53], the appellant contends that a public interest litigation was in fact maintainable in the event of a stadium intended for public use, meant for sports activities was misused or not properly maintained.

10. This Court on 30.11.2009 had restrained the respondents from further leasing the premises. On 15.12.2009 this Court directed the respondents to file a statement in respect of the activities of the club. In response to the said direction the Executive President of the DCA club has filed an affidavit dated 21.9.2010 on behalf of respondents 1 and 2. It is stated therein that Nahar Singh Stadium and adjoining areas are being used for the following sports activities : (a) cricket; (b) foot ball; (c) lawn tennis; (d) badminton; (e) table tennis;(f) billiards; (g) swimming; (h) athletics/Gymnasium. It is stated that the premises has a bar room, restaurant, card room and TV lounge and that about one acre of land which is outside the

stadium, which had been earlier given to Modern Tent House, is being co-managed with Hotel Raj Mahal Regency.

11.After the hearing was concluded, the fourth respondent (DCA Club) has filed written submissions disclosing that the DCA Club had entered into an MOU dated 30.6.2010 with Hotel Raj Mahal Regency for co-management of the Club. The copy of the Memorandum of Understanding dated 30.6.2010 produced as an annexure to the written submissions disclosed that DCA Club has entrusted the Kapil Pavillion and the open area in front of it for five years to Hotel Rajmahal Regency, "for managing the Bar and Restaurant and provide tentage, and holding parties/functions on the lawns and manage the other activities like Gymnasium, Billiards and Tennis etc". Hotel Rajmahal Regency is required to pay to DCA Club Rs.35,000/- plus taxes per every "big function" using the party lawn apart from Rs.25000/- towards average monthly electricity charges. The licensee was required to invest Rs.25 lakhs (non-refundable) for renovation, air-conditioning, furniture and fixtures and interiors to improve the ambience of the club. This arrangement entered by DCA Club on 30.6.2010 is in clear violation of the interim order of this Court dated 30.11.2009. Be that as it may.

12. The written submissions also allege that the DCA Club has been acting as a "support base" for cricket and other sports activities by maintaining the day and night practice pitches outside the stadium, maintaining the Lawn Tennis Courts, Badminton Courts, swimming pool and gymnasium, helping in maintaining the entire cricket stadium including the main ground, practice pitches, main pitches, dressing room, the North Block which houses the hostel of Haryana Cricket Nursery and providing regular security to the whole stadium area. It was submitted that the DCA Club is in lawful possession of the premises (measuring 6497 sq.yds., that is open area of 5713 sq.yds. and pavilion area of 784 sq.yds.) and working towards sports development, cultural development fraternity, talent

promotion within the framework of statutory requirements and using the club as well as the open land allotted to it for the purpose of activities relating to sports and games.

13. We have referred to the facts to demonstrate that there have been several irregularities by the District Administration (District Sports Council) in granting arbitrarily a largesse to DCA club etc., in the form of a long term lease at an annual rent of Rs.1/-, and use of a Sports Stadium, for non-sports commercial activities. The matter required consideration. Unfortunately, the High Court chose to dismiss the petition *in limine* and thereby failed to exercise its jurisdiction.

14. What we find in this case is the common malaise found in various parts of the country in regard to sports stadia and sports facilities. Firstly, inadequate and inappropriate use. Secondly, poor maintenance. Thirdly, lack of access to students, public, athletes and sports persons. A huge tract of valuable land belonging to the local authority was earmarked exclusively for sports activities by constructing a stadium. The pavilions were intended to be used for sports related activities. Unfortunately, the District Sports Council instead of encouraging sports and developing the entire area into a thriving and vibrant stadium for various sports and sportsmen, has pushed sports activities into the background by converting the pavilion into a club with a bar room, restaurant, card room and developing the open space meant for sports activities into a party lawn for functions/marriages. This is done by granting a 99 year lease of a prime area of the stadium measuring 6497 sq.yds. (that is, the entire south pavilion building measuring 784 sq.yds. and the open area of about 1.25 acres) for a paltry rent of Re.1 per annum. The stadium and infrastructure therein are meant for the benefit of the people. Sports promote health, spirit of competition, and social integration. The sports facilities in the Stadium are meant to be used by residents and sports persons of the city/town and surrounding areas. The prime area of the stadium cannot be taken over by persons in power and the rich

and mighty for an elitist recreational club by paying a token annual rent of Re.1. The affidavit shows that in the leased area sports activities are not encouraged and the entire leased area is used for commercial activities: bar, restaurant, party hall and party lawn. This Court sought the particulars and details to know the activities conducted. The affidavit in reply dated 21.9.2010 filed by DCA Club vaguely states that it is being used for the activities of cricket, lawn tennis, badminton, billiards, swimming pool, gymnasium, football, athletics. This is obviously false as the football ground and athletics ground are outside the area leased to the DCA Club. The cricket stadium is also outside the area leased to DCA Club. It is not disclosed who is maintaining the cricket stadium, football field, basket ball field, athletic tracks etc., and whether cricket, football, basketball are regularly played, by whom and at what level; whether the infrastructure and facilities for playing these games are available; who is permitted to play tennis, badminton; who is permitted to use the swimming pool; and who is running the gymnasium and what kind of equipment is available and who are entitled to use it. The District Administration (District Sports Council headed by the Dy. Commissioner) and the State have not bothered to answer any of these issues even before us.

15. Whenever nepotism, favoritism and unwarranted government largesse to private interests, threaten to frustrate schemes for public benefit, it is the duty of High Courts to strike at such action. The stadium is meant for improving and developing sports and sports persons. But slowly and steadily these are ignored by stating that the funds are not available for maintenance or people are not coming to use the facilities. The standard refrain is that a part of the stadia or sports facility can be used for non-sports activities generating funds for the upkeep of the stadium. In no time, an exclusive recreational club is established for those in power, those who have access to power and those who can afford to pay hefty sums to access the facilities by way of membership. Thus valuable state resources meant for the general public, for the poor and the

needy who require the facilities to improve themselves, are denied access and the entire facility becomes the domain of a chosen few. What started as a multipurpose stadium for the benefit of citizens become partly a private recreational club and partly a neglected unused stadium. What started as a club then goes into private hands for commercial exploitation for a hotel or for conducting marriages and other functions. The only "sports" activity regularly held is in the card room. Unfortunately, all this is done under the nose of the District Administration, in a centrally located property belonging to the Municipal Corporation and controlled by District Sports Council. Creating a sports ground, encouraging sports is a part of human resource development which is the function of the State. No part of the stadia or sports grounds can be carved out for non-sport or commercial activities to be run by recreational club or by private entrepreneurs. Recreational clubs are not sports clubs. Nothing prevents the Municipal Corporation or District Administration from running these sports facilities either directly or through registered associations without any restriction as to membership. After all human resource development and the health and welfare of the citizens is one of the main functions and responsibility of governments. We fail to understand why the Government/ Municipal Corporation failed to allot funds and maintain the sports facilities; why sports facilities created at huge costs are not used or made available as sports grounds to the colleges and schools; why a large chunk of the stadium complex (measuring 6497 sq.yards) including a huge building meant to be a sports pavilion is let out for 99 years on a rent of Re.1/- per year, without inviting tenders; and why were the sports facilities permitted to be converted into a club house, marriage hall and party lawn for private functions. The State and its instrumentalities should wake up to their responsibilities in regard to the citizens and youth of this country, in regard to human resources development.

16. The country requires world class infrastructure to train potential athletes and sportspersons. It is not sufficient if

infrastructure is created, but such infrastructure and facilities should be properly maintained and optimum utilization of the infrastructure should be ensured. The Parliamentary Standing Committee on Human Resources Development has noted thus in the 185th Report on Promotion of Sports in India (laid on the Table of Lok Sabha on 30.11.2006):

"Under-utilisation of infrastructure

5.12. Optimum utilisation of our existing sports infrastructure has also been one of areas of concern before the Committee. We have erected huge stadia and other sports infrastructure in the metros and cities, which are used only when national or international tournaments take place. For the rest of the period, stadia remain unutilized or are rented out for cultural programmes and other non-sporting events. The public at large generally does not have access to such huge stadia. A lot of money is being spent on their maintenance including security. Sports Federations and other bodies having offices there, do not pay the rent also. Besides, excellent infrastructure is created in different States by way of organizing National Games there. The Committee came to know that these generally remain idle most part of the year and States found it difficult to maintain. The Committee finds it ironical that on the one hand, we suffer from massive lack of infrastructure and on the other hand, our infrastructure remains un-utilized or under-utilized. This is an unfortunate situation that needs to be corrected. The Committee strongly recommends to have a plan prepared for this purpose in consultation with all the State governments, Federations, Sports Authority of India, etc. for putting our infrastructure to maximum use".

17. A sports complex cannot be converted into a Recreation club. Recreational clubs usually have provisions for recreation with swimming pool, tennis, badminton, table tennis (indoor and outdoor sports), restaurant with bar, and lounges

and areas for gathering, interaction, and functions. Merely because a recreational club has provision for some sports activity like badminton or tennis, it does not become a sports club. Nor can a sports stadium belonging to the government with special infrastructure created for sports, athletes and sports persons can be converted into a recreational club. Nor can a stadium complex be used for non-sporting recreational activities or for holding marriages and other functions, unless it had been planned in a manner providing for a recreational club. Persons experienced in sports administration and sportspersons should manage the stadia and not the Managing Committee of the recreational clubs.

18. We may also note at this juncture the difference between exclusive sport stadia and multi-purpose community arenas. Multi-purpose community arenas can be used for sport activities, community meets, and also for holding public or entertainment events. They ensure frequent use, optimum utilization and earning of adequate revenue to meet the cost of maintenance. If stadia have to be converted into a multi-purpose arena, then necessary provision should be made to ensure that the use for public events or entertainment events does not affect the usefulness of the arena for sports. With adequate planning, constant maintenance, multi-purpose arenas may generate better income from non-sports activities which can be ploughed for its maintenance and upkeep of the arena and development of sports. All sports facilities cannot be converted into multipurpose arenas. The object of these observations is not to encourage conversion or use of sports stadia into multipurpose community arenas or to approve the practice of using sports stadia for non-sports activities or for public functions or entertainment events.

19. If a chunk of a Government stadium, being prime land in the heart of the city meant for developing sports and athletics is misused or illegally allowed to go into private hands, it cannot be said that no public interest is involved. While the High

Courts are not expected to take policy decisions in regard to sports administration and infrastructure, nor expected to supervise the running of the sports stadia, they are bound to interfere and protect public interest when blatant misuse is brought to their notice. The High Court should direct the concerned authorities to perform their duties and take action in regard to the irregularities, omissions and negligence, so that the interest of the public, particularly human resources development, could be protected. Lack of commitment to the cause of sports has ensured that India remains at the bottom rungs of any international sports event, though it boasts of one sixth of world population. Development of sports infrastructure does not mean spending hundreds of crores for infrastructure for some international event and then allowing the entire infrastructure to go waste, but to ensure continuous and effective use of those facilities and provide adequate maintenance and upkeep. Basic sports infrastructure should be made available at village, taluka and district levels and there should be a comprehensive plan for optimum utilization of the facilities already available so that they are accessible to sportspersons. The government cannot allow sports facilities and sports bodies to be hijacked by persons totally unconnected with sports for private gain or for the benefit of an exclusive few. State of Haryana prides itself in giving importance to sports. We do hope that the state administration realizes the needs of the society and the need for improving sports as an integral part of human resources development. Participation in sports and sport competitions builds patriotism and national pride, apart from other regular benefits.

20. In this behalf we may refer to the following passages from draft Comprehensive Sports Policy drawn up in 2007. Dealing with playgrounds, it stated :

> "As regards the provisioning of space for playgrounds and the preservation of existing playgrounds, the National Sports Policy 1984 emphasized the importance of this and

> recommended legislation, if necessary, to secure this objective. No such legislation has been brought on the statute books and, in the meanwhile, the use of existing open spaces for purposes other than sports and games, as also the severe shortage of land for sports and games, especially in urban areas, has become a serious issue calling for rectificatory action. It may be particularly noted that the seventh Survey has underlined the decline in schools of 5-9% between 1978 and 2002 in playfields and access to outside sports facilities. In contradistinction, China, which has emerged as a leading-edge sporting nation over the past few decades, has 37 per cent of its population, which comes to about 480 million citizens, actively participating in physical education and sports activities. There are over 3,50,000 popular sports instructors. Even as far back as the year 2000, for which information is readily available, China had over 40,000 grassroots level sports associations, 3854 urban community associations, 2000 community sports institutions, and over 1,00,000 part-time sports instructors, besides an incredible 6,20,000 sports facilities spread across the country. Even a small country like Cuba, whose population of about 11.5 million is comparable to that of NCT Delhi, boasts approximately 2 million athletes, of whom 23,000 are in the high performance category in 38 different sports disciplines at the national and international level."

The draft policy pointed out following deficiencies in the existing sports management :

> · "access to sport and physical education opportunities still remains highly inadequate, especially in rural areas and the poorer parts of urban areas; and as a consequence, the levels of participation in sport and physical education at home, school, college, the community level and the workplace are abysmally low;

- the participation of girls and women in physical education and sports is far below that of boys and men;

- persons with disability have hardly any access to sporting facilities and most of the sports infrastructure is not disabled friendly;

- indigenous sports and games need to be brought centre-stage in the promotion of a national sporting culture;

- education remains highly academic-centric with a definite trend towards reducing school sports and extra-curricular sports;

- India's performance in international sport needs to be significantly enhanced through a holistic and sportsperson centred cradle-to-grave sports policy;

- to this end, and within the framework of the Olympic Charter, the Sports Authority of India, the Indian Olympics Association and the National Sports Federations need to be revamped, rejuvenated and reoriented to function in an open, democratic, equitable, transparent and accountable manner;

- as there is too much concentration if resources and public support on too few team sports like cricket, there is need to popularize other sports, especially medal-intensive individual sports disciplines such as athletics, gymnastics and swimming;

- sports medicine and sports science need particular attention;

- the scientific and technical support systems for high performing athletes are insufficient;"

The draft policy spelt out the following solution :

"The Policy aims at adopting a holistic approach to sports development taking into account the health benefits, recreation benefits, educational benefits, social benefits, economic benefits and source of national pride that it offers. This would require a realignment of responsibilities between the Union and State Governments, on the one hand, and, on the other, between Government and the Indian Olympics Association, the Sports Authority of India, the National Sports Federations and their affiliated bodies at the state and district level, and corporate bodies. This in turn might require Constitutional changes and the elaboration of a suitable legal framework. The Policy shall endevour to achieve a shared vision amongst all stakeholders that would be realized through convergence of their efforts. Special emphasis will be laid on mobilizing corporate support in the field of sports. The participant/ athlete shall occupy centre-stage in the Comprehensive National Sports Policy, will all other stakeholders playing a promotional, supportive and convergent role towards achieving the goals of mass participation, expansion of thee talent pool, enhanced performance in competitive sports, and the emergence of India as a vibrant leading-edge sporting nation in the world through transparent and effective sports systems. In other words, the policy would provide a conducive framework within which sports can develop and thrive."

The said policy also made the following among other recommendations, to identify talented sportspersons who could use the facilities in the stadium complexes:

"Fostering a sports club culture: Encourage and support the setting up in both rural and urban areas, with particular emphasis on poorer localities, of a variety of public and private sports and youth development institutions, as well as sports and health clubs, to enable the young and the old, men and women, the physically challenged and the

children, casual players and serious contenders, employees and professionals, the health conscious and talented sportspersons, to find a suitable playing environment to meet their playing needs. These sports clubs would either create their own facilities or access public or private facilities through suitable 'pay and play' schemes for their members. They could also avail of the governmental programmes and schemes to provide the required facilities, equipment and technical support".

We are informed that the said draft policy and the recommendations and suggestions therein were rejected by the Sports Federations. Be that as it may.

21. The following questions require to be addressed in regard to this case :

Specific Issues:

(i) What is the basis for giving a virtual largesse of a huge property by the District Sports Council, Faridabad, to DCA Club at a paltry rent of Re. 1/- per annum, without inviting offers/bids, without ensuring exclusive use for sports/athletics?

(ii) When the lease deed categorically states that the lessee shall not carry out any additions and alterations to the building and shall not sublet or transfer its rights and the building shall not be used for any purpose other than the purpose for which the lease was granted, the reason why action has not been taken by the state government and district administration, against DCA Club for the violations of all these conditions, as admittedly DCA Club has granted licences which virtually amounts to sub-leases in regard to the leased premises, allowed constructions to be put up and allowed premises to be used for purposes other than the purpose for which it was leased.

(iii) Whether the entire stadium, in particular the Cricket Stadium, football ground, basketball ground, athletic tracks, swimming pool, badminton and lawn tennis courts are accessible to the public or only to the members of the club and if so on what conditions?

(iv) What is the amount incurred by the DCA Club in allegedly assisting in maintaining the stadia, athletic tracks and other sports areas?

(v) Whether leases and sub-leases can be granted without any financial benefit to the owner of the stadium complex, that too without any kind of open competitive bidding?

(vi) What steps are taken to ensure that the entire stadium is used only for sports and sports related activities and that access is provided to all persons interested in sports by giving primacy to the sports and athletics in the stadium complex.

(vii) Whether the lease in favour of DCA Club requires to be cancelled/revoked/terminated for breaches?

General Issues:

(viii) What steps are to be taken to ensure that there is no diversion of the stadia and sports facilities for non sports activities, recreational activities and private commercial activities.

(ix) Whether there is any misuse or diversion to unauthorized use, in respect of other stadia and sports facilities/complexes in the state and whether there is any policy guidelines to prevent their misuse or diversion to unrelated use?

As the High Court has not considered these aspects and

the matter requires monitoring and appropriate directions, we consider it necessary to remand the matter to the High Court.

22. We therefore allow this appeal, set aside the order of the High Court, remand the PIL to the High Court with a request to the High Court to deal with and dispose of the matter in accordance with law, in particular with reference to the issues enumerated in the previous para and other issues that may arise during hearing by the High Court.

R.P. Appeal allowed.

STATE OF JHARKHAND & ORS.
v.
ASHOK KUMAR DANGI AND OTHERS
(Civil Appeal Nos. 8118-21 of 2010)

JULY 4, 2011

[G.S. SINGHVI AND CHANDRAMAULI KR. PRASAD, JJ.]

Service Law:

Recruitment to the posts of Primary School Teachers in State of Jharkhand – Eligibility – Claim of candidates holding C.P.Ed./Dip. P.Ed. – Division Bench of High Court directing to fill up 5% of total vacancies by Physical Trained candidates taking into account the policy of State of Bihar – HELD – How many posts of Primary School Teachers would be filled up by Physical Trained candidates, is essentially a question of policy for the State to decide – High Court erred in relying on the policy of the State of Bihar and directing for filling up 5% posts of the Primary School Teachers by Physical Trained candidates – The Act and the Rules governing appointment in the State of Bihar do not govern appointment in the State of Jharkhand and those have specifically been repealed by r. 16 of the Rules – However it is deemed expedient that in case the authorities have not framed any policy, they should frame a policy before it initiates its next process of appointment – Jharkhand Primary Teachers' Appointment Rules, 2002 – rr. 2(b), (iii) and r.16 – Constitution of India, 1950.

Constitution of India, 1950:

Article 226 – Direction by Division Bench of High Court in writ appeals to authorities to fill up 5% vacancies of Primary School Teachers by physical trained candidates – HELD: At

no point of time the writ petitioners had challenged the amendment of Rules or the corrigendum issued by the Commission –Neither any statute nor rule nor the policy of the State of Jharkhand provide for filling up certain percentage of the posts of Primary School Teachers by candidates trained in physical education – Any direction to the State Government to make appointment of Physical Trained candidates as Primary School Teachers would tantamount to framing a policy and any such direction in matters of policy is uncalled for – Jharkhand Primary Teachers' Appointment Rules, 2002.

The Jharkhand Public Service Commission, in exercise of the power under r. 3 of the Jharkhand Primary Teachers' Appointment Rules, 2002, by advertisement dated 24-8-2002, invited applications for filling up the vacancies of teachers in Government Primary Schools. Rule 2(b) of the Rules was amended by Jharkhand Primary Teachers' Appointment (Amendments) Rules, 2003 published on 6-3-2003, prescribing in clause (iii) of r.2(b) of the Rules, "C.P. Ed. or Dip. P. Ed *only for the physical trained teachers".* Consequently, the Commission published corrigendum dated 22-4-2003 and provided that the candidates holding C.P.Ed./Dip.P.Ed. will be deemed eligible for appointment against vacancies for the posts of Physical Trained Teachers only.

A writ petition was filed before the High Court, *inter alia,* praying for issuance of a writ in the nature of mandamus commanding the State Government and its functionaries to consider the cases of candidates with C.P. Ed. or Dip. P. Ed. also for appointment against the entire vacancies of Primary School Teachers. The Single Judge dismissed the writ petition. However, in the appeals filed by the writ petitioners, the Division Bench of the High Court gave direction to make appointment of

Physical Trained candidates on 5% of the total vacancies of Primary School Teachers taking into account the policy of the State of Bihar. Aggrieved, the State Government filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. It is well settled that the State Government must have liberty and freedom in framing policy. How many posts of Primary School Teachers be filled up by Physical Trained candidates, is essentially a question of policy for the State to decide. In framing of the policy, various inputs are required and it is neither desirable nor advisable for a court of law to direct or summarise the Government to adopt a particular policy which it deems fit or proper. [para 11] [759-G-H; 760-A-B]

1.2. In the instant case, the candidates trained in teaching claim that the posts of Primary School Teachers be filled by them and Physical Trained candidates be considered for Physical Trained Teachers only; whereas Physical Trained candidates contend that they should be considered for appointment against both the posts. These, competing claims need to be addressed by the policy makers. Further, the Court does not have the statistics such as the number of Primary Schools, the resources which the Government can spend for providing Physical Trained Teachers and their need. In such a situation, any direction in matters of policy is uncalled for. [para 11] [760-C-E]

1.3. The Act and the Rules governing appointment in the State of Bihar do not govern appointment in the State of Jharkhand and those have specifically been repealed by r. 16 of the Jharkhand Primary Teachers' Appointment Rules, 2002. Further, the need of the two States may not be identical and it was, therefore, necessary for the State of Jharkhand to frame a policy in this regard. In the face

of it, the High Court erred in relying on the policy of the State of Bihar and directing for filling up 5% posts of the Primary School Teachers by Physical Trained candidates. [para 12] [760-F-H; 761-A]

State of Punjab & Ors. Vs. Balbir Singh & Ors. **1976 (2) SCR 115 = (1976) 3 SCC 242, distinguished.**

2.1. As regards the exercise of power under Article 226 of the Constittution, in the instant case, neither any statute nor rule nor the policy of the State of Jharkhand provide for filling up certain percentage of the posts of Primary School Teachers by candidates trained in physical education. Any direction to the State Government to make appointment of Physical Trained candidates as Primary School Teachers do not flow from any of the rules or the policy of the State and as such the direction to make reservation in their favour would tantamount to framing a policy and cannot be said to be failure to exercise the discretion vested in the State Government. [para 13] [761-B-E]

Comptroller and Autitor-General of India, Gian Prakash, New Delhi and Anr.Vs. K.S. Jagannathan & Anr. **1986 (2) SCR 17 = (1986) 2 SCC 679 - distinguished.**

2.2. At no point of time the writ petitioners had challenged the amendment of Rules which provided that the Physical Trained candidates shall be eligible only for the appointment to the post of Physical Trained Teachers as also corrigendum issued by the Commission confining their eligibility for the Physical Trained Teachers only. In the light of the amendment in the Rules, the Commission issued corrigendum and confined the candidature of persons holding qualification of C.P.Ed. or Dip. P.Ed., like the writ petitioners, to the posts of Physical Trained Teachers only. It conducted the examination on that basis and the writ petitioners without

making any challenge to the same, participated in the selection process and appeared in the examination. It is only after the result was published and their candidature not considered against the entire vacancy of the Primary School Teachers that they have chosen to file the writ petition. Any direction to consider the candidature of the writ petitioners against the entire vacancies of Primary School Teachers would unsettle the settled position and shall result into chain reaction, affecting the appointment of a large number of persons. [para 15-16] [762-F-G; 764-C-D]

Rajasthan Public Service Commission vs. Chanan Ram **1998 (1) SCR 1099 = (1998) 4 SCC 202, relied on.**

2.3. The High Court erred in directing the appellants to fill-up 5% vacancies of Primary School Teachers from Physical Trained candidates. However, this Court deems it expedient that in case the appellants have not framed any policy, they should frame a policy before initiating the next process of appointment. [para 17] [785-A-B]

A.A. Calton v. Director of Education **(1983) 3 SCC 33;** *N.T. Devin Katti v. Karnataka PSC* **(1990) 3 SCC 157;** *Gopal Krushna Rath v. M.A.A. Baig* **(1999) 1 SCC 544; and** *Maharaja Chintamani Saran Nath Sahdeo v. State of Bihar* **1999 (3) Suppl. SCR 518 = (1999) 8 SCC 16 – cited.**

Case Law Reference:

1986 (2) SCR 17	distinguished	para 10
1976 (2) SCR 115	distinguished	para 10
(1983) 3 SCC 33	cited	para 14
1999 (1) SCC 544	cited	para 14
1999 (3) Suppl. SCR 518	cited	para 14
(1990) 3 SCC 157	cited	para 14

1998 (1) SCR 1099 relied on para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8118-8121 of 2010.

From the Judgment & Order dated 23.12.2005 of the High Court of Jharkhand, Ranchi in LPA Nos. 161 & 87 of 2004, W.P. (S) Nos. 3889 and 3100 of 2004.

WITH

C.A. Nos. 8122, 8123-8124 of 2010.

Gopal Prasad, Krishnanand Pandeya, Ratan Kumar Choudhuri for the Appellants.

Sunil Kumar, Ajay Kumar, Arun Kumar Beriwal, Anil Kumar Tandale, A.P. Saharya, Sandeep Nagora, Himanshu Shekhar, Pawan Kr. Mishhra, Kumud Lata Das for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellants, the State of Jharkhand and its functionaries, aggrieved by the judgment and order dated 23rd December, 2005 of the Jharkhand High Court, passed in LPA No. 161 of 2004 and analogous appeals have preferred these appeals by leave of the Court.

2. Shorn of unnecessary details, facts giving rise to the present appeals are that the Governor of Jharkhand in exercise of the powers conferred by Article 309 of the Constitution of India framed Jharkhand Primary Teachers' Appointment Rules, 2002 (hereinafter referred to as the Rules) providing for appointment of teachers in Primary Schools.

Rule 2(b) of the Rules defined 'Trained' which reads as follows:

"2. Definitions : -

x x x x x x x

(b). 'Trained' means those persons who have received the following training from the recognized institution and has passed-

(i) Two years Teachers training, or

(ii) B.Ed/Dip. In Ed./Dip. In Teaching; and

(iii) C.P.Ed/Dip.P.Ed.

x x x x x x x"

3. Rule 3 of the Rules conferred power to the Jharkhand Public Service Commission (hereinafter referred to as the 'Commission) to publish advertisement inviting applications from citizens of India, who had passed Matriculation or its equivalent examination and trained as defined in Rule 2(b) of the Rules to fill up the posts of Primary School Teachers. In exercise of the power under Rule 3 of Rules, the Commission made advertisement on 24th August, 2002 inviting applications for filling up the vacancies of the teachers in the Government Primary Schools. The eligibility criteria prescribed in the advertisement reads as follows:

"The applicant must-

(a) be a Citizen of India;

(b) have passed Matric or equivalent examination; and

(c) possess two years teachers training or B.Ed./Dip. in Ed./Dip. in Teaching or C.P.Ed. or Dip.P.Ed."

Rule 2(b) of the Rules was amended by Jharkhand Primary Schools Appointment Amendments Rules, 2003 published on 6th March, 2003, whereby the words '*only for the physical trained teachers'* were inserted after Rule 2(b)(iii) of

the Rules. Rule 2(b) of the Rules after its amendment reads as follows :

2. Definitions :

x x x x x x

(b) "Trained" means those persons who have received the following training from the recognized institution and has passed:

"(i) Two years Teachers training, or

(ii) B.Ed/Dip. In Ed./Dip. In Teaching; and

(iii) C.P.Ed/Dip.P.Ed. only for the Physical Trained Teachers.

In the light of the aforesaid amendment in the Rules, the Commission published corrigendum dated 22nd April, 2003 and provided that the candidates having C.P.Ed./D.P.Ed. will be deemed eligible for appointment against vacancies for the post of Physical Trained Teachers only.

4. The Commission conducted the examination of the eligible candidates in which the writ petitioners appeared. Their results were not published and their candidature confined only to the posts of Physical Trained Teachers. Aggrieved by that, they filed writ petition before the Jharkhand High Court, *inter alia,* praying for issuance of a writ in the nature of mandamus commanding the State Government and its functionaries to consider their cases for appointment against the entire vacancies of Primary School Teachers and further for a direction not to restrict their candidature only to the vacant posts of Physical Trained Teachers.

5. The learned Single Judge by its judgment dated 2nd December, 2003 dismissed the writ petition, *inter alia*

observing that the writ petitioners do not possess requisite qualifications and hence; not entitled to be considered for appointments to the post of Primary School Teachers. While doing so, the learned Single Judge observed as follows:

> "In the instant case, admittedly, Petitioners obtained physical training course which is required for the post of physical trained teacher. For being appointed as a primary teacher a candidate must possess qualification of a trained teacher i.e. B.Ed./Dip-in-Ed/Dip-in-Teach. In my considered opinion, therefore, petitioners do not possess requisite qualification for appointment on the post of Primary teacher"

6.Aggrieved by the same, writ petitioners preferred appeals and the Division Bench of the High Court by the impugned order dated 23rd December, 2005 disposed of the appeals with the following direction :

> "(I) For the present the respondents shall make appointment of physical trained teachers at least on the 5% posts of the total vacancies of the primary teachers and the JPSC shall publish the pending results of such candidates whose results have not been published as yet without any further delay to the extent of the said number of vacancies within a period of one month from the date of receipt/ production of a copy of this order/judgment.
>
> (II) The State-respondents may come with a clear policy decision regarding the appointment against future vacancies and the cadre of physical trained teachers in the schools and their promotional avenue or any such allied matter.
>
> (III) Since there is no separate cadre for the present and admittedly the physical trained teachers come within the cadre of primary school teachers, it is

held that the appellants, and others, who possessed the eligibility, as required for appointments of physical trained teachers, are entitled for appointments as primary physical trained teachers and they are entitled to be considered for appointments to the extent of 5% of the total existing vacancies and to the extent of the reserved posts.

(IV) The physical trained candidates, who do not possess B.Ed./Dip-in-Ed/Dip-in-Teach or other equivalent primary teachers' training course certificate, have no right to put their claim for appointment against the posts which are meant for general subjects primary teachers and their right will be confined to the percentage of the ratio of the posts meant for them. However, after a fresh appointment as physical trained teachers, they may be treated as any other primary school teachers for the purpose of assignment of classes or for disciplinary conduct."

7. The High Court had given the direction to make appointment of Physical Trained candidates on 5% of the total vacancies of the Primary School Teachers taking into account the policy of the State of Bihar. It observed that Physical Trained Teachers and Primary School Teachers do not belong to different cadre and further the Government of Jharkhand has not framed any definite scheme or policy regarding number or ratio of the post of Physical Trained Teachers in the State. It also observed that the State of Bihar had taken a policy decision for appointment of Physical Trained Teachers to the extent of 5% of the vacancies of the Primary School Teachers and said policy existing prior to the date of re-organisation of the States has not been modified nor any other policy decision has been taken by the State of Jharkhand.

8. Mr. Gopal Prasad, learned Counsel for the appellants

submits that percentage of posts to be filled by the Physical Trained candidates is a matter of policy and the High Court erred in directing the appellants to fill-up 5% vacancies of Primary School Teachers by Physical Trained Candidates. He points out that Rule 16 of the Rules has repealed Bihar Primary School Teacher Appointment Rules, 1991 and Bihar Primary School Teachers Amendment Appointment Rules, 1993 or any other Act or Rules framed by the Government of Bihar in its application to the State of Jharkhand. Accordingly, he submits that reliance on so-called policy decision of the State of Bihar is absolutely misplaced and the High Court erred in relying on the said policy decision.

9. Mr. Ajay Kumar, learned Counsel appearing on behalf of the respondents, however, submits that every school needs a Physical Trained Teacher and the State of Jharkhand having no policy in regard thereto, the High Court did not err in giving direction to fill-up 5% vacancies of the Primary School Teachers by Physical Trained Candidates. According to him, nothing prevents this Court to issue mandamus directing framing of policy. He relied on the judgment of this Court in *Comptroller and Autitor-General of India, Gian Prakash, New Delhi and Anr.Vs. K.S. Jagannathan & Anr.,* (1986) 2 SCC 679 to support his contention. In this case, it has been held as follows:

"20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been

conferred. In all such cases and in any other fit and proper case, a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

10. Mr. Kumar further points out that the Policy of the State of Bihar so far as it relates to appointment of Physical Trained Teachers, would not eclipse by Rule 16 of the Rules. In support of the submission, reliance has been placed on a decision of this Court in *State of Punjab & Ors. Vs. Balbir Singh & Ors.* (1976) 3 SCC 242 which reads as follows:

"…In our judgment, when there is no change of sovereignty of a particular State and it is merely an adjustment of territories by the re-organisation of a particular State, the administrative orders made by the Government of the erstwhile State continue to be in force and effective and binding on the successor State unless and until they are modified, changed or repudiated by the governments of the successor States."

11. We have bestowed our consideration to the rival submissions and find substance in the submission of the learned Counsel for the appellants. The High Court has found that the Government of Jharkhand, till date, had not framed any policy regarding the number of posts to be filled by Physical Trained Candidates. How many posts of Primary School Teachers be filled up by Physical Trained candidates, in our opinion, is essentially a question of policy for the State to decide. In framing of the policy, various inputs are required and

it is neither desirable nor advisable for a Court of law to direct or summarise the Government to adopt a particular policy which it deems fit or proper. It is well settled that the State Government must have liberty and freedom in framing policy. Further, it also cannot be denied that the courts are ill-equipped to deal with competing claims and conflicting interests. Often, the Courts do not have satisfactory and effective means to decide which alternative, out of the many competing ones, is the best in the circumstances of the case. One may contend that providing primary education to the children is essential for the development of the country. Whereas others argue that physical training of the children in the Primary School is must as that would make the nation healthy. As in the present case, the candidates trained in teaching claim that the posts of Primary School Teachers be filled by them and Physical Trained Candidates be considered for Physical Trained Teachers only as they in absence of any training in education not equipped to teach in Primary Schools, whereas Physical Trained Teachers contend that they should be considered for appointment against both the posts. These, competing claims, in our opinion, need to be addressed by the policy makers. Further, we do not have the statistics as regards to the number of Primary Schools, the resources which the Government can spend for providing Physical Trained Teachers and their need. In such a situation, any direction in matters of policy is uncalled for.

12. As observed earlier, the High Court itself has found that there is no policy in regard to the number of posts of teachers to be filled by the Physical Trained Candidates in the State of Jharkhand. The Act and the Rules governing appointment in the State of Bihar do not govern appointment in the State of Jharkhand and those have specifically been repealed by Rule 16 of the Rules. Further, the need of the two States may not be identical and it was therefore necessary for the State of Jharkhand to frame a policy in this regard. In the face of it, we are of the opinion that the High Court erred in relying on the policy of the State of Bihar and directing for filling up 5% posts

of the Primary School Teachers by Physical Trained Candidates.

13. Now we revert to the decision of this Court in the case of Comptroller and *Auditor-General* (supra) relied on by the respondents. In the said case while considering the power under Article 226 of the Constitution this Court has held that a mandamus can be issued where the Government or a public authority has failed to exercise or wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision. It has further been observed that in order to compel the performance of a public duty the court may itself pass an order/direction. Here, in the present case, neither any statute or rule or the policy of the State of Jharkhand provide for filling up certain percentage of the posts of Primary School Teachers by candidates trained in physical education. Any direction to the State Government to make appointment of Physical Trained Candidates as Primary School Teachers do not flow from any of the rules or the policy of the State and as such the direction to make reservation in their favour would tantamount to framing a policy and cannot be said to be failure to exercise the discretion vested in the State Government.

In the case of *Balbir Singh* (supra) relied on by the respondents this Court has observed that after the reorganization of the State the administrative orders made by the Government of the erstwhile State continue to be in force and binding on the successor State but while observing so this Court has made it clear that the same shall be binding "until they are modified, changed or repudiated by the Government of the successor State". As stated earlier rule 16 of the Rules had specifically repealed the Act and the Rules governing appointment of Primary School Teachers in the State of Bihar and it has been observed that those shall not govern appointments in the State of Jharkhand. In the face of it the decision relied on in the case of *Balibir Singh* (supra) is clearly distinguishable.

14. Respondents contend that amendment of Rule 2 (b) (iii) of the Rules by notification dated 6th of March, 2003 shall not apply to the appointment in question as the process of appointment commenced, by inviting application prior to that date, on 24th of August, 2002. It has been pointed out that the rights and benefits already acquired under the Rules prior to amendment cannot be taken away by amendment of the Rules. It is emphasized that the respondents acquired vested right of being considered and their rights crystallized on the date of publication of the advertisement. It has further been submitted that since process of the appointment commenced with advertisement which being an integral part of appointment same would come to an end on declaration of result and the consequential appointment, hence the candidates are required to be considered on the basis of the eligibility criteria initially provided in the Rules and the advertisement. In support of the submission, reliance has been placed on a large number of decisions of this Court; viz., *A.A. Calton v. Director of Education (1983) 3 SCC 33; N.T. Devin Katti v. Karnataka PSC (1990) 3 SCC 157; Gopal Krushna Rath v. M.A.A. Baig (1999) 1 SCC 544 and Maharaja Chintamani Saran Nath Sahdeo v. State of Bihar* (1999) 8 SCC 16.

15. We do not find any substance in the submission of the Counsel of the respondents. It is relevant here to state that at no point of time the writ petitioners had challenged the amendment of Rules which provided that the Physical Trained Candidates shall be eligible only for the appointment to the Physical Trained Teachers as also corrigendum issued by the Commission confining their eligibility for the Physical Trained Teachers only. Their prayers in the writ petition were as follows:

> "It is, therefore, respectfully prayed that your Lordships may graciously be pleased to admit this case, issue notices to the Respondents and direct for the following reliefs :
>
> [I] For issuance of an appropriate Writ in the nature of mandamus commanding upon the respondents to

immediately and forthwith publish the result of these petitioners in view of the fact that in terms of Annexure-I, i.e. Advertisement dated 24.8.2002 all the Petitioners had applied for being appointed as a Primary School Teacher out of 9223 seats and 528 were shown vacant in the district of Jamtara but now simply because of the fact that they posses the qualification of physical trained teachers they have been kept it on the ground that their appointment shall only be made for the vacant post of physical trained teachers in the district of Giridih and Lohardaga in non-existence;

[II] For an appropriate writ in the nature of mandamus commanding upon the respondents particularly, respondent No. 2, to consider the case of these Petitioners for being appointed as Primary Teachers as against the total vacancies of 9233 for which advertisement issued and for which the Petitioners had applied not to consider by restricting their candidature only in the four districts in the State of Jharkhand;

[III] For a further direction upon the respondents to immediately and forthwith appoint the Petitioners to the post of teachers of primary schools in view of the fact that the examinations had already been conducted on 27.5.2003 and both the Petitioners had prepared very well in the said examination; and

[IV] For any other appropriate writ(s)/order(s)/direction(s) that Your Lordships may deem fit and proper for doing conscionable justice to the Petitioner in the facts and circumstance of the present case."

16. It is in the present appeals the writ petitioners, for the first time, have attempted to contend that amendment to Rule 2(b)(iii) made on 6th March, 2003, which *inter alia* provided that candidates having C.P.Ed or Dip.P.Ed shall be eligible for Physical Trained Teachers only cannot be applied

retrospectively and their cases shall be governed by the un-amended Rules. It has been pointed out that the amendment has not been made with retrospective effect. We are not inclined to go into this question in the present appeal for the reason that in the light of the amendment in the Rules, Commission issued corrigendum and confined the candidature of persons holding qualification of C.P.Ed. or Dip. P.Ed., like the writ petitioners, to the posts of Physical Trained Teachers only. It conducted the examination on that basis and the writ petitioners without making any challenge to the same, participated in the selection process and appeared in the examination without any murmur. It is only after the result was published and their candidature not considered against the entire vacancy of the Primary School Teachers that they have chosen to file the writ petition with the relief aforesaid. Any direction to consider the candidature of the writ petitioners against the entire vacancy of Primary School Teachers would unsettle settled matter and shall result into chain reaction, affecting the appointment of a large number of persons.

17. Further in the case of *Rajasthan Public Service Commission vs. Chanan Ram* (1998) 4 SCC 202, this Court held that Government has the right to make selection in accordance with the changed rules and make final recruitment. In the said case, it has been observed as follows:

"17……..The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended Rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules……."

In view of the aforesaid, it is inexpedient to consider the authorities relied on by the respondents in any detail. We are of the opinion that the High Court erred in directing the appellants to fill-up 5% vacancies of Primary School Teachers from Physical Trained Candidates. However, we deem it expedient that in case the appellants have not framed any policy, it should frame a policy before it initiates its next process of appointment.

18. In the result, we allow these appeals, set aside the impugned judgment and dismiss the writ petition without any order as to costs.

R.P. Appeals allowed.

HINDUSTAN COCA-COLA BEVERAGE PVT. LTD.

v.

SANGLI MIRAJ & KUPWAD MUNICIPAL CORPORATION & ORS.

(Civil Appeal No. 4917 of 2011)

JULY 4, 2011

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

Bombay Provincial Municipal Corporation Act, 1949:

s.2(42) – 'Octroi' – Levy of on glass bottles and plastic crates containing aerated beverages – Plea that bottles and crates are reusable and durable and were repeatedly used by manufacturer – Further plea that the prices of bottles and crates were amortized and included in retail sale price of aerated beverages – HELD: If the bottles and crates have not finally rested in Municipal limits of the Corporation in which they are imported, the company can make an application for refund under the Rules with the relevant evidence – In case the cost of bottles and crates is amortized and included in the retail sale price of the aerated beverages, evidence can also be placed in that regard in order to claim refund – The authorities may consider the proposal of the manufacturer or on their part devise a more convenient and workable mechanism for levy and collection of octroi.

The appellants, engaged in the manufacture and sale of aerated beverages, filed writ petitions before the High Court challenging the bills of the respondent-Municipal Corporation levying octroi separately on the glass bottles and plastic crates utilized by the appellants to pack and transport the aerated beverages manufactured by them. It was contended for the appellants that the glass bottles and plastic crates were both re-usable and durable and

were repeatedly used by the appellants. It was further contended that the cost of glass bottles and crates were amortized and included in the retail sale price of the aerated beverages. It was, therefore, pleaded that octroi could not be levied on the value of the glass bottles and crates and the impugned bills were, therefore, illegal and arbitrary. The High Court, relying on the case of *Acqueous Victuals dismissed the writ petitions. However, liberty was granted to the appellants to claim refund by filing appropriate applications in case the bottles and crates were not sold, used or consumed in the Municipal limits of the respondent-Corporation. Aggrieved, the manufacturer filed the appeals.**

Dismissing the appeals, the Court

HELD: 1.1. The instant case is squarely covered by the decision of this Court in the case of Acqueous Victuals.* The difference of the mode of computation of the octroi will not affect the applicability of the ratio of the said decision to the instant case and the same applies to the instant case on all fours. Accordingly, in case the appellant-company is sending out the same bottles for recycling and if the bottles and crates are not sold, used, or consumed in the Municipal limits of the respondent-Corporation, that is to say, if they have not finally rested in the Municipal limits of the respondent-Corporation in which they are imported, the appellant-company can always make an application for refund under the Rules. The appellant-company will have to produce evidence on the points detailed in the case of *Acqueous Victuals*.* In the instant case, the definition of "octroi" is contained in s. 2(42) of the Bombay Provincial Municipal Corporation Act, 1949. Relevant entry in respect of aerated water in the octroi schedule under the Rules is at serial no.11 (D). Relevant entry as regards bottles is at serial no.52. Relevant entry as regards barrel crate and individual crate, is at serial No.53E. The Rules contain detailed

provisions under which an importer can make an application for refund. [para 18,22 and 23] [777-D-G; 780-B-G]

Acqueous Victuals Private Limited vs. State of Uttar Pradesh & Ors.* **1998 (3) SCR 290 =[1998] 5 SCC 474; and *Burmah Shell Oil Storage & Distributing Company of India Limited v. Belgaum Borough Municipality* **1963 Suppl. SCR 216 =AIR 1963 SC 906 - relied on**

S.M. Ram Lal & Co. v. Secretary to Government of Punjab **1969 UJ 373 (SC), referred to.**

1.2. In case, the cost of the bottles and crates is amortized and included in the retail sale price of the aerated beverage, the evidence can also be placed in that regard, in order to claim refund on any such amount. [para 23] [780-E-F]

1.3. As regards the plea that the bottles in which beverages are brought are recycled and used bottles and, therefore, levy of octroi cannot be at the same rate as that of the new bottles, these are also disputes on the facts, which would require producing of evidence. On the appellant-company making an application for refund, the authority concerned will consider it in its proper perspective and, if a case is made out, shall grant refund. In case the appellant is aggrieved by the valuation of the bottles and crates on the basis of which the impugned bill is issued they are at liberty to file objections before the appropriate authority, which will adjudicate the same in accordance with law. [para 23-24] [780-E-H; 781-A-B]

1.4. The appellant has expressed its concern about the mechanism by which the levy could be computed and collected. According to it, the existing procedure is very cumbersome and unworkable at both the ends, and moreover, the same would result into incurring of huge

managerial time and administrative cost. The appellant has also given proposals to the respondent-Corporation for devising a suitable and convenient mechanism. The said request requires consideration. Accordingly, the respondent-Corporation shall consider the said proposal in accordance with law and even otherwise on their part devise a suitable, convenient and workable mechanism for levy and collection of octroi. [para 25] [781-B-D]

Case Law Reference:

1998 (3) SCR 290	**relied on.**	**para 6**
1963 Suppl. SCR 216	**relied on**	**Para 13**
1969 UJ 373 (SC)	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4917 of 2011.

From the Judgment & Order dated 8.10.2010 of the High Court of Judicature at Bombay in Writ Petition No. 5510 of 2010 and Judgment and order dated 20.10.2010 in Review Petition No. 207 of 2010 in Writ Petition No. 5510 of 2010.

WITH

C.A. No. 4918 of 2011.

S.K. Bagaria, L. Nageshwara Rao, Vikram Nankani, Tarun Gulati, Sparsh Bhargava, Praveen Kumar, Dheeraj Nair, Chetan Chopra, Santosh Krishnan for the Appellant.

Shyam Diwan, Vijay Kumar, Sudhir Mehta, Vishwajit Singh for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Delay condoned.

2. Leave granted.

3. As both the appeals involve identical question of law the same were heard together and are disposed of by this common judgment. Both the present Civil Appeals are filed against the judgment dated 08.10.2010 in the Writ Petition No. 5510 of 2010 and against the judgment dated 08.10.2010 in the Writ Petition No. 5867 of 2010, passed by the Division Bench of the High Court of Judicature at Bombay whereby the Division Bench has dismissed the writ petitions filed by the appellants herein challenging the validity of the bill issued by the Respondent Corporation, levying and demanding octroi from the appellants on glass bottles and crates.

4. In the Civil Appeal filed against the judgment dated 08.10.2010 in the Writ Petition No. 5510 of 2010 the appellant company is, inter alia, engaged in the manufacture of aerated beverages marketed under different brands. The products of the company are distributed from its plant located at Pirangut Taluka, Mulshi, District Pune to amongst other places like Sangli Miraj and Kupwad.

5. According to the appellant, their products are distributed and sold in returnable and reusable glass bottles. Glass bottles are stored in plastic crates. Glass bottles and crates are owned by the appellant. They are never sold to any distributor or retailer. Once the product in the glass bottles kept in crates is consumed, glass bottles along with crates are returned to the appellant for filling after cleaning and washing them. The appellant pays octroi levied on the aerated beverages when they enter octroi limits of Municipal Corporations. The impugned bill has the effect of levying octroi separately on the glass bottles and plastic crates utilized by the appellant to pack and transport the aerated beverages manufactured by them. The aerated beverages cannot be separated from bottles and crates. The bottles and crates are neither consumed nor sold but are returned. The glass bottles and plastic crates are both reusable and durable and are repeatedly used by the appellant. Moreover, it is alleged that the cost of the glass bottles and

crates is amortized and included in the retail sale price of the aerated beverages. Hence, it was suggested that Octroi cannot be levied on the value of the glass bottles and crates and the impugned bills are, therefore, illegal and arbitrary.

6. The said challenge did not find favour with the High Court and the High Court after placing reliance on the judgment of this Court in the case of *Acqueous Victuals Private Limited v. State of Uttar Pradesh & Ors.* reported at (1998) 5 SCC 474 dismissed the Writ Petition. However, liberty was granted to the appellant company to claim refund by filling appropriate application, in case, the bottles and crates are not sold, used, or consumed in the Municipal limits of the respondent-corporation, that is to say, if they have not finally rested in the Municipal limits of the respondent-corporation; and a further direction was issued that if such an application is filed, the same will be considered in its proper perspective by the concerned authority and if a case is made out the refund shall be granted.

7. We heard the learned senior counsel appearing for the parties at length. Similar submissions, as were made before the High Court, were also made before this Court. It was submitted by the learned senior counsel appearing for the appellant that plastic crates and glass bottles are durable and reusable. They are used a number of times by the appellant. The bottles and crates are not sold. They are not consumed. The bottles are used but again sent out and refilled. The crates are also similarly sent back.

8. It was further submitted that as per the definition of the term octroi as found in Section 2(42) of the Bombay Provisional Municipal Corporation Act, 1949 (for short "BPMC Act"), "octroi" means a cess on the entry of goods into the limits of a city for consumption, use or sale therein and as in the present case there is no consumption, use or sale, the levy of octroi is unjustified.

9. Strong emphasis was placed on the submission that,

the cost of the bottles and crates is amortized and included in the retail sale price of the aerated beverage. Since the cost of glass bottles and crates is already included in the price of the beverage on which the octroi is levied and collected, no further octroi can be levied on the glass bottles and crates.

10. All the above said submissions and contentions were refuted by the learned senior counsel appearing for the respondents. It was submitted that the issue in the present case stands settled by this Court, long back, in the case of *Acqueous Victuals* (supra) and the High Court has rightly dismissed the Writ Petition by following the ratio laid down in the said judgment of this Court. Further, it was submitted that the appellant cannot be aggrieved by the said levy of the octroi on glass bottles and crates, as in case the appellant can satisfy the authorities that they were not used, consumed or sold in the Municipal limits but were taken out for recycling, in the said case they can claim refund and as such are not burdened with the liability of octroi on such bottles and crates.

11. Before we proceed further it would be relevant to refer to the judgment of this Court in the case of *Acqueous Victuals* (supra). In *Acqueous Victuals* (supra), the petitioner-Company was engaged in the business of bottling soft drinks. After bottling these beverages at its plants at Bareilly, the petitioner-Company distributed the same to wholesalers in Districts of Uttar Pradesh. Section 128 of the Uttar Pradesh Municipalities Act, 1916 conferred powers on the Municipal Boards to impose octroi on goods or animals brought within the Municipality for consumption, use or sale therein. Byelaws of the Municipalities provide for levying octroi on soft drinks. As the Municipalities were seeking to levy Octroi on the basis of gross weight not only of the beverages but also of the bottles containing the beverages which were brought within the Municipal limits, the petitioner-Company filed writ petition in the Allahabad High Court challenging the said levy. According to the petitioner-Company, the bye-laws provided for levying octroi on soft

drinks but not on the weight of bottles which contained those soft drinks. The High Court dismissed the petition. The High Court held that the bottles in which the soft drinks were carried could be said to have been used within the Municipal limits for the purpose of storing them till they were ultimately utilized by the consumers concerned. Therefore, even the weight of bottles containing these liquids could legitimately be taken into consideration by the Municipalities for imposing the octroi duty thereon.

12. Dealing with the petition challenging the High Court's decision, this Court referred to Section 128 (1) (viii) of the Uttar Pradesh Municipalities Act, 1916 which states that subject to any general rules or special orders of the State Government in this behalf, the taxes which a Board may impose can consist of Octroi on goods or animals brought within the Municipality for consumption, use or sale therein. The rates of levy were given in Schedule I. Schedule I referred to aerated water but not to aerated water bottles. This Court considered the main charging provision i.e. Section 128(1)(viii) which stated that Octroi can be charged on goods which were brought within the Municipality for consumption, use or sale and held that packing which contains the consignment of octroiable beverages would remain liable to be included in the taxable gross weight of consignment provided such packing is shown to be brought within the Municipal limits for the purpose of its sale, consumption, or use within the Municipal limits. But, if the packing is found to have been taken out of the Municipal limits after its contents were discharged within the Municipal limits, then the weight of such packing cannot be brought to octroi tax or if such tax is levied at the entry point, it would become liable to be refunded. This Court further observed that the claim of refund would involve disputed questions such as whether such consignments with the packing were actually sold with their contents to the local consumers, or wholesalers, whether they were consumed or used up within the local limits or whether they were used for an indefinite period and ultimately rested

within the Municipal limits and had not been taken out. These disputed questions of fact are required to be examined and adjudicated upon when claims for refund are considered by the appropriate authorities.

13. While arriving at the above conclusion, this Court referred to the Constitution Bench judgment in *Burmah Shell Oil Storage & Distributing Company of India Limited v. Belgaum Borough Municipality* reported at AIR 1963 SC 906 where it was dealing with the question whether octroi was leviable on the goods brought within the limits of Belgaum for consumption by Burmah Shell, for re-export and for sale. While interpreting the words found in Entry No.52 of the State list in the Constitution dealing with taxes on the entry of goods into a local area for consumption, use or sale therein, this Court observed that the two expressions, "use" and "consumption" together connote the bringing in of goods and animals with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes or uses them up. This Court observed that this authoritative pronouncement of the Court makes it clear that before a Municipality can impose octroi duty on any commodity, it has to be shown that the commodity concerned was brought within the Municipal limits for consumption, that is, for being totally used up so that it ceases to exist within the Municipal limits or it was to be used for an indefinite period within the Municipal limits so that it ultimately rests within the Municipal limits and does not go out subsequently, or the commodity concerned must be shown to have been brought within the Municipal limits for the purpose of sale within the said limits.

14. This Court also referred to its judgment in *S.M. Ram Lal & Co. v. Secretary to Government of Punjab* reported at 1969 UJ 373 (SC), where this Court was dealing with the question, whether the wool imported within the Municipal limits of Faridabad in raw form for dyeing within the Municipal limits could be said to have been used in the Municipal limits or

consumed therein so as to attract Octroi duty thereon. This Court observed that the word 'use' occurs in Entry No.52 of List II of Seventh Schedule sandwiched between 'consumption' and 'sale', and it must take colour from the context in which it occurs. This Court further observed that the coupling of three words 'consumption', 'use' and 'sale' connotes that the underlying common idea was that either the title of the owner is transferred to another or the thing or commodity ceases to exist in its original form.

15. However, this Court did not approve of the High Court's reasoning that the bottles and shells were used as containers till final consumption of contents and, therefore, the bottles which contained the beverage were used till the final consumption stage and were, therefore, liable to levy of Octroi leaving aside the question whether they were brought within the Municipal limits for consumption thereof. Referring to Burmah Shell's case, this Court held that though the use of the bottles may not amount to its destruction or total using up, but to attract octroi, the bottles must have finally rested within the Municipal limits and not taken out. This Court concluded that to attract the levy of octroi on the goods brought within the Municipal limits, there must be proof of the fact that the goods got consumed completely within the Municipal limits or were used for an indefinite period in such a way that they come to rest finally and permanently within the Municipal limits or sold within the said limits.

16. With reference to the facts of the case before it, this Court observed that the moot question was whether the bottles which were filled in with beverages imported for sale within the Municipal limits could be said to have been consumed or used within the Municipal limits. The question whether the bottles were really sold by the petitioner-Company within the Municipal limits requires resolution on consideration of relevant facts. If empty bottles are taken out of Municipal limits, they cannot be said to have been consumed or destroyed within the Municipal

limits. The question which needs investigation is whether out of the total consignment of bottled beverages imported within the Municipal limits, the entire consignments of the very bottles after getting emptied got re-exported or whether some of the said bottles forming part of the original consignments got destroyed by way of breakage, etc. or were never returned by the consumers concerned and only rest of the imported bottles were re-exported by enabling the consumers and retailers or wholesalers to get refund of the price of the bottles paid by way of advance security from the petitioner-Company on return of these empty bottles for recycling. It is axiomatic that if the bottles in which beverages were brought within the Municipal limits for sale to consumers had themselves got destroyed by breakage, etc. or were not returned by consumers, they could be said to be consumed within the Municipal limits and, hence, there would be no occasion for their export at any time thereafter. In the said circumstance the intention with respect to the fact that whether or not, the said goods were brought for consumption and usage will become clear only at the subsequent stage i.e. when the bottles are re-exported. In the view that it had taken, this Court held that if the petitioner-Company satisfied the authorities concerned that the bottles containing the original consignments after getting emptied within the Municipal limits were actually taken out of the Municipal limits for recycling, then it would be entitled to claim proportionate refund of the octroi duty assessed on the weight of such empty bottles only subject to the burden of such amount of duty not being shown to have been passed on to consumers of beverages or to anyone else, i.e. there is no unjust enrichment.

17. Setting aside the High Court's order to the above extent, this Court permitted the petitioner-Company to lodge its claim for refund by producing evidence on the following points:

> "(a) Nature of the consignments concerned with their dates and the number of bottles packed with beverages brought within the municipal limits with their weight;

(b) Proof regarding the fact that these bottles were not sold within the municipal limits to wholesalers, retailers or to any other person;

(c) Number of bottles covered by the consignments concerned which were subsequently taken out as empty bottles beyond the municipal limits for recycling and weight of such empty bottles;

(d) Whether the bottles which are actually found to have been taken out of the municipal limits were the very same bottles containing beverages brought within the municipal limits by way of relevant consignments;

(e) Whether the value of such bottles and amount of octroi duty on their weight was passed on to the consumers or not?"

18. In our considered opinion the present case is squarely covered by the above said decision of this Court in the case of *Acqueous Victuals* (supra), and the said decision was passed on the similar facts as of the present case, the only difference being that in the case of *Acqueous Victuals* (supra) octroi was computed and levied on the basis of the weight of the bottles and crates, whereas in the present case, the impugned bill seeks to levy octroi on the basis of value of the bottles and value of the crates. It was suggested by the learned senior counsel appearing for the appellant that due to the said difference the judgment in the case of *Acqueous Victuals* (supra) will not be applicable to the present case. In our opinion the said difference of the mode of computation of the octroi will not affect the applicability of the ratio of the said decision to the present case and the same applies to the present case on all fours.

19.It was also suggested by the learned senior counsel appearing for the appellant that the decision in the case of *Acqueous Victuals* (supra) cannot be said to be the correct law as the said decision did not correctly appreciate the law laid

down by the Constitution Bench of this Court in the case of *Burmah Shell Oil* (supra). In order to appreciate the said submission it would be appropriate to extract the relevant portion of the judgment in the case of *Acqueous Victuals* (supra) wherein this Court has elaborately considered the law laid down by the Constitution Bench in the case of *Burmah Shell Oil* (supra):-

"15. In view of the aforesaid decision, it becomes obvious that the word "retention" is held to be a synonym with the word "repose", meaning thereby the article concerned must finally rest within the municipal limits. In the light of the aforesaid judgment of the Constitution Bench of this Court, therefore, it is obvious that before a municipality can impose octroi duty on any commodity, it has to be shown that the commodity concerned was brought within the municipal limits for consumption, that is, for being totally used up so that it ceases to exist within the municipal limits themselves or it was to be used for an indefinite period within the municipal limits so that it ultimately rests within the municipal limits and does not go out subsequently, or the commodity concerned must be shown to have been brought within the municipal limits for the purpose of sale within the said limits. Having thus laid down the aforesaid legal position concerning the imposition of octroi in the penultimate paragraph of the Report at p. 234, the Court observed that the Burmah Shell was liable to pay octroi tax on goods brought into local area (a) to be consumed by itself or sold by it to consumers direct and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it. The Company was, however, not liable to octroi in respect of goods which it brought into the local area and which were re-exported. But to enable the Company to save itself from tax in that case it had to follow the procedure laid down by rules for refund of taxes.

16. The aforesaid authoritative pronouncement of the Constitution Bench of this Court, therefore, sets at rest the controversy in the present case. If it is the case of the writ petitioner that during the relevant period from 1980 to 1987 it brought within the municipal limits of the four respondent-Municipalities beverages packed in bottles and the bottles were not sold within the municipal limits and after the beverages were taken out of these bottles, these very bottles were returned to the petitioner and were taken back to Bareilly, then for claiming the refund of the octroi paid on the weight of these bottles during the relevant period when the consignments entered the municipal limits from time to time, the writ petitioner had to follow the procedure laid down by the Municipality concerned under its rules for refund of taxes and had to comply with the statutory gamut of these rules. It had also to show that the burden of disputed octroi duty was borne by it and was not passed on to consumers of beverages contained in these bottles. In other words, it would not be guilty of unjust enrichment if refund was granted. If the refund claim on furnishing the relevant proofs was not ultimately granted, the remedy of appeal provided under the rules had to be followed."

20. On a minute and detailed perusal of the judgment of the Constitution Bench in the case of *Burmah Shell Oil* (supra), and the above noted inference drawn in the case of *Acqueous Victuals* (supra), we do not agree with the said submission of the appellant. We respectfully agree with the above noted inference drawn and are of the considered opinion that this Court in *Acqueous Victuals* (supra) has correctly appreciated the law laid down by the Constitution Bench in *Burmah Shell Oil* (supra).

21. Though it was vehemently argued that the cost of the bottles and crates is amortized and included in the retail sale price of the aerated beverage but no facts were placed before the High Court in that regard. Moreover, even in case the same were placed, the same being disputed question of fact could not have been gone into by the High Court exercising the

jurisdiction under Article 226 of the Constitution of India.

22. In the present case, the definition of "octroi" is contained in Section 2(42) of the BPMC Act. Relevant entry in respect of aerated water in the octroi schedule under the said Rules is at serial no.11 (D). Relevant entry as regards bottles is at serial no.52. Relevant entry as regards barrel crate and individual crate, is at serial No.53E. The said Rules contain detailed provisions under which an importer can make an application for refund.

23. Accordingly, in our opinion, as also laid down by this Court in *Acqueous Victuals* (supra), in case the appellant-company is sending out the same bottles for recycling and if the bottles and crates are not sold, used, or consumed in the Municipal limits of the respondent-Corporation, that is to say, if they have not finally rested in the Municipal limits of the respondent-Corporation in which they are imported, the appellant-company can always make an application for refund under the said Rules. The appellant-company will have to produce evidence on the points detailed in the *Acqueous Victuals* (supra) which we have quoted hereinabove. As submitted by the appellant, in case, the cost of the bottles and crates is amortized and included in the retail sale price of the aerated beverage, the evidence can also be placed in that regard, in order to claim refund on any such amount. Besides, it was also pointed out that bottles in which beverages are brought are recycled and used bottles and therefore levy of octroi cannot be at the same rate as that of the new bottles. These are also disputes on the facts, which would require production of evidence. On the appellant-company making an application for refund, the concerned authority will consider it in its proper perspective and if a case is made out shall grant refund.

24. Needless to say, in case, the appellant is aggrieved by the valuation of the bottles and crates on the basis of which

the impugned bill is issued they are at the liberty to file objections before the appropriate authority, and the appropriate authority will adjudicate the same in accordance with the law, as against which if still aggrieved, further remedy as available could be resorted to.

25. At this stage it is pertinent to mention that during the hearing, the appellant has expressed its concern about the mechanism by which the said levy could be computed and collected as according to them the present procedure is very cumbersome and unworkable at both the ends, and moreover, the same would result into incurring of huge managerial time and administrative cost. After the present judgment was reserved for pronouncement, the appellant has also given proposals to the respondent corporation for devising a suitable and convenient mechanism. The said request on the part of the appellant requires consideration. Accordingly, the responded corporation shall consider the said proposal in accordance with law and even otherwise on their part devise a suitable, convenient and workable mechanism for levy and collection of octroi.

26. With the above said directions both the appeals are dismissed with no order as to costs.

R.P. Appeals dismissed.

NOORUL HUDA MAQBOOL AHMED
v.
RAM DEO TYAGI & ORS.
(Criminal Appeal No. 1256 of 2011)

JULY 04, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973

s. 227—Application for discharge—Mumbai riots—Suleman Bakery incident of 9.1.1993—Miscreants from rooftop of Suleman Bakery firing shots and pelting stones, bottles and acid bulbs towards police picket set up opposite to it—Wireless message sent to control room—Joint Commissioner of Police (R-1) reached the spot with Special Operations Squads and ordered to arrest the miscreants—In the process twelve persons got injured and eight died—After roits subsided, Commission of Inquiry set up on complaints against police force – In the instant case, FIR lodged against 18 police personnel for offences punishable u/ss. 302/34 and 307/34—They filed application for their discharge—Trial court ordered discharge of the nine respondents – High Court confirmed the order in revision—Held: The miscreants were firing from the rooftop of Suleman Bakery – The trial court relied on the statements of the inmates and held that the police did not enter the building with the intention to kill the inmates – Even after the entry some of the policemen did not fire a single bullet, they were clearly acting in discharge of their duty and, therefore, entitled to the protection u/s 161 of the Bombay Police Act – The trial court found that there was no justifiable case against the police officials who even in the volatile situation did not open fire at all – The High Court also examined the truthfulness of the statements and the documents and rejected the revision against the order of discharge passed by the trial court – In the circumstances,

there is no reason to take a different view than the one which has been taken by the High Court – Bombay Police Act – s.161.

Criminal Law:

Criminal trespass – Common intention – Common object – Mumbai riots –Suleman Bakery incident – Miscreants firing from the rooftop of the building at the police picket – Wireless message sent to control room – Joint Commissioner of Police reached the spot with Special Operations Squads (SO) – Ordered to arrest the miscreants – When in spite of orders, door of building was not opened by inmates, door ordered to be broken open – In the process, twelve persons got injured and other eight succumbed to injuries – HELD: It cannot be disputed that situation in Mumbai on 9.1.1993 was extremely volatile – This was evident from the very existence of picket in front of Suleman Bakery – Miscreants were firing at police picket – Wireless message was sent to Control room and on that basis SOS led by Joint Commissioner of Police (R-1) reached the place – When orders to open the door of the building were not paid any heed, R-1 was perfectly justified in directing to break open the front door of the building and the police personnel had to enter – Therefore, entry could not amount to trespass or criminal trespass – There cannot be any dispute that the members of SOS had duty to quell the riots – Therefore, SOS cannot be said to be an unlawful assembly – Under such circumstances, if in that volatile situation some of the police personnel did not fire a single bullet, they cannot be made vicariously liable for the acts of some others which acts are not shown to be with a common intention or common object of killing the people – The trial court and the revisional court have rightly taken the view that there could be no common intention shared on the part of those who did not fire a single bullet.

Commission of Inquiry:

Report of Commission – Evidentiary value of – HELD: The observations and findings in the report of the Commission are only meant for the information of the Government – The courts are not bound by the finding of the Commission of Inquiry and they have to arrive at their own decision on the evidence placed before them in accordance with law.

In December 1992 and January 1993, communal riots erupted in the city of Mumbai. Police pickets were set up in sensitive areas. One such area was Suleman Bakery in close vicinity of a Mosque and a Madarasa. The area fell within Dongri Police Station and the police picket was set up diagonally opposite to Suleman Bakery, in the area of Pydhonie Police Station. The case of the respondents police personnel was that on 9.1.1993, some miscreants started firing at the police picket from the terrace of Suleman Bakery, unhindered by the warnings from the police. Ultimately, a police officer from Pydhonie Police Station reported the incident to the Control Room and asked for help. Respondent no. 1, the Joint Commissioner of Police, reached the spot with a team of Special Operations Squads (SOS). The persons in the Suleman Bakery continued to pelt bottles, acid bulbs and stones towards the police. Respondent no. 1, therefore, ordered the squad to enter the bakery and finding the door bolted from inside and the inmates of building not opening the door, ordered to break open the door and arrest the miscreants. The door was broken open and in the process 12 persons got injured and 8 died. An FIR was lodged against 78 miscreants who were involved in the incident of 9.1.1993. 70 persons were shown as absconding and the remaining persons were charged for offences punishable u/ss 143, 147, 149, 307, 120-B, 325, 327 IPC as also under the Arms Act. After the riots subsided, complaints were lodged against the police force. Ultimately, a Commission was set up which found

that in some incidents including the instant one, the police used more than necessary force. The State Government lodged prosecutions against erring police personnel. In the instant case also an FIR was registered for offences punishable u/ss 302/34 and 307/34 IPC and ultimately a charge-sheet was filed against 18 police personnel. The accused police personnel filed application for their discharge u/s 227 CrPC which resulted in discharge of respondents nos. 1 to 9. The appellant challenged the order in a revision petition before the High Court, which upheld the order. Aggrieved, the revision petitioner filed the appeal.

Dismissing the appeal, the Court

HELD: 1. There can be no dispute that the FIR lodged against the police personnel heavily relies on the evidence given before the Commission of Inquiry. The trial court has rightly relied on the decision of this Court in *T.T. Antony's case wherein it is held that the observations and findings in the report of the Commission are only meant for the information of the Government. However, the courts are not bound by the finding of the Commission of Inquiry and they have to arrive at their own decision on the evidence placed before them in accordance with law. [para 10-11] [798-F-G; 801-B-C]**

***T.T. Antony v. State of Kerala* 2001 (3) SCR 942 = AIR 2001 SC 2637; *Kehar Singh & Ors. v. State (Delhi Administration)* 1988 (2) Suppl. SCR 24 = AIR 1988 SC 1883 – relied on.**

2.1. It cannot be disputed and was not really disputed that the situation in Bombay on 9.1.1993 was extremely volatile. The material available suggests that the miscreants were trying to breach the curfew by coming on the road and by making women as their shields and

there was constant exhortation at the instance of miscreants and they were encouraging people to come on the road to breach the curfew. The very existence of the picket in front of the Suleman Bakery and the conversation from the picket to the control room at the Pydhonie Police Station would give the idea as to how grim the situation was. [para 11] [800-G-H; 801-A-B]

2.2. The trial court relied on the wireless message given by A-17 to the control room and the arrival of respondent no.1 along with the team, and came to the conclusion that there was firing from the roof top of the Suleman Bakery and the door was closed from inside and inspite of the repeated orders, the inmates refused to open the door and, therefore, respondent no.1 ordered the squads to break open the door and apprehend the miscreants. The trial court accepted the police report that 7 of the accused persons did not fire a single bullet. The court also relied on the statement of the inmates and held that the policemen did not enter with the intention to kill the inmates. The trial court held that the SOS had not made any pre-arranged plan of opening fire and killing the innocent persons and thus s.34 IPC was not attracted. It is on this basis that the trial court came to the conclusion that if even after the entry some accused persons did not fire a single bullet, they were clearly acting in discharge of their duties and, therefore, they were entitled to the protection u/s 161 of the Bombay Police Act. The trial court found that there was no justifiable case against the police officials who even in the volatile situation did not open fire at all. The High Court also referred to the scope of revisional jurisdiction as also the scope of s.227 Cr.P.C. and observed that the truthfulness of the statements or circumstances or documents of the prosecution is not questioned by the defence. [para 11-13] [801-E-H; 802-A-G; 803-G-H]

State of Maharashtra v. Priya Sharan Maharaj & Ors. **1997 (2) SCR 933 = AIR 1997 SC 2041;** *Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra* **2008 (6) SCR 1116 =2008 (10) SCC 394 – referred to.**

3.1. Considering the question of firstly breaking open of the door, there can be no dispute that there was huge disturbance going on from the precincts of the Suleman bakery. From the material on record, it was clear that the missiles were being thrown at the police inasmuch as the API was actually injured. There can also be no dispute about the fact that wireless messages were sent and on the basis of that, the action was taken by the SOS which was being led by respondent No.1. The record suggest that the police personnel had directed the opening of the door but the same were not being opened. Therefore, respondent No.1 was perfectly justified in directing the breaking open of the front doors of Suleman Bakery. [para 14] [804-C-F]

3.2. Once the doors were broken up, the police personnel had to enter. Therefore, the entry could not amount to trespass. A trespass becomes a criminal trespass if it is with an intention to annoy or to do something illegal which is not the case here. There was no question of the so-called entry amounting to criminal trespass. [para 15] [806-B-C]

4. There can be no dispute that the respondents were all the members of the SOS and had the duty to quell the riots. They were not doing anything illegal in coming out and trying to control the riots. There is also no dispute that the riots were undoubtedly going on. There was no reason for the trial court and the revisional court and even for this Court to believe that the SOS squad came on its own without there being any apprehension of further troubles. Those apprehensions are apparent enough in the wireless message on which the trial court

wholly relied on and, in the opinion of this Court, rightly. Therefore, it cannot be said that the SOS itself was an unlawful assembly. There is evidence on record to suggest that the miscreants were not the mute bystanders or were hiding there without doing any mischief. Under such circumstance, if in that volatile situation also some of the personnel did not fire a single bullet, they cannot be made vicariously liable for the act of some others which acts are also not shown to be with a common object of killing the people. Therefore, there was no question of there being an unlawful assembly or any act having been committed by the respondent in pursuance of its common object. The trial court as well as the revisional court has already taken the view that there could be no common intention shared on the part of those who did not even fire a single bullet. In the circumstances, there is no reason to take a different view than the one which has been taken by the High Court. [para 14-15] [805-C-F; 806-E-H; 807-A-B]

5.1. On merits itself it cannot be said that there was any prima facie case against these respondents who had not fired a single bullet and who were thoroughly acting in pursuance of orders of their superiors and were doing their duty. [para 16] [807-C]

5.2. As regards the statements of witnesses recorded u/s 161 CrPC, all the statements appear to be of the residents of the Madarasa. Significantly enough, in no statement, any specific act on the part of any of the respondents is mentioned. In all the statements, the only act attributed to the police who entered the Suleman Bakery was of firing at the inmates and other persons and some of the inmates dying due to that. There is not a single statement identifying those policemen who fired or suggesting that those who did not fire committed any other mischief of beating etc. All the statements referred

to the order of the police to take out the hidden weapons. Indeed no weapon was found in Suleman Bakery but the weapons could have been easily removed as the buildings there were so connected that one could easily run away from Suleman Bakery through connected rooftops of the other buildings. Admittedly, there was no specific act attributed either to respondent No. 1 or respondent No.9. In the circumstances, if admittedly the respondents did not fire a single bullet, it cannot be said that they had a common object to kill the persons in Suleman Bakery or the Madarsa or the Mosque attached thereto. The trial court and the revisional Court were not wrong in relying on this very material circumstance that none of the respondents, though armed, fired a single bullet. [para 17] [807-F-H; 808-B-H]

Case Law Reference:

2001 (3) SCR 942	**relied on**	**para 11**
1988 (2) Suppl. SCR 24	**relied on**	**para 11**
1997 (2) SCR 933	**referred to**	**para 12**
2008 (6) SCR 1116	**referred to**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1256 of 2011.

From the Judgment & Order dated 16.10.2009 of the High Court of Bombay in Criminal Appeal No. 357 of 2003.

Vijay Pardhan, U.R. Lalit, Huzefa Ahmadi, Javed Rashi Patel, Garima Kapoor, Ejaz Maqbool, Suwadi, Rajiv Tyagi, Shrikant Shivade, Shivaji M. Jadhav, Prashant B., Amit Mittal, Chinmoy Khaladkar and Sanjay V. Kharde (for Asha Gopalan Nair) for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. The order passed by the Bombay High Court confirming the order passed by the Additional Sessions Judge, Greater Bombay allowing the discharge application preferred by Accused No.1, Ram Deo Tyagi, Lahane Bhagwan Vyankatrao (A-2), Sawant Subhash Namdeo (A-4), Santosh S. Koyande (A-6), Chandrakant B. Raut (A-8), Anil Narayan Dhole (A-14), Satish Kumar B. Naik (A-15), Ganesh Bhaskar Satvase (A-16) and Anant Keshav Ingale (A-17) is in challenge here. Against the aforementioned order of discharge passed by the Trial Court, the present appellant Noorul Huda Maqbool Ahmed had filed a revision before the Bombay High Court and the High Court dismissed the said revision. That is how the appellant is before us. We would prefer to refer to the accused persons by their respective positions before the Trial Court.

3. It has to be noted that the aforementioned discharge order by the Trial Court was not challenged before the High Court by the State of Maharashtra and in fact they chose to support the order. Even before us on a specific plea having been made, the learned counsel appearing for the State of Maharashtra has chosen to support both the orders by the Trial Court as well as the High Court.

4. The city of Mumbai, which is otherwise known to be a cosmopolitan city was rocked by communal riots in early 1993. On 09.01.1993 the said riot was at its peak and it engulfed various parts of city of Bombay coming within the jurisdiction of number of police stations. In the present matter, we are concerned with two police stations, namely, Pydhonie Police Station and Dongri Police Station. A road called Mohd. Ali Road divides the respective areas of these two police stations. There was one bakery called Suleman Bakery. This bakery has a Mosque in its immediate neighbourhood as also a Madarasa where admittedly the students belonging to Islamic faith used to reside and were being trained. The said Mosque is called Chuna Bhatti Mosque. It is an admitted position that Suleman

Bakery, the Mosque as also the Madarasa came within the control of Dongri Police Station. They are situated at the aforementioned Mohd. Ali Road and since there were severe disturbances, a police picket was set up diagonally opposite to the said Suleman Bakery. But in the area of Pydhonie Police Station, seeing that some miscreants were firing at the picket at the road from the terrace of Suleman Bakery, the police warned the miscreants to stop their nefarious activities. However, the same went on unhindered by these warnings. A police officer from the Pydhonie Police Station, therefore, reported this incident to the control room and asked for help. One wireless van allegedly came to the spot and also noticed that some shots were fired from the building of the Suleman Bakery. On receipt of the wireless message to the control room, Joint Commissioner of Police Shri R.D. Tyagi, respondent No.1 herein came to the spot along with a team called the Special Operations Squads (SOS). Such squads were formulated to control communal riots. The persons in the bakery were not deterred by the presence of Tyagi or the members of the SOS and continued to pelt bottles, acid bulbs and stones towards the police. Therefore, Joint Commissioner Tyagi ordered the squad to enter the bakery. Needless to mention that the door of the bakery was bolted from inside and the inmates did not open the door though they were asked to do so. Respondent No.1, Tyagi, therefore, directed the police force to break open the door of the bakery and to arrest the miscreants. The police squad was told to use minimum force. Accordingly, the door was broken and the members of the SOS team entered the Suleman Bakery but in the process they had to resort to firing due to which 12 persons inside got injured and 8 persons succumbed to death. Admittedly, the members of the team could not recover any fire arm except swords and sticks.

5. Shri Tyagi then left the place and complaints were lodged after the riots against the police force. There was an enquiry under the Commission of Inquiries Act headed by Hon'ble Shri Justice B.N. Srikrishna, as His Lordship then was.

Justice Srikrishna found that in this particular incident and some other incidents police were responsible for using more than necessary force and the Government of Maharashtra, therefore, decided to lodge prosecutions against the police officers who had taken law in their hands. In the present case, the State had lodged a complaint against 18 police personnel for the offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code. A Sessions Case being No.1171 of 2001 was, therefore, lodged in which the 18 accused persons moved an application for discharged under Section 227 of the Criminal Procedure Code. The Sessions Judge discharged the accused persons named and dismissed the application of rest of the accused persons and directed that the prosecution shall continue against the others as has been stated. The State of Maharashtra had not challenged the order. However, the same came to be challenged by a private party who claims to be a victim. The High Court having dismissed the said revision, the same private party has come up before us by way of the present appeal. Before we proceed to appreciate the contentions raised by the learned Senior Counsel appearing for the appellant Shri Vijay Pradhan, we must also note a few more facts. On the basis of the incident which took place on 09.01.93, an FIR was lodged against as many as 78 persons by Anant Keshav Ingale who is none else but accused No.10 in Dongri Police Station. All these accused were committed to Sessions Court in the year 2002. The said Sessions case is Trial No.930 of 2002. Out of the 78 persons, as many as 70 persons are shown to be absconding. The remaining persons were charged for the various offences under Sections 143,144,145,147,149, 307 read with Section 307, Section 34 as also Section 120 B, IPC and 325, 327 of the Arms Act on 22.12.2004. The said order was challenged in the High Court where it is still pending.

6. The prosecution in this case was launched on the basis of the FIR C.R. No.198 of 2001 in Pydhonie Police Station on 25.5.2001. It is on the basis of the statement of one Mirza

Azamtullah Beg. On the basis of this FIR, subsequent investigation proceeded and a charge sheet came to be filed against the 17 accused persons. It was at this stage that applications came to be filed on behalf of the accused persons under Section 227 of the Cr.P.C. which resulted in the discharge of the present respondent Nos. 1 to 9 which order was then challenged before the High Court and was confirmed by the same.

7. Shri Pradhan appearing on behalf of the private person launched a scathing attack on the order of discharge as well as the confirming order passed by the High Court. In his address, he tried to point out that both the Courts had erred in relying on the circumstance that the accused who were discharged had not fired a single bullet. As regards the respondent No.1, the contention was that he was the leader of the team who had gone to quell the riots. According to Shri Pradhan, in fact, there was absolutely no reason for the SOS firstly to go in front of the Suleman bakery as the story, that there was stone pelting throwing of glass bottles and firing from the terrace of the Suleman bakery, was nothing but a myth. Shri Pradhan was at pains to point out that the situation was perfectly under control and there was no evidence to suggest that the coming on the scene of the SOS was in any manner warranted. Shri Pradhan further argued that if at all there was any wireless message sent from the picket to the Pydhonie Police Station, it was absolutely a false message because there was no question of firing from the Suleman bakery, particularly, on the backdrop of the fact that the team which entered Suleman bakery did not find any firing arm or ammunition. The contention raised was that admittedly all the persons alleged to be hiding in Suleman bakery were Mohammedans and the Special Operations Squad wanted to teach a lesson to the Mohammedans who were held up in the Suleman bakery. Shri Pradhan pointed out that there was a complete curfew and it is not as if the unruly mob had come on the streets breaching the curfew order. He pointed out that there

were number of persons admittedly studying in Madarsa who were innocent Mohammedan students. Shri Pradhan further pointed out that the entry of the whole team of 17 or 18 police men, particularly, after breaking open the front door of the Suleman bakery and their firing and killing 8 persons was nothing but an act of revenge against the Mohammedans. Shri Pradhan also took us in great details through the topography of the area as also the inside details of Suleman bakery. He argued that there was a single staircase for going above the ground floor of the Suleman bakery and the ground floor itself was a small area. He, therefore, suggested that the presence of so many persons in the ground floor was not possible. He further pointed out that the staircase was so narrow that only one person could have at a time gone up and there was no scope for so many persons to go up. From this, he derived an argument that the team which entered after breaking open the front doors had gone up and then shot dead 8 defenceless persons and also injured others. Therefore, Shri Pradhan was at pains to point out that all those injured had suffered bullet injuries. From this, he extended his argument further suggesting that all this was not possible unless there was a common object on the part of the police personnel to teach lesson to the innocent members of Muslim community. He further pointed out that there was nothing which justified the wanton and mindless firing. He urged that some persons of the police force who may not have fired a single bullet, it was enough to rope them in with the aid of Section 34 or Section 149, IPC as the whole assembly had turned illegal in firstly breaking open the doors without any purpose and then going up and firing at the defenceless persons hiding in Suleman bakery. Shri Pradhan very strenuously argued that merely because respondent No.1 had not entered the shop, it does not absolve him at all as he was the leader of the SOS and had to take the full responsibility. He pointed out that in fact there was no reason for respondent No.1 to come on the spot at all and then to order his team to break open the doors and to enter the Suleman bakery. Shri Pradhan, therefore, firstly suggested a common intention and

argued that the act of entering, by itself, was sufficient to hold that those accused who entered were participants in crime. In that view, Shri Pradhan argued that the mere fact that they did not fire was not a relevant factor. He alternatively argued that at any rate this was an unlawful assembly again on account of Clause *thirdly* of Section 141 of IPC and hence all the discharged accused persons were the members of the unlawful assembly and had to be at least charged and inquired into by the Courts below.

8. Replying this Shri U.R. Latit, learned senior counsel pointed out that to suggest that the situation was under control and everything was calm and quiet, would be a travesty of facts. Shri Lalit pointed out that the situation was extremely tense and a wireless message was sent from the picket in front of the bakery to Pydhonie Police Station. Shri Lalit argued that the whole police force could not be attributed with the motive of teaching lesson to a particular community. He suggested that the members of the picket and, more particularly, Ingale who sent the message had full idea of the topography since he was able to see himself the whole situation prevalent in Suleman bakery and its terrace from the building which was opposite Suleman bakery. He pointed out that the picket was set up only to quell the violence and the very existence of the picket was a pointer to the fact that everything was not calm and quiet and under control in that area which is predominantly a Muslim area and which was a greatly disturbed area. Shri Lalit pointed out that by no stretch of imagination could the SOS be called an unlawful assembly as their very duty was to establish peace. He further pointed out that it is not as if respondent No.1 had carried the SOS without any reason or justification. He had in fact gone there on account of the wireless message. He further pointed out that insofar as respondent No.1 is concerned, there was hardly any question of his having entertained any motive to teach lesson to the Muslim community. Insofar as others who entered the building, Shri Lalit pointed out that if even under that explosive situation the police personnel did not use weapon

and did not fire a single bullet, there was no question of attributing any motive to such personnel. On the other hand, these police personnel even at the risk of their own lives had chosen to enter the building. Shri Lalit said that on the basis of the evidence available, the entry into the Suleman bakery by breaking the locks was fully justifiable. He further pointed out that the topography was such that the miscreants could have easily run away with the guns and ammunition as the building there are connected to each other and it was very easy for the miscreants to escape with ammunition. From all this, Shri Lalit pointed out that the discharge order passed by the Trial Court and confirmed by the High Court was perfectly justified.

9. It is on this basis that we have to examine the respective claims. We must at this point consider the First Information Report and its contents. A close scrutiny therein suggests that it was an admitted position that the riots in the two communities were going on from 6th to 10 December again started on 6th January and subsided only on 16th or 17th January. It is also an admitted position that severe damage was caused to public and private property and there was also loss of lives and since the riots assumed serious proportions, the curfew was imposed for 24 hours in several parts of the city during the said period and police pickets were maintained at various places. It is also mentioned in the FIR that the Special Operations Squads were formed by the police and that respondent No.1 at that time was the Joint Commissioner of Police (Crime), Greater Bombay and that all the other accused were Inspector of police, Sub-Inspector of Police, Police Constables etc. It was also an admitted position that Shri Anant Keshav Ingale accused No.17 (before Sessions Judge) was then attached to Pydhonie police station and all the accused were attached to Special Operations Squads. The FIR describes the topography of Suleman bakery as also of the mosque which is called Chuna Bhatti and the Madarsa called Darul Uloom. The FIR says about the firing at the picket and the conversation between ASI Nagare In-Charge of the picket with Anant Keshav Ingale (A-

17 before Sessions Court). Regarding the said gun shots coming from the direction of the terrace of the Suleman bakery, though it asserts that there was no record regarding any untoward incident which allegedly commenced at 9.30 and went on for three hours, it is pointed out that no bullets or cartridges were traced near about the picket and no injury was caused to anybody. The FIR then refers to the wireless message from the picket to Pydhonie police station about firing as also the information communicated to respondent No.1, R.D. Tyagi by the control room about the firing. It also refers to the conversation on the part of respondent No.1 referring to a man with a stengun being present. It is mentioned that the said stengun man was neither caught nor the stengun was recovered. The FIR also refers to the further orders issued by respondent No.1 to enter the bakery after breaking open the front doors. The FIR then makes a reference to the Dongri police station and also refers to the FIR lodged against 78 persons arrested by SOS. Specific mention is also made in the FIR that 10-15 persons escaped with weapons and the attempts on their part to commit murder rioting etc. There is a specific reference made in the FIR CR No. 46 of 1993. There is then a reference made to the further investigation conducted by one P.I. Patil. Then a reference is made to the report of Justice Srikrishna. It is further mentioned that Anwar Ali Mohd. Islam, a witness examined by the Commission received injury by gun shot. A reference is made to the dialogue between the police personnel regarding the hidden weapons. A reference is also made to the evidence of Mohd. Qutubuddin, Noorul Huda and Abdul Wafa Hahibulla Khan etc. who have deposed before the Commission regarding the entry of the police into Suleman Bakery. It is then mentioned in the Panchnama that seven empties and two live cartridges were recovered from the place of offence which were fired by the miscreants. An assertion is then made that no fire arms were recovered during the Panchnama. A reference is then made to the injuries suffered by the 8 dead persons. A reference is made to the observation that it was impossible for 78 persons to fit

themselves in the bakery building. Then it was impossible for 17 persons to break into the bakery and catch hold of the 78 persons. It is also pointed out that in the topography, it is clearly mentioned that the entire version is exaggerated and incapable of taking place. It was pointed out that not a single serious injury was sustained by any member of the SOS nor was there any injury by the fire arm. It is also mentioned that it was impossible for the miscreants to escape with fire arms as there was no way of escape from the mosque. It is then mentioned that the entire FIR No.CR 46 of 1993 recorded with the Dongri Police station is a got up document in attempting to justify the death of nine persons caused by them. It is also mentioned further that Anant Keshav Ingale could not have been at the picket at 9.30 as the entry at the station diary made at 12.45 p.m. on 9.1.93 at Pydhonie police station shows that Ingale and API Jadhav left police station at 10.20 a.m. and he was no where near the Suleman bakery until about 12.45 p.m. A reference is made to the record of the Commission, the FIR and the Panchnama in Dongri Police Station Cr. No.46 of 1993 and the material collected in that crime.

10. Motives are attributed then to the accused persons that they took undue advantage of the authority given to them and abused the power to cause the death of 9 innocent persons. Heavily relying on this FIR, Shri Pradhan pointed out that the prosecution on the basis of the FIR in Dongri Police Station was nothing but a façade created by the police for screening themselves and justifying the firing in Suleman bakery. There can be no dispute that the FIR heavily relies on the evidence given before the Commission of Inquiry. When we see the application under Section 227 and especially by the first accused, it is pointed out therein that in those riots more than 1500 persons had lost their lives and also the property of crores of rupees was damaged. It is pointed out that the entire police force was working under tremendous pressure and during those riots seven police officers were killed and 496 officers/ policemen were injured. It was also pointed out that

sophisticated fire arms and other lethal bombs were used by the violent mob and the police officers had to make Herculean efforts to bring the situation under control and that the police were relentlessly targeted by the violent mob. A detail reference has been made to the Dongri, Pydhonie, Nagpada and Agripada police stations which are predominantly Muslim areas and were communally hypersensitive. The application further refers to the bombs being hurled at police in the firing directed at them. About 9th January, it is specifically contended that the Commissioner of Police and the respondent No.1 were patrolling the concerned area. The situation grew extremely volatile and explosive, particularly, in the areas of the four aforementioned police stations and, therefore, a wireless message was given to the Commissioner that almost a civil war type situation had arisen and in fact it was thought of handing over of the area to the military. It is pointed out that the Commissioner of Police, therefore, left the area to attend a meeting while respondent No.1 reached along with the SOS while prosecution witness Ajit Deshmukh continue to patrol the area in Pydhonie. Relying on the statement of prosecution witness Ajit Deshmukh, it is further pointed out that the miscreants were challenging from the roof top of Suleman bakery. It also refers to one round being fired towards the SOS when they were alighting from the vehicle. A reference is also made to the shot being returned by Ajit Deshmukh in self defence from his service revolver. Reference is also made to the observations made by Anant Keshav Ingale (A-17 before Sessions Court) from above a shop and also confirming that the miscreants were using automatic fire arms and three persons carrying revolvers. A reference is then made to the entry which was based mainly on the further fact that the witness Deshmukh sustained injury on his left hand as he was hit with a hard object like glass bottle and it was that circumstance that door was ordered to be broken. A reference is made to the three injured persons who had jumped and also the further investigation against those who were taken into custody. The reference is made to the recommendation in the Commission

that no prosecution should be initiated against R.D. Tyagi (A-1 herein) as he had acted in discharge of his official duty. In his application, Shri R.D. Tyagi had taken a defence of acting in discharge of his duties. It was also pointed out that the accused did not go on his own but in response to a wireless call and on arrival he faced a gun shot and fire at witness Ajit Deshmukh. It was further mentioned that R.D. Tyagi had also reported about having seen the arm carrying miscreants on the rooftop of Suleman bakery. It is also pointed out that the information was got verified on the other police picket and that respondent No.1 herein had taken full precaution and had issued warnings to miscreants at Suleman bakery and asked them to surrender and when this did not yield any results, the bakery was ordered to be broken open by force. It is also pointed out that Ajit Deshmukh was also hit hard by missile and, therefore, the operation had to be done without there being any alternative. It is on this basis that the application was moved. By way of legal submissions, it was urged that there was already an FIR lodged at the Dongri police station about the happenings in Suleman bakery, therefore, there could be no second FIR in respect of the same incident. Section 161 of the Bombay police Act was also pressed in service. Section 197 was also pressed in service, particularly, in respect of Shri R.D. Tyagi. The Civil Service Rules were also pressed in service to suggest that he could not now be proceeded after his retirement which took place in the year 1997. Almost to the same effect with a little difference were the other applications made by accused Nos. 2 to 18.

11. It cannot be disputed and was not really disputed by Shri Pradhan that the situation in Bombay on 9.1.1993 was extremely volatile though Shri Pradhan insisted everything was calm and quiet on account of the curfew. It is not possible to come to that conclusion at least on the basis of the material available which suggests that the miscreants were trying to breach the curfew by coming on the road and by making women as their shields and there was constant exhortation at the

instance of miscreants and they were encouraging people to come on the road to breach the curfew. A very existence of the picket in front of the Suleman bakery and the conversation from the picket to the control room at the Pydhonie police station would give the idea as to how grim the situation was. We have also carefully seen the Trial Court's order. The Trial Court has rightly relied on the decision of this Court in *T.T. Antony v. State of Kerala* [AIR 2001 SC 2637], wherein it is held that the observations and findings in the report of the Commission are only meant for the information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of law and having duty to act fairly, it has endorsed to act upon it. It was further observed that the investigation agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigation agency from forming a different opinion under Section 169/170 Cr.P.C. of Cr.P.C. if the evidence obtained by it supports such a conclusion. However, the Courts were not bound by the report of the finding of the Commission of Inquiry and the Courts have to arrive at their own decision on the evidence placed before them in accordance with law. The Trial Court has also relied on *Kehar Singh & Ors. v.State (Delhi Administration)* AIR 1988 SC 1883 to hold that the report of the Commission referred the consideration of the government and it is the opinion of the Commission based on the statement of the witnesses and other material but has no evidentiary value in the criminal case. The Trial Court then proceeded to examine the prima facie case and relied on the wireless message given by Anant Keshav Ingale to the control room and the arrival of R.D. Tyagi in pursuance of the message along with the team. The whole message was then quoted by the Trial Court from which the Trial Court came to the conclusion that there was firing from the roof top of the Suleman bakery and the door was closed from inside and inspite of the repeated orders, the inmates refused to open the door and, therefore, R.D. Tyagi ordered squad to break open the door and apprehend the miscreants. The Trial

Court then went on to accept the police report to suggest that 7 of the accused persons did not fire a single bullet. From this, the Trial Court came to the conclusion that though the police officers were in possession of 638 rounds, some of them fired from 1 to 7 rounds while some others did not fire a single round. The Court also relied on the statement of the inmates and came to the conclusion that the policemen did not enter with the intention to kill the inmates. The Trial Court then went on to exclude the application of Section 34, IPC and ruled out the possibility that the SOS had made any pre-arranged plan of opening fire and killing the innocent persons. The Trial Court has also analyzed the orders issued by R.D. Tyagi to break open the doors and came to the conclusion that he was justified in directing the doors to be broken open. The Trial Court also relied on the statement of Ajit Deshmukh API who was an inured police officer and ultimately came to the conclusion that there was no question of application of Section 34, IPC, particularly, when the Joint Commissioner A-1 had directed to take precaution for the safety of the SOS team and also specifically directed to resort to minimum force. It is on this basis that the Trial Court came to the conclusion that if even after the entry same accused persons did not fire a single bullet, they were clearly acting in discharge of their duties and, therefore, they were entitled to the protection under Section 161 of the Bombay Police Act. The Trial Court found that there was no justifiable case against the police officials who even in the volatile situation did not open fire at all. Consideration was also made to the fact that the persons who died had died only of gun shot injuries and that accused had not fired a single bullet.

12. The High Court also referred to the scope of revisional jurisdiction as also the scope of Section 227 Cr.P.C. The High Court relied on *State of Maharashtra v. Priya Sharan Maharaj & Ors.* [AIR 1997 SC 2041] and the observations made in paragraph 8 to the following effect:

"The law on the subject is now well settled, as pointed out in *Niranjan Singh Punjabi v. Jitendra Bijjaya* (1990)4

SCC 76: (AIR 1990 SC 1962) that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

The Court also referred to the observations made in *Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra* [2008 (10)SCC 394]:

"16. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out

The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible."

13. A very relevant observation has thereafter been made by the High Court that the truthfulness of the statements or circumstances or documents of the prosecution is not questioned by the defence. Then the High Court proceeded to consider the scope of Section 34, IPC as also the scope of Section 47 (2) of the Cr.P.C. The High Court then considered the scope of alternative argument made by the revisional Court that the matter should be remanded for adding new charges

under Section 111, IPC under Section 442 read with Section 111 and 113 of IPC against R.D. Tyagi and the other accused who were discharged. Ultimately, the High Court rejected the argument and, in our opinion, rightly so. Even Section 107 was referred by the High Court. In that the High Court rightly came to the conclusion that the acts of R.D. Tyagi (A-2 before the High Court) and other respondents did not fall under Section 107, IPC as neither of the three requirements under Section 107 was fulfilled. Even Shri Pradhan did not press that point before us.

14. We, after seeing the depth at which Shri Pradhan argued the matter, invited Shri Pradhan to justify the application of Section 34, IPC particularly on the part of accused No.1 and those who did not fire a single bullet. Considering the question of firstly breaking open of the door there can be no dispute that there is nothing on record to suggest that everything was alright with the Suleman bakery and that there was huge disturbance going on from the precincts of the same. There can also be no dispute about the fact that wireless messages were sent and on the basis of that, the action was taken by the SOS which was being led by respondent No.1. In our opinion, therefore, the accused No.1 was perfectly justified in directing the breaking open of the front doors of Suleman bakery. We have examined the record ourselves which suggest that the police personnel had directed the opening of the door but the same were not being opened. Shri Pradhan was fair enough to admit that there were persons in Suleman bakery. His only contention is that they were not committing any mischief. From the material on record, it was clear that the missiles were being thrown at the police inasmuch as API Shri Deshmukh was actually injured and there is material to support that in that situation when after breaking of the doors the police men entered and yet some of the policemen did not fire the bullets, they certainly could not be clothed with common intention. In our opinion, the Trial Court as well as the revisional Court have already taken the view that there could be no common intention shared on the part of those

who did not even fire a single bullet. Shri Pradhan also saw the hollowness of the claim of the prosecution that these accused persons could be roped in with the aid of Section 34, IPC. He, therefore, argued that the assembly of the police at least till the time they break open the door was lawful object as it was their duty but they should not have broken open the door and trespassed the Suleman bakery and all those who entered Suleman bakery formulated an unlawful assembly as they illegally trespassed into the Suleman bakery since A-1 herein, Shri Tyagi had ordered them to break open the doors even he was a part of that unlawful assembly who had the common object. Now the question is whether this assembly could be called an unlawful assembly. There can be no dispute that they were all the members of the SOS and had the duty to quell the riots. They were not doing anything illegal in coming out and trying to control the riots. There is also no dispute that by Shri Pradhan that the riots were undoubtedly going on. We outrightly reject the claim of Shri Pradhan that everything was calm and quiet and yet the SOS came. There was no reason for the Trial Court and the revisional court and even for us to believe that the SOS squad came on its own without there being any apprehension of the further troubles. Those apprehensions are apparent enough in the wireless message on which the Trial Court wholly relied on and, in our opinion, rightly. Therefore, there is no point in holding that the SOS itself was an unlawful assembly.

15. Further question is the object of the SOS. A wild argument was addressed that the SOS were out to teach lesson to the rioters. There is absolutely no material about the same. Shri Tyagi had no reason whatsoever to be inimical towards a particular community merely because he belonged to a different community. There is no material on record to suggest that any of the SOS personnel had any personal agenda. Therefore, till that point of time at least there can be no question of the assembly being unlawful. Again if the first accused directed the breaking open of the door, he had solid

reason behind it. It was his job and duty to quell the riots and to control the rioters. In pursuance of that he ordered the breaking open of the door. In our opinion, he was perfectly justified in doing so. If he had ordered the SOS to break open the order, there was no alternative for them but to break open the door. Therefore, in the breaking open the door he did not commit any illegality. Once the doors were broken up they had to enter. Therefore, the entry could not amount to trespass. A trespass becomes a criminal trespass if it is with an intention to annoy or to do something illegal which is not the case here. There was no question of the so-called entry amounting to criminal trespass. If some of the members did not fire a single shot, could it be said that they had a common object of killing the people much less innocent people? Those who fired the bullets and caused the death, whether that act will amount to murder is entirely a different question. That will have to be established on the basis of the evidence that they had specific agenda for doing so or they had the intention to do so or that they acted in excess of their powers, that is purely a matter of evidence. But in case of those who did not fire a single shot, it had to be said that they had the common objection or that the common object of intention of killing them. After all, the police who entered were risking their own lives. There is evidence on record to suggest that the miscreants were not the mute bystanders or were hiding there without doing any mischief. Under such circumstance, if in that volatile situation also some of the personnel did not fire a single bullet could they be made vicariously liable for the act of some others which acts are also not shown to be with a common object of killing the people? The answer would have to be in the negative. Therefore, in our opinion, there was no question of there being an unlawful assembly and any act having been committed by the respondent in pursuance of that common object. Whether there was an object on the part of others to fire and kill the mob inside is to be examined by the Trial Court. But insofar as the present respondents are concerned, not firing a single bullet would certainly take them out of the prosecution area. We do not agree

that on that account they could not be discharged. In fact, the Trial Court and revisional Court have not relied only on that circumstance. That circumstance has been considered in the light of other attending circumstances and, therefore, we do not find any reason to take a different view than the one which has been taken by the High Court.

16. Shri Lalit tried to argue about the Bombay Police Act. However, Shri Pradhan has not gone to that aspect and it is unnecessary for us to consider the effect of Section 161 of the Bombay Police Act. We find that on merits itself it cannot be said that there was any prima facie case against these respondents who had not fired a single bullet and who were thoroughly acting in pursuance of orders of their superiors and were doing their duty.

17. Shri Pradhan, however, contended that there was lot of material against the accused persons about their having actively taken part in the incident and in support of his contention he took us through a few statements of the witnesses recorded under Section 161 Cr.P.C. They are statements of Shri Abdul Sattar Suleman Mithaiwala, Abdul Wafa Khan Habibullah Khan, Mohd. Kutubuddin s/o Mohd. Musa Siddiq, Hasan Razakudin Mohd, Gulam Mohd. Farukh Shaikh, Abdulla Abul Kasim and the appellant himself. Besides these, Shri Pradhan also relied on the statements of Sabre Alam Jamaluddin Balwor, Mohd. Hussain Aulad Ali Dafali, Mohd. Islam Mohd. Kuddus Shaikh, Budul Abdul Latif Khan and Mohd. Rafiq s/o Mahebook Ali. We have carefully gone through all these statements. Barring the first statement, all the statements have come by way of additional documents attached to the rejoinder. All the statements appear to be of the residents of the Madarsa. Significantly enough, in no statement any specific act on the part of any of the respondents is mentioned. Generally, it is mentioned in the statements that the persons concerned heard shouting of policemen who were shouting *Darwaja Kholo, Darwaja Kholo* (open the door) and were also asking *Hathiyar Khah Chhupa hai* (where is the weapon

hidden). In the statement of Abdul Wafa Khan Habibullah Khan it is mentioned "*one of the policemen pressed the rifle's nozzle under the chick and shouted 'sabko maar dalo' but the other policemen stopped him from doing so".* The description in the statements is that some persons were shot dead by the police. In all the statements the act of shooting and killing is attributed to the police without identifying them. Some of these statements are of those who were injured. In short, in all the statements, the only act attributed to the police who entered the Suleman bakery was of firing at the persons and inmates and some of the inmates dying due to that. There is not a single statement identifying those policemen who fired or suggesting that those who did not fire committed any other mischief by beating by rifle butts etc. All the statements referred to the order of the police to take out the hidden weapons. We have expressed earlier and even at the cost of repetition, we may mention that indeed no weapon was found in Suleman bakery but that does not solve the problem because Shri Lalit explained to us in great details that the weapons could have been easily removed as the buildings there were so connected that one could easily run away from Suleman Bakery through connected rooftops of the other buildings. We put a specific query to Shri Pradhan as to whether there appeared even a single statement against respondent No.1 herein or respondent No.9 herein. Shri Pradhan was fair enough to admit that there was no specific act attributed either to Shri Tyagi (respondent No. 1 herein) or Shri Ingale (respondent No.9 herein). In short, the statements, even if they were to be believed completely, would only provide material against those who actually fired the gun shots. Under such circumstances, if admittedly the respondents did not fire a single bullet, it cannot be said that they had a common object to kill the innocent insiders in Suleman Bakery or the Madarsa and Mosque attached thereto. We are quite convinced that the Trial Court and the revisional Court were not wrong in relying on this very material circumstance that none of the respondents, though armed, fired a single bullet.

18. Shri Pradhan then claimed that if after reading the evidence if some material is found against some others, then the complainant should have the liberty to apply for action under Section 319 Cr.P.C. It would be speculative on our part to say anything on this matter. It will be for the Trial Court to consider any such application, if made, on its own merit. There will be no question of giving liberty for that purpose. No other points were argued.

19. Under the circumstances, we do not find any merit in this appeal and proceed to dismiss the same. The appeal is dismissed.

R.P. Appeal dismissed.

NATIONAL INSURANCE CO. LTD.
v.
SHYAM SINGH AND ORS.
(Civil Appeal No. 4921 of 2011)

JULY 4, 2011

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

Motor Vehicles Act, 1988 – s.163A; Second Schedule – Motor accident – Death of 19 year old unmarried young man – Compensation claim by his parents – Determination of multiplier – Held: Choice of multiplier is determined by the age of the deceased or claimants whichever is higher – In this case, a young unmarried man died in an accident leaving behind aged parents – Multiplier applied keeping in view the average age of the deceased's parents.

Respondent No. 3 and 4 are parents of a 19 year old boy who died in a motor accident. They filed claim petition stating that the deceased was a young man of robust health and was working as mechanical fitter in an Engineering Prism Cement Factory on a salary of Rs. 4500/- per month and in total was getting Rs. 6000/- per month inclusive of salary and over-time allowance and was supporting his parents financially; and that after his death, Respondents No. 3 and 4 were rendered without any financial support and deprived of the association and pleasure of having a family and grand children in future.

The Motor Accident Claims Tribunal came to a finding that the deceased was earning Rs. 3000/- per month and deducted 50% therefrom towards personal expenses, as he was a bachelor. Considering the age of the parents which was 56 and 55 years, it applied the Multiplier of 9, and awarded a total compensation of Rs. 1,72,000/- (Rs.

1,62,000/- towards the loss of dependency + Rs. 10,000/- towards conventional heads) alongwith 6% interest p.a. from the date of claim petition. Being aggrieved, Respondent No. 3 and 4 preferred miscellaneous appeal before the High Court for enhancement of amount of compensation. The High Court enhanced the multiplier to 18 instead of 9 and granted expenses to the tune of Rs. 15000/- under conventional heads. Accordingly, the High Court enhanced the amount of compensation from Rs. 1,72,000/- to Rs. 3,39,000/-.

The question which arose for consideration in the instant appeal was whether the High Court correctly enhanced the multiplier keeping in view the age of the deceased which was 19 years.

Allowing the appeal, the Court

HELD: The assessment of damages and compensation takes into account a number of imponderables. This Court in the case of *Vijay Shankar Shinde* dealt with the law with regard to determination of the multiplier in a similar situation as in the present case. The Court held that the choice of multiplier is determined by the age of the deceased or claimants whichever is higher. It held that the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. If a young man is killed in the accident leaving behind aged parents who may not survive long enough to match with a high multiplier provided by the 2nd Schedule, then the Court has to offset such high multiplier and balance the same with the short life expectancy of the claimants. The dictum laid down in **Vijay Shankar Shinde* is applicable to the present case. Accordingly, it is held that the Tribunal had rightfully applied the multiplier of 8 by taking the average of the parents of the deceased who were 55 and 56 years. The award passed by the Tribunal is restored. [Paras 8, 9, 10, 11] [814-G; 815-C-H; 816-A-H]

General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas and Ors. **AIR 1994 SC 1631 and** **Vijay Shankar Shinde and Ors. v. State of Maharashtra* **(2008) 2 SCC 670 – relied on.**

Sarla Verma (Smt.) and Others v. Delhi Transport Corporation andAnother **(2009) 6 SCC 121 – referred to.**

Case Law Reference:

(2009) 6 SCC 121	**referred to**	**Para 5, 6**
AIR 1994 SC 1631	**relied on**	**Para 8**
(2008) 2 SCC 670	**relied on**	**Para 9, 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4921 of 2011.

From the Judgment & Order dated 15.3.2010 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in Misc. Appeal No. 4867 of 2009.

Ramesh Chandra Mishra, Dr. Meera Agarwal for the Appellant.

Dr. 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 15.03.2010 passed by the High Court of Madhya Pradesh at Jabalpur in Miscellaneous Appeal No. 4867 of 2009, whereby the High Court had partially allowed the appeal filed by the Respondent No. 3 and 4 herein, against the award dated 28.08.2009 passed by the Second Additional Motor Accident Claims Tribunal, Satna, Madhya Pradesh and enhanced the compensation awarded by the Tribunal.

3. The factual matrix of the case is that Respondent No. 3 and 4 are parents of one Yogendra Kumar Pathak, who was 19 years of age and on 01.11.2007 while on his way to his village Kor Gaon, he alongwith his sister were travelling in jeep No. MP 19-A 930. The said jeep wasbeing driven by Respondent No. 1 and met with an accident near Dhal Factory General Road due to rash and negligent driving by the Respondent No. 1which resulted in his death on the spot. FIR was lodged at Police Station, Civil Lines, Satna against the driver under Sections 229 and 304-A of the Indian Penal Code. His dead body was taken to his village from the hospital on payment of Rs. 800/- and amount of Rs. 25000/- was spent on cremation.

4. It was stated in the claim petition that before his death, the deceased was a young man of robust health and was working as mechanical fitter in Priya Engineering Prism Cement Factory on the salary of Rs. 4500/- per month and in total was getting Rs. 6000/- a month inclusive of salary and over time allowance and was supporting his parents financially. After his death, Respondents No. 3 and 4 have been rendered without any financial support and have been deprived of the association and pleasure of having a family and grand children in future.

5. The M.A.C.T., Satna, came to a finding that the deceased was earning Rs. 3000/- per month and deducted 50 % therefrom towards personal expenses, as he was a bachelor. Considering the age of the parents which was 56 and 55 years, applied the Multiplier of 9, and awarded a total compensation of Rs. 1,72,000/- (Rs. 1,62,000/- towards the loss of dependency + Rs. 10,000/- towards conventional heads) along with 6 % interest per annum from the date of claim petition. Being aggrieved, the Respondent No. 3 and 4 preferred miscellaneous appeal No. 4867 of 2009 before the High Court for enhancement of amount of compensation stating that the income of the deceased was Rs. 4500/- and not Rs. 3000/- as determined by the Tribunal, and a multiplier of 16 instead of 9

was supposed to be applied. The High Court relying on the judgment of this Court in the case of *Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another* (2009) 6 SCC 121, enhanced the multiplier to 18 instead of 9 and granted expenses to the tune of Rs. 15000/- under conventional heads. Accordingly, the High Court enhanced the amount of compensation from Rs. 1,72,000/- to Rs. 3,39,000/-

6. The learned counsel appearing for the appellant submitted that the High Court had failed to correctly apply the ratio laid in the case of *Sarla Verma* case (supra.). It was further contended that this Court has repeatedly held that in case where an unmarried young man dies, the average age of the parents will be taken for determining the multiplier and not the age of the deceased. In the aforesaid case, it has been clearly stated that for the age group of 56-60 years the multiplier should be 8, as has been correctly applied by the Tribunal by taking the average age of the Respondents 3 and 4 who are 55 and 56 years of age. It was further submitted that assuming, though not admitting, even if the age of the deceased is to be considered for determining the multiplier, the correct multiplier should have been 16 instead of 18, which is applicable to the age group between 15 to 20 years.

7. On the other hand, the learned counsel appearing for the Respondents No. 3 and 4 supported the impugned judgment and submitted that the High Court correctly enhanced the multiplier keeping in view the age of the deceased which was 19 years.

8. The assessment of damages and compensation takes into account a number of imponderables. This has been held by this court in the case of *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas and Ors*. (AIR 1994 SC 1631) as: -

> "The assessment of damages to compensate the dependents is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g. the life expectancy of the deceased

and the dependents, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependents during that period, the chances that the deceased may not have lived or the dependents may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together etc."

9. This Court in the case of *Vijay Shankar Shinde and Ors. v. State of Maharashtra* (2008) 2 SCC 670, after referring to the earlier judgments of this Court, in detail, dealt with the law with regard to determination of the multiplier in a similar situation as in the present case. The said findings of this Court are as under:

"6. We have given anxious consideration to these contentions and are of the opinion that the same are devoid of any merits. Considering the law laid down in *New India Assurance Co. Ltd. v. Charlie* AIR 2005 SC 2157, it is clear that the choice of multiplier is determined by the age of the deceased or claimants whichever is higher. Admittedly, the age of the father was 55 years. The question of mother's age never cropped up because that was not the contention raised even before the Trial Court or before us. Taking the age to be 55 years, in our opinion, the courts below have not committed any illegality in applying the multiplier of 8 since the father was running 56th year of his life.

7. The learned Counsel relying on the 2nd Schedule of the Act contended that the deceased being about 16 or 17 years of age, a multiplier of 16 or 17 should have been granted. It is undoubtedly true that Section 163A was brought on the Statute book to shorten the period of litigation. The burden to prove the negligence or fault on the part of driver and other allied burdens u/s 140 or 166 were really cumbersome and time consuming. Therefore as a part of social justice, a system was introduced via Section 163A wherein such burden was avoided and thereby a speedy remedy was provided. The relief u/s 163-A has been held not to be additional but alternate. The Schedule provided has been threadbare discussed in various pronouncements including Deepal Girishbhai Soni v. *United India Insurance Co. Ltd.* AIR 2004 SC 2107. 2nd Schedule is to be used not only referring to age of victim but also other factors relevant therefore. Complicated questions of facts and law arising in accident cases cannot be answered all times by relying on mathematical equations. In fact in U.P. State Road Transport Corporation v. Trilok Chandra (1996) 4 SCC 362, Ahmedi, J. (As the Chief Justice then was) has pointed out the shortcomings in the said Schedule and has held that the Schedule can only be used as a guide. It was also held that the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. If a young man is killed in the accident leaving behind aged parents who may not survive long enough to match with a high multiplier provided by the 2nd Schedule, then the Court has to offset such high multiplier and balance the same with the short life expectancy of the claimants. That precisely has happened in this case. Age of the parents was held as a relevant factor in case of minor's death in recent decision in Oriental Insurance Co. Ltd. v. Syed Ibrahim and Ors. AIR 2008 SC 103. In our considered opinion, the Courts below rightly struck the said balance."

10. In our view, the dictum laid down in *Vijay Shankar Shinde* (supra) is applicable to the present case on all fours. Accordingly, we hold that the Tribunal had rightfully applied the multiplier of 8 by taking the average of the parents of the deceased who were 55 and 56 years.

11. Thus, the present appeal is allowed to the aforesaid extent and the award passed by the Tribunal is restored. No costs.

B.B.B. Appeal allowed.

SMT. RAMKANYA BAI & ANR.
v.
JAGDISH & ORS.
(Civil Appeal No. 4922 of 2011)

JULY 04, 2011

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

Madhya Pradesh Land Revenue Code, 1959:

ss. 131, 242, and 257 – Easementary rights determined u/s. 131 by revenue court (Tahsildar) – Subsequent civil suit by the owner of a land for declaration that servient owner does not have an easementary right, customary or otherwise, over his property and the order of Tahsildar u/s. 131 recognizing such right, is illegal and erroneous – Trial court dismissed the suit holding that the revenue court alone had jurisdiction to grant relief and not the civil court – Jurisdiction of civil court – Held: The Code does not bar the jurisdiction of civil courts nor creates any new category of private easementary rights not covered by the provisions of the Easements Act – Decision of Tahsildar will not bar a subsequent civil suit by either party to a proceeding u/s 131 in respect of easement claimed in the proceedings u/s. 131 – It cannot be said that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement – Decision of Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, u/s. 131(1), is open to challenge in a civil suit and subject to the decision of the civil courts – s. 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights.

s. 242 – Customary easements – Wajib-ul-arz – Held: It is the record of customs in a village in regard to easements

(including the right to irrigation and right of way); and the right to fishing in privately owned/held lands and water bodies.

The first respondent filed an application to the Naib Tahsildar under Section 131 of the Madhya Pradesh Land Revenue Code, 1959 claiming a right of way over the land of appellants to reach his lands and the same was allowed. The appellants filed an appeal as also revision and the same were dismissed. The appellants then filed a civil suit seeking a declaration that the first respondent does not have an easementary right, customary or otherwise, over his property and the order of Tahisildar under Section 131 of the Code recognizing such right, is illegal and erroneous. The trial court dismissed the suit on the ground that having regard to Section 131 read with Section 257 of the Code, the revenue court (Tahsildar) alone had jurisdiction to grant relief on the basis of custom and convenience of parties, and not the civil court. Aggrieved, the appellants filed an appeal as also second appeal and the same were dismissed. Therefore, the appellant filed an instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Under Section 131 of the Madhya Pradesh Land Revenue Code, 1959 a dispute relating to a claim for a customary easement over a private land, relating to a right of way or right to take water, which is not recognized and recorded as a customary easement in the village *Wajib-ul-arz* could be decided. [Para 6] [826-C-D]

Kamala Mills Ltd. v. State of Bombay **AIR 1965 SC 1942:1966 SCR 64;** *Dhulabhai v. State of Madhya Pradesh* **1968 (3) SCR 662 – referred to.**

1.2. The Code nowhere bars the jurisdiction of civil courts to decide upon easementary rights relating to agricultural or other lands. It neither creates nor

recognizes any new category of private easementary rights either by way of right of way or right to take water, which is not covered by the provisions of the Easements Act or which is not required to fulfill the requirements prescribed by the Easements Act. An easement cannot be acquired otherwise than in the manner provided in the Easement Act. Section 131 of the Code merely deals with customary easements covered by Section 18 of the Easements Act. It cannot be said that the elements of an easement required to be fulfilled under the Easement Act are not required in respect of a private easement under Section 131. Apart from the fact that Section 131 of the Code does not deal with acquisition of any special easement by some method which is not referred in the Easements Act, sub-Section (2) of Section 131 expressly provides that irrespective of any order passed by the Tahsildar under Section 131, any person can establish any right relating to an easement by a civil suit. There is nothing in Section 131 or any other provision of the Code, which makes the decision of the Tahsildar final and not open to question in a civil court. Therefore, the decision of the Tahsildar will not bar a subsequent civil suit by either party to a proceeding under Section 131, in respect of the easement claimed in the proceedings under Section 131 of the Code. [Para 9] [828-H; 829-A-F]

1.3. When a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction. Similarly, when a person who does not have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such land can resist such assertion or obstruct the exercise of the easementary right and also approach the civil court to declare that the defendant has

no easementary right of the nature claimed, over his land and/or that the defendant should be prevented from asserting such right or interfering with his possession and enjoyment. [Para 10] [829-G-H; 830-A]

1.4. Section 257 of the Madhya Pradesh Land Revenue Code, 1959 relates to the exclusive jurisdiction of the revenue authorities. Any statutory provision ousting the jurisdiction of civil courts should be strictly construed. A suit for enforcement of an easementary right or for a declaration that the defendant does not have any easementary right over plaintiff's property or a suit for injunction to restrain a defendant from interfering with the possession of plaintiff or exercising any easementary right over plaintiff's property, is not barred by the Code. Such suits do not fall under any of the excluded matters enumerated in clauses (a) to (z-2) of Section 257 of the Code. Section 257, no doubt, also provides that no civil court shall entertain any suit instituted to obtain a decision or order *on any matter which the States Government, the Board or any Revenue Officer is empowered to determine by the provisions of the Code*. But this is subject to the opening words of the Section "except as otherwise provided in this Code or in any other enactment for the time being in force". Sub-section (2) of Section 131 of the Code reserves and retains specifically the jurisdiction of the civil court to entertain suits relating to any easements, irrespective of the decision of the Tahsildar on a similar issue. Therefore, the right to decide upon the nature of easements and enforcement of easements is expressly preserved for decision by a civil court in a civil suit. The two fold object of sub-Section (2) of Section 131 is to declare that Section 131(1) of the Code does not deal with a matter which is in the exclusive province of revenue authorities and also to enable either party to approach the civil court in regard to any easementary right, irrespective of the decision

under Section 131(1) by the Tahsildar. The effect of Section 257 and Section 131(2) is that the enquiry and decision by the Tahsildar based on "previous custom" and "conveniences of parties" in regard to any private easementary rights relating to right of way or right to water will always be subject to the decision of the civil court in any civil suit by any party relating to that matter. Therefore, Section 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights. [Para 11] [830-B-H; 831-A-B]

Nathuram v. Siyasharan **1969 JLJ 115;** *Rambai v. Harchand* **1979 RN 532 – disapproved.**

Gopidas (Mahant) v. Ram Krishna Pandey **1971 JLJ 825;** *Fakka v. Hariram* **1984 RN 422 – approved.**

1.5. *Wajib-ul-arz* is the record of customs in a village in regard to easements (including the right to irrigation and right of way); and the right to fishing in privately owned/held lands and water bodies. These entries could be modified in the manner provided in sub-section (5) of Section 242 of the Code. Though the Code provides for maintaining a record of all customary easements imposed upon privately held lands and water bodies, significantly the Code does not provide the remedies available in the event of disturbance or interference with such easements recorded in *Wajib-ul-arz,* as the remedy is only way of a suit before the civil court. Customary easements are the most difficult to prove among easements. To establish a custom, the plaintiff will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable. If the *Wajib-ul-arz (*where such a record is maintained) records or shows the customary easement,

it would make the task of civil courts comparatively easy, as there will be no need for detailed evidence to establish the custom. If the remedy for violation of a customary easement recognized and recorded in the *Wajib-ul-arz* is by way of a civil suit, it is inconceivable that in regard to violation of a customary easement *not recognized or recorded in the Wajib-ul-arz,* the remedy would be only by way of a summary enquiry by the Tahsildar under Section 131 of the Code, and not by a suit, before the civil court. [Para 15] [834-G-H; 835-A-D]

1.6. It cannot be said that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement (relating to right of way or right to take water, to a person's land). The decision of the Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, under Section 131(1), is open to challenge in a civil suit and subject to the decision of the civil court. The jurisdiction of the civil court to try any suit relating to easements is not affected by Sections 131, 242 or 257 of the Code. The judgments and decrees of the courts below are set aside and it is declared that the civil court has the jurisdiction to try the suit filed by the appellants. [Para 16] [835-E-G]

Case Law Reference:

1966 SCR 64	**Referred to.**	**Para 8**
1968 (3) SCR 662	**Referred to.**	**Para 8**
1969 JLJ 115	**Disapproved.**	**Para 12**
1979 RN 532	**Disapproved.**	**Para 12**
1971 JLJ 825	**Approved.**	**Para 13**
1984 RN 422	**Approved.**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4922 of 2011.

From the Judgment & Order dated 19.1.2007 of the High Court of Madhya Pradesh Bench at Indore in First Appeal No. 1151 of 2005.

Ujjal Singh, J.P. Singh, R.C. Kaushik for the Appellants.

Sushil Kumar Jain, Puneet Jain, B.L. Joshi, Pratibha Jain, Vikas Upadhyay, B.S. Banthia for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellants claim to be the owners of lands bearing Khasra Nos.29/2/2 and 29/1. The first respondent Jagdish claims to be the owner of Khasra Nos.36/3 and 36/4. The first respondent made an application to the Naib Tahsildar, Tappa Betma, Depalpur, Indore District, under section 131 of the Madhya Pradesh Land Revenue Code, 1959 ('Code' for short) claiming a right of way over Khasra Nos.29/2/2 and 29/1 of the appellants, to reach his lands bearing Khasra Nos.36/3 and 36/4. The Naib Tahsildar made on order dated 25.10.2001, under section 131 of the Code, holding that first respondent, with his agricultural equipments, bullock-cart etc., was entitled to pass through the Government Road, Khasra No.21 (East to West) of the village Salampur and thereafter pass through Khasra Nos. 29/1 and 29/2/2 belonging to the appellants, for reaching his land bearing Khasra Nos.36/3 and 36/4 and the appellants shall not obstruct such passage. The appeal by the appellants filed against the said order under section 44 of the Code was dismissed and the subsequent revision filed by the appellants under section 50 of the Act was also dismissed.

3. Thereafter appellants filed Civil Suit No.66A/2002 on the file of the Civil Judge (Class II), Depalpur, Indore district for the following reliefs : (a) a declaration that the first respondent did

not have any right of way over their lands bearing Nos.29/2/2 and 29/1 to reach his lands bearing Khasra Nos.36/3 and 36/4 and that they are entitled to enjoy their lands without any interference from first respondent; (b) for a declaration that the order dated 25.10.2001 passed by the Tahsildar creating a new passage, over khasra Nos.29/1 and 29/2/2, was illegal; and (c) for a consequential injunction restraining first respondent from creating/ constructing any new passage, over their lands. The said suit was dismissed by the trial court, by judgment dated 4.12.2004 on the ground that having regard to section 131 read with section 257 of the Code, the revenue court (Tahsildar) alone had jurisdiction to grant relief on the basis of custom and convenience of parties, and it did not have any jurisdiction. The appeal (Appeal No.3-A/2005) filed by the appellants was dismissed by the first appellate court on 19.4.2005. The subsequent second appeal filed by the appellants was also dismissed by the High Court on 19.1.2007. The said judgment is under challenge in this appeal by special leave.

4. On the contentions urged by the parties, the following questions arise for our consideration:

(a) Whether the jurisdiction of the civil court to entertain a suit for declaration or injunction, claiming a customary easement of right of way or right to take water, through the land of a servient owner, is barred by section 257 of the Code, on the ground that it is a matter which the Revenue Officer (Tahsildar) is empowered to decide under section 131 of the Code?

(b) Whether the civil court has no jurisdiction to entertain a suit by the owner of a land for a declaration that the defendant does not have an easementary right, customary or otherwise, over his property and the order of Tahsildar under section 131 of the Code recognizing such right, is illegal and erroneous?

5. Section 131 of the Code deals with rights of way and other private easements. It is extracted below :

> *"131. Rights of way and other private easements*.—(1) In the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of the village, otherwise than by the recognized roads, paths or common land, including those road and paths recorded in the village Wajib-ul-arz prepared under section 242 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry, decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned.
>
> (2) No order passed under this section shall debar any person from establishing such rights of easement as he may claim by a civil suit."

Section 257 deals with the exclusive jurisdiction of revenue authorities in regard to revenue matters under the Code, and bar of jurisdiction of civil courts in regard to such matters. The relevant portion thereof is extracted below :

> *"257. Exclusive jurisdiction of revenue authorities.*— Except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is by this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters—
>
> (a) to (z-2) xxxxx [not extracted as not relevant]"

6. An analysis of section 131 of the Code shows that it provides for the adjudication by the Tahsildar, in respect of disputes raised by a cultivator, relating to any of the following

three private easementary rights:-

(a) the route by which a cultivator shall have access to his fields;

(b) the route by which a cultivator shall have access to waste or pasture lands of the village; and

(c) the route by which a cultivator shall have access to the source from which, or the course by which, he may avail himself of water.

Section 131 provides that such disputes shall be decided in each case, by the Tahsildar, after a local enquiry, with reference to the previous custom and with due regard to the convenience of all parties concerned. The disputes relating to recognized roads, paths or common land including those roads and paths recorded in the village *Wajib-ul-arz* prepared under section 242 of the Code are expressly excluded from the scope of section 131 of the Code. It is thus clear that what could be decided under section 131 of the Code is a dispute relating to a claim for a customary easement over a private land, relating to a right of way or right to take water, which is not recognized and recorded as a customary easement in the village *Wajib-ul-arz.*

7. The definition of different easements, the manner of imposition and acquisition of easementary rights, the incidents of easements and the remedies in case of interference or disturbance with easements are governed by the provisions of the Indian Easements Act, 1882. Easement Act refers to the different methods by which easements are acquired or imposed, that is, namely easements by grant, easements of necessity, easements by prescription and customary easements. Acquisition of an easementary right, by any of the aforesaid methods, requires fulfillment of the conditions prescribed under the Easements Act. A private easement, including a right of way to a person's land or right to take water from a source to his land, cannot be acquired in a manner not

contemplated or prescribed by the Easement Act. Easements by grant require a grant by the owner of the servient heritage. Easements of necessity are based on implied grants or reservations made by the owner of a servient heritage, at the time of disposition such as transfers and partitions. Easements by prescription can be acquired only by peaceable and open enjoyment, without interruption for twenty years. Customary easement can be are acquired by virtue of a local custom.

8. Having regard to section 9 of the Code of Civil Procedure, a civil court can entertain any suit of civil nature except those, cognizance of which is expressly or impliedly barred. In *Kamala Mills Ltd. v. State of Bombay* [AIR 1965 SC 1942] this court held :

> "The normal rule prescribed by section 9 of the Code of Civil Procedure is that the courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred……. Whenever it is urged before a civil court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider *whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate*. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. *But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive*. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the

> tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not."

(emphasis supplied)

In *Dhulabhai v. State of Madhya Pradesh* - 1968 (3) SCR 662, a Constitution Bench of this Court held that exclusion of the jurisdiction of the civil court is not readily to be inferred with, unless the following, among other conditions apply :

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure…….
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

9. The Code nowhere bars the jurisdiction of civil courts

to decide upon easementary rights relating to agricultural or other lands. The Madhya Pradesh Land Revenue Code neither creates nor recognizes any new category of private easementary rights either by way of right of way or right to take water, which is not covered by the provisions of the Easements Act or which is not required to fulfill the requirements prescribed by the Easements Act. An easement cannot be acquired otherwise than in the manner provided in the Easement Act. Section 131 of the Code does not provide for or recognize a new type of easement which is not contemplated or recognized in Easement Act, but merely deals with customary easements covered by section 18 of the Easements Act. Nor can it be said that the elements of an easement required to be fulfilled under the Easement Act are not required in respect of a private easement under section 131 of the Code. Apart from the fact that section 131 of the Code does not deal with acquisition of any special easement by some method which is not referred in the Easements Act, sub-section (2) of section 131 expressly provides that irrespective of any order passed by the Tahsildar under section 131, any person can establish any right relating to an easement by a civil suit. There is nothing in section 131 or any other provision of the Code, which makes the decision of the Tahsildar final and not open to question in a civil court. Therefore, the decision of the Tahsildar will not bar a subsequent civil suit by either party to a proceeding under section 131 of the Code, in respect of the easement claimed in the proceedings under section 131 of the Code.

10. When a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction. Similarly, when a person who does not have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such land can resist such assertion or obstruct the exercise of the easementary right and also approach the civil

court to declare that the defendant has no easementary right of the nature claimed, over his land and/or that the defendant should be prevented from asserting such right or interfering with his possession and enjoyment.

11. Section 257 relates to the exclusive jurisdiction of the revenue authorities. Any statutory provision ousting the jurisdiction of civil courts should be strictly construed. A suit for enforcement of an easementary right or for a declaration that the defendant does not have any easementary right over plaintiff's property or a suit for injunction to restrain a defendant from interfering with the possession of plaintiff or exercising any easementary right over plaintiff's property, is not barred by the Code. Such suits do not fall under any of the excluded matters enumerated in clauses (a) to (z-2) of section 257 of the Code. Section 257, no doubt, also provides that no civil court shall entertain any suit instituted to obtain a decision or order *on any matter which the State Government, the Board or any Revenue Officer is empowered to determine by the provisions of the code*. But this is subject to the opening words of the section "except as otherwise provided in this Code or in any other enactment for the time being in force". We have already noticed that sub-section (2) of section 131 of the Code reserves and retains specifically the jurisdiction of the civil court to entertain suits relating to any easements, irrespective of the decision of the Tahsildar on a similar issue. Sub-section (2) of section 131 provides that no order passed under section 131 shall debar any person from establishing such rights of easements as he may claim by a civil suit. Therefore the right to decide upon the nature of easements and enforcement of easements is expressly preserved for decision by a civil court in a civil suit. The two fold object of sub-section (2) of section 131 is to declare that section 131(1) of the Code does not deal with a matter which is in the exclusive province of revenue authorities and also to enable either party to approach the civil court in regard to any easementary right, irrespective of the decision under section 131(1) by the Tahsildar. The effect of

section 257 and section 131(2) is that the enquiry and decision by the Tahsildar based on "previous custom" and "conveniences of parties" in regard to any private easementary rights relating to right of way or right to water will always be subject to the decision of the civil court in any civil suit by any party relating to that matter. Therefore it has to be held that section 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights.

12. But some decisions of the Madhya Pradesh High Court have proceeded on the assumption, rather erroneously and without any basis, that the private easements including right of way referred under section 131 of the Code, are not the easements which are dealt with in the Indian Easement Act, but are a new type of easement unknown to general law of easements, which require to be decided by the Tahsildar only with reference to the previous customs and conveniences of parties. A distinction is sought to be drawn by those decisions, between easements under the Easement Act and easements under section 131 of the Code, by holding that the Easement Act deals with easements perfected by prescription, whereas section 131 of the Code refers to private easements, which are not perfected by prescription. They also proceed on the basis that in view of section 131 of the Code providing for a Revenue Authority, that is a Tahsildar, to deal with the special type of private easements provided for in section 131 of the Code, civil courts will have no jurisdiction to entertain or decide any matter relating to such type of private easements, having regard to the bar contained in section 257 of the Code; and consequently any decision of the Tahsildar under section 131 of the Code is amenable only to an appeal and thereafter a revision provided under the Code itself, and is not open to challenge in a civil suit [See : *Nathuram v. Siyasharan* - 1969 JLJ 115 and *Rambai v. Harchand* - 1979 RN 532].

13. On the other hand, other decisions of the Madhya Pradesh High Court have taken the view that a civil court is not

barred from entertaining suits for declaration and/or injunction, against a person who has secured an order under section 131 of the Code, to declare such order of Tahsildar as illegal and not binding or to restrain the defendant from exercising the right recognized by the Tahsildar [*Gopidas (Mahant) v. Ram Krishna Pandey* – 1971 JLJ 825 and *Fakka v. Hariram* – 1984 RN 422]. In *Gopidas* (supra), a learned Single Judge of the Madhya Pradesh High Court (A.P. Sen, J., as he then was) explained the position succinctly, thus:

> "The scheme underlying the section, envisages a suit under section 131(2) by the claimant for the establishment of his right, if such right is not recognized by the Tahsildar. This necessarily implies that the correctness of the finding reached by the Tahsildar may be questioned in subsequent legal proceedings in the ordinary Courts of law. No doubt, the language of section 131(2) is susceptible of the construction suggested by the learned counsel that the right of a suit is confined to the claimant. This, however, does not result in the consequence that a person, on whose property a right of way is declared by Tahsildar to exist, should have no remedy for the protection of his rights in property, against an arbitrary or erroneous assumption of jurisdiction by the Tahsildar."

We respectfully agree with the said observations. The decisions in *Nathuram* and *Rambai* are not good law.

14. At this juncture we may refer to the relevance of *Wajib-ul-arz* while dealing with cases of customary easements. Section 242 of the Code deals with *Wajib-ul-arz* and is extracted below :

> *"242. Wajib-ul-arz*.—(1) As soon as may be after this Code comes into force, the Sub-Divisional Officer shall, in the prescribed manner, ascertain and record the customs in each village in regard to –
>
> (a) the right to irrigation or right of way or other

easement;

(b) the right to fishing;

in any land or water not belonging to or controlled or managed by the State Government or a local authority and such record shall be known as the Wajib-ul-arz of the village.

(2) The record made in pursuance of sub-section (1), shall be published by the Sub-Divisional Officer in such manner as may be prescribed.

(3) Any person aggrieved by any entry made in such record may, within one year from the date of the publication of such record under sub-section (2), institute a suit in a civil court to have such entry cancelled or modified.

(4) The record made under sub-section (1) shall, subject to the decision of the civil court in the suit instituted under sub-section (3), be final and conclusive.

(5) The (Sub-Divisional Officer) may, on the application of any person interested or on his own motion, modify an entry or insert any new entry in the Wajib-ul-arz on any of the following grounds :

(a) That all persons interested in such entry wish to have it modified; or

(b) That by a decree in a civil suit it has been declared to be erroneous; or

(c) That being founded on a decree or order of a civil court or on the order of a Revenue Officer it is not in accordance with such decree or order; or

(d) That being so founded, such decree or order has subsequently been varied on appeal, revision or review; or

(e) That the civil court has by a decree determined any custom existing in the village."

Rules have been made under section 242 relating to *Wajib-ul-arz* vide notification dated 2.2.1966, Rule 2 thereof is extracted below :

"2. Customs under sub-section (1) of section 242 shall be ascertained and recorded in the *Wajib-ul-arz* under the following heads, namely : -

(i) Right to irrigation;

(ii) Other water-rights;

(ii) Right to fishing;

(iv) Rights of way, village roads, paths, drains and the like;

(v) Rights of persons of other villages over the lands of the village;

(vi) Rights of the villagers over the lands of other villages;

(vii) Other easement – (a) Burial and cremation ground, (b) Gaothan, (c)Encamping-ground, (d) Threshing-floor, (e)Bazars, (f) Skinning-grounds, (g) Rights to graze and take fuel, (h) Manure and rubbish;

(viii) Other miscellaneous rights."

15. *Wajib-ul-arz* is thus the record of customs in a village in regard to (i) easements (including the right to irrigation and right of way); and (ii) the right to fishing in privately owned/held lands and water bodies. The entries therein could be modified in the manner provided in sub-section (5) of section 242 of the Code. Though the Code provides for maintaining a record of all customary easements imposed upon privately held lands and water bodies, significantly the Code does not provide the

remedies available in the event of disturbance or interference with such easements recorded in *Wajib-ul-arz,* as the remedy is only way of a suit before the civil court. Customary easements are the most difficult to prove among easements. To establish a custom, the plaintiff will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable. If the *Wajib-ul-arz (*where such a record is maintained) records or shows the customary easement, it would make the task of civil courts comparatively easy, as there will be no need for detailed evidence to establish the custom. Be that as it may. If the remedy for violation of a customary easement recognized and recorded in the *Wajib-ul-arz* is by way of a civil suit, it is inconceivable that in regard to violation of a customary easement *not recognized or recorded in the Wajib-ul-arz,* the remedy would be only by way of a summary enquiry by the Tahsildar under section 131 of the Code, and not by a suit, before the civil court.

Conclusion

16. In the circumstances, we reject the contention that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement (relating to right of way or right to take water, to a person's land). The decision of the Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, under section 131(1) of the Code, is open to challenge in a civil suit and subject to the decision of the civil court. The jurisdiction of the civil court to try any suit relating to easements is not affected by section 131, 242 or section 257 of the Code. In view of the above, this appeal is allowed and the judgments and decrees of the courts below are set aside and it is declared that the civil court has the jurisdiction to try the suit filed by the appellants. The trial court is requested to dispose of the suit expeditiously.

N.J. Appeal allowed.

CHITTARANJAN DAS
v.
STATE OF ORISSA
(Criminal Appeal No. 820 of 2007)

JULY 04, 2011

[G.S. SINGHVI AND CHANDRAMAULI KR. PRASAD, JJ.]

Prevention of Corruption Act, 1947 – s. 19 – Previous sanction necessary for prosecution – FIR lodged against a public servant for possessing assets disproportionate to known sources of income – Vigilance Department seeking sanction for prosecution of the public servant – Refusal by State Government to grant sanction for prosecution – Superannuation of the public servant – Thereafter, despite request by Vigilance Department the State Government declined to reconsider the decision – Subsequently, charge sheet filed u/s. 5(2) rw s. 5(1)(e) of the Act against the public servant – Special Judge taking cognizance of the offence and issued process – Challenge to – Held: In a case in which sanction sought is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public Servant – Any other view will render the protection illusory – Thus, impugned order is set aside and the prosecution of the public servant pending in the court of Special Judge is quashed.

Appellant, public servant was found in possession of disproportionate assets to the tune of Rs.5.5 lakhs. The Vigilance Department sought sanction for prosecution of the appellant but the State Government declined to grant sanction. Thereafter, the appellant superannuated from service. The Vigilance Department requested the State

Government for reconsideration of the earlier order refusing the sanction for prosecution of the appellant. The State Government declined to grant sanction for prosecution as no *prima facie* case of disproportionate assets was made out against the appellant. Thereafter, the Vigilance Department filed charge-sheet against the appellant under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 alleging acquisition of disproportionate assets to the tune of Rs.1.4 lakhs. The Special Judge took cognizance of the said offence and issued non-bailable warrant against the appellant. Aggrieved, the appellant filed a petition under Section 482 of the Code of Criminal Procedure seeking quashing of the said order but the High Court disposed of the same. The trial court also dismissed the application for discharge filed by the appellant. The appellant then challenged the said order and the High Court dismissed the same. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. Sanction is a devise provided by law to safeguard public servants from vexatious and frivolous prosecution. It is to give them freedom and liberty to perform their duty without fear or favour and not succumb to the pressure of unscrupulous elements. It is a weapon at the hands of the sanctioning authority to protect the innocent public servants from uncalled prosecution but not intended to shield the guilty. In the instant case, while the appellant was in service, sanction sought for his prosecution was declined by the State Government. The Vigilance Department did not challenge the same and allowed the appellant to retire from service. After the retirement, Vigilance Department requested the State Government to reconsider its decision, which was not only refused but the State Government while doing so clearly observed that no *prima-facie* case of

disproportionate assets against the appellant is made out. Notwithstanding that Vigilance Department chose to file charge-sheet after the retirement of the appellant and on that Special Judge had taken cognizance and issued process. In a case in which sanction sought is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public Servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility. The submission that refusal to grant sanction under Section 19 of the Prevention of Corruption Act, 1947 while the appellant was in service is of no consequence as undisputedly charge-sheet against the appellant was filed and further the Court had taken cognizance of the offence and issued process after his retirement, cannot be accepted. [Paras 7 and 8] [842-E-G; 843-A-F]

1.2. On facts, the prosecution of the appellant shall be an abuse of the process of the Court. According to the First Information Report, appellant possessed disproportionate assets worth Rs.5.5 lakhs. However, according to the charge-sheet, the disproportionate assets were to the extent of Rs.1.44 lakhs only. The State Government while declining to grant sanction for prosecution observed that assets possessed by the appellant are not disproportionate to his known source of income. Further, no disputed question being involved, the High Court instead of making observation as to "whether in instant case sanction order is necessary and whether that was refused by the State Government and what would be the consequence thereof" to be decided

by the trial court, ought to have decided the issues itself. The facts being not in dispute the High Court erred in not deciding these issues. The order of the High Court is set aside and the appellant's prosecution in pending in the Court of Special Judge is quashed. [Para 10, 11 and 12] [844-G-H; 845-A-D]

N. Bhargavan Pillai (dead) by LRs. & Anr. vs. State of Kerala **AIR 2004 SC 2317 - distinguished.**

Case Law Reference:

AIR 2004 SC 2317 distinguished. Para 8

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 820 of 2007.

From the Judgment & Order dated 11.7.2006 of the High Court of Orissa in Criminal Misc. Case No. 1499 of 2004.

Vinod Bhagat for the Appellant.

Suresh Chandra Tripathy for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Bereft of unnecessary details the facts giving rise to the present appeal are that the appellant, a member of the Orissa Administrative Service, at the relevant time was serving as a Deputy Secretary to the Government of Orissa in the Irrigation Department. The officers of the Vigilance Department searched his house after obtaining a search warrant from the Court, on 17th March, 1992. It led to registration of a first information report against the appellant. During the investigation, it was found that the appellant possessed disproportionate assets of Rs.5,58,752.40. As the appellant was removable from service by the State Government, the Vigilance Department sought its sanction for prosecution of the appellant. The State Government by its letter dated 13th May, 1997, declined to grant

sanction and advised that the proposal for prosecuting the appellant be dropped. The appellant superannuated from service on 30th June, 1997. It seems that even after the retirement of the appellant, the Vigilance Department wrote on 25th of March, 1998 for reconsideration of the earlier order refusing the sanction for prosecution of the appellant. The State Government by its letter dated 31st July, 1998 wrote back to the Vigilance Department and declined to grant sanction for prosecution, as in its opinion there was no prima facie case against the appellant and the assets held by him were not disproportionate to the known sources of his income. Accordingly, the State Government reiterated that there is "no justification for reconsideration of the earlier orders refusing the sanction of prosecution" of the appellant. Notwithstanding the aforesaid refusal of the Government, the Vigilance Department on 10th September, 1998 filed charge-sheet against the appellant under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 alleging acquisition of disproportionate assets of Rs.1.44.234.78 between 1st January, 1980 and 31st December, 1985. The charge-sheet was laid before the Special Judge (Vig.), Bhubneshwar who by its order dated 2nd August, 1999 took cognizance of the aforesaid offence and issued non-bailable warrant against the appellant.

2. Appellant, aggrieved by the above order taking Cognizance of offence and issuance of the non-bailable warrant of arrest, filed petition under Section 482 of the Code of Criminal Procedure seeking quashing of the aforesaid order inter alia on the ground that his prosecution without sanction of the State Government is bad in law but the High Court by its Order dated 22nd September, 2003 disposed of the application with liberty to the appellant to raise this contention before Special Judge (Vig.) at the time of the framing of the charge.

3. Appellant, thereafter filed an application for discharge before the trial court which dismissed the same by order dated

9th June, 2004 *inter alia* on the ground that the appellant having retired from service, prior sanction is not necessary. Appellant challenged the aforesaid order before the High Court which by the impugned order rejected the challenge and while doing so observed as follows:

> "6. On a conspectus of the facts and circumstances involved in the case and the position of law in the matter of sanction vis-à-vis the impugned order, this Court does not find any illegality in that order so as to invoke the inherent power with a view to quash the impugned order. Be that is it may, it is made clear that the disputed question as to whether in the present case a sanction order is necessary and whether that was refused by the State Government and what is the consequence thereof, may be gone into at the time of trial if raised by the accused-petitioner notwithstanding rejection of his application by the impugned order inasmuch as the foregoing discussion by this Court in any manner does not interfere with that right of the accused to be pursued, if so legally advised at the time of trial."

4. Mr. Vinoo Bhagat appearing on behalf of the appellant submits that the State Government having refused to grant sanction for prosecution and thereafter declined to reconsider this decision and further having declined to grant sanction for the prosecution of the appellant his prosecution is illegal and an abuse of the process of the Court.

5. Mr. S.C. Tripathy, however, appearing on behalf of the respondents submits that the charge-sheet was filed after the retirement of the appellant and in fact on that basis cognizance of the offence was taken and process issued thereafter and hence, the appellant cannot challenge his prosecution on the ground of want of sanction. According to him, as the appellant ceased to be a public servant on the date when the Court took cognizance of the offence and issued process, sanction for his prosecution is not necessary at all.

6. We do not have the slightest hesitation in accepting the broad submission of Mr. Tripathi that once the public servant ceases to be so on the date when the Court takes cognizance of the offence, there is no requirement of sanction under the Prevention of Corruption Act. However, the position is different in a case where Section 197 of the Code of Criminal Procedure has application. In fact, the submission advanced finds support from the judgment of this Court in the case of *N. Bhargavan Pillai (dead) by LRs. & Anr. vs. State of Kerala* AIR 2004 SC 2317 where it has been held as follows :

> "8. The correct legal position, therefore, is that an accused facing prosecution for offences under the Old Act or New Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the Court took cognizance of the said offences. But the position is different in cases where Section 197 of the Code has application."

7. However, in the present case, we are faced with the situation in which Vigilance Department asked the State Government to grant sanction while the appellant herein was in service which it refused. Not only that Vigilance Department sought for reconsideration of the decision by the State Government which prayer was also rejected. In fact the State Government reiterated that there is no prima facie case against the appellant and the assets held by him were not disproportionate to the known sources of his income. Mr. Tripathy points out that refusal to grant sanction under Section 19 of the Prevention of corruption Act, 1947 while the appellant was in service is of no consequence as undisputedly charge-sheet against the appellant was filed and further the Court had taken cognizance of the offence and issued process after his retirement. He points out in the case of *N. Bhargavan Pillai* (Supra) sanction sought for was refused but this Court did not find any illegality in that.

8. We do not find any substance in the submission of Mr.

Tripathy and the decision relied on is clearly distinguishable. Sanction is a devise provided by law to safeguard public servants from vexatious and frivolous prosecution. It is to give them freedom and liberty to perform their duty without fear or favour and not succumb to the pressure of unscrupulous elements. It is a weapon at the hands of the sanctioning authority to protect the innocent public servants from uncalled for prosecution but not intended to shield the guilty. Here in the present case while the appellant was in service sanction sought for his prosecution was declined by the State Government. Vigilance Department did not challenge the same and allowed the appellant to retire from service. After the retirement, Vigilance Department requested the State Government to reconsider its decision, which was not only refused but the State Government while doing so clearly observed that no prima-facie case of disproportionate assets against the appellant is made out. Notwithstanding that Vigilance Department chose to file charge-sheet after the retirement of the appellant and on that Special Judge had taken cognizance and issued process. We are of the opinion that in a case in which sanction sought is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public Servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility.

9. Now we revert to the decision of this Court in the case of *N. Bhargavan Pillai* (Supra) relied on by the respondents. True, it is that in paragraph 5 of the said judgment, it has been observed that "it is a case where the sanction which was sought for was refused" but from this paragraph, it is not clear whether it was sought before or after the retirement of the public servant. However, while reading the judgment as a whole, it is apparent

that in this case Charge-sheet against the public servant was filed after retirement. Further, sanction for his prosecution was sought and refused thereafter. This would be evident from the following narration of facts in the said judgment:

> "3……The managing Director of the Corporation wrote to the Director of Vigilance (Investigation) along with a copy of Ext.P-I report. The Director of Vigilance (Investigation) sanctioned registration of a case. On the basis of the direction the then Deputy Superintendent of Police, Vigilance, Kollam (PW-10) registered a case as per Ext. P-39. He entrusted the investigation to Inspector of the Kollam Vigilance Unit-I (PW-11), who conducted the investigation and sent a report to his higher authorities. *In the meantime, the accused retired from service on 28-2-1992. Since he had retired from service sanction for prosecution became unnecessary. The case was transferred to the newly established Pathanamthitta Vigilance Unit. PW-12, the Deputy Superintendent of Police, Vigilance, Pathanamthitta Unit who was put in charge of this case also verified the records and filed the charge sheet."*
>
> (underlining ours)

Thus in the case relied on, the sanction for prosecution was not necessary and therefore its refusal had no bearing on the Trial of the public servant. However, in the present case sanction was sought and refused while the appellant was in service. Hence, this judgment does not lend any support to the contention of the respondents and is clearly distinguishable.

10. Otherwise also, the facts of the case are so telling that we are of the opinion that the prosecution of the appellant shall be an abuse of the process of the Court. According to the First Information Report, appellant possessed disproportionate assets worth Rs.5.58 lakhs. However, according to the charge-sheet, the disproportionate assets were to the extent of Rs.1.44

lakhs only. State Government while declining to grant sanction for prosecution observed that assets possessed by the appellant are not disproportionate to his known source of income.

11. We are further of the opinion that no disputed question being involved, the High Court instead of making observation as to "whether in present case sanction order is necessary and whether that was refused by the State Government and what would be the consequence thereof" to be decided by the trial court, ought to have decided the issues itself. The facts being not in dispute the High Court erred in not deciding these issues.

12. In the result, we allow this appeal, set aside the order of the High Court and quash the appellant's prosecution in TR No. 113 of 1999, pending in the Court of Special Judge (Vig.) Bhubaneshwar.

N.J. Appeal allowed.

GOA ANTIBIOTICS & PHARMACEUTICALS LTD.
v.
R.K. CHAWLA & ANOTHER
(Criminal Miscellaneous Petition No. 10490 of 2011)

JULY 04, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Advocates Act, 1961:

ss. 29, 33 – Right to practice in courts – Held: A person enrolled as an Advocate only can practice in courts – Natural person can appear in person and argue his own case personally but he cannot give a power of attorney to anyone other than a person enrolled as an advocate to appear on his behalf –s.32, however, vests discretion in the court to permit any person who is not enrolled as an advocate to appear before the court and argue a particular case – In the instant case, an application for permission was filed by the Deputy Manager, power of attorney holder to argue the case personally on behalf of the petitioner-company – Supreme Court refused to exercise discretion under s.32 and rejected the said application – Petitioner-company granted four weeks time to engage a lawyer to appear and argue on its behalf.

s. 32 – Right to appear/argue on behalf of entity – Held: As regards the artificial persons like a company registered under the Companies Act or a registered co-operative society or a trust, neither the Director of the company nor member of the Managing Committee or officer bearer of the registered society or a trustee has a right to appear and argue on behalf of that entity, since that entity is distinct from its shareholders or office bearers or Directors – However, court has discretion u/s. 32 to permit such person to appear on behalf of that entity.

ss. 29 and 33 – Right of an enrolled lawyer to appear on behalf of someone and discretion vested in the court to permit a non-lawyer to appear before it – Distinction between.

Power of attorney: Right of power of attorney holder to appear or argue – Held: Power of attorney holder cannot, unless he is an enrolled lawyer, appear in court on behalf of anyone, unless permitted by the court u/s. 32 of Advocates Act, though of course he may sign sale deeds, agreements etc. and do other acts on behalf of someone else, unless prohibited by law – Advocates Act, 1961 – ss.29, 32, 33.

CRIMINAL APPELLATE JURISDICTION : Crl. M.P. No. 10490 of 2011.

From the Judgment & Order dated 21.4.2009 of the High Court of Bombay & Goa at Panaji in Criminal Revision Application No. 60 of 2008.

WITH

Crl. M.P. No. 10490 of 2011.

Petitioner-In-Person.

The following Order of the Court was delivered

O R D E R

Mr.Vishnu Kerikar, Deputy Manager, Finance & MS claims to be the power of attorney holder of the petitioner-Goa Antibiotics & Pharmaceuticals Limited in this case. He wishes to argue the case personally on behalf of the petitioner.

Section 33 of the Advocates Act, 1961 (hereinafter referred to as the 'Act') states as follows:

> "33. Advocates alone entitled to practise - Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."

A perusal of the above provision shows that only a person who is enrolled as an advocate can practice in a court, except where otherwise provided by law. This is also evident from Section 29 of the Act.

A natural person can, of course, appear in person and argue his own case personally but he cannot give a power of attorney to anyone other than a person who is enrolled as an advocate to appear on his behalf. To hold otherwise would be to defeat the provisions of the Advocates Act.

Section 32 of the Act, however, vests discretion in the court, authority or person to permit any person who is not enrolled as an advocate to appear before the court and argue a particular case. Section 32 of the Act is not the right of a person (other than an enrolled advocate) to appear and argue before the court but it is the discretion conferred by the Act on the court to permit any one to appear in a particular case even though he is not enrolled as an advocate.

In this case, an application for permission has been filed by Mr. Vishnu Kerikar who wishes to appear and argue on behalf of the petitioner-Goa Antibiotics & Pharmaceuticals Ltd. which is a company registered under the Indian Companies Act. We are not inclined to exercise our discretion under Section 32 of the Act and hence we reject the said application.

However, we grant the petitioner four weeks' time to engage a lawyer to appear and argue on behalf of the petitioner-company.

We make it clear that as regards artificial persons like a company registered under the Indian Companies Act, or a registered co-operative society, or a trust, neither the Director of the Company nor member of the Managing Committee or

office bearer of the registered society or a trustee has a right to appear and argue on behalf of that entity, since that entity is distinct from its shareholders or office bearers or directors. However, it is the discretion of the court under Section 32 of the Act to permit such person to appear on behalf of that entity.

There is a distinction between the right to appear on behalf of someone, which is only given to enrolled lawyers, and the discretion in the Court to permit a non-lawyer to appear before it. Under Sections 29 and 33 of the Act only those persons have a right to appear and argue before the court who are enrolled as an advocate while under Section 32 of the Act, a power is vested in the court to permit, in a particular case, a person other than an advocate to appear before it and argue the case. A power of attorney holder cannot, unless he is an enrolled lawyer, appear in Court on behalf of anyone, unless permitted by the Court under Section 32 of the Act, though of course he may sign sale deeds, agreements etc. and do other acts on behalf of someone else, unless prohibited by law.

Accordingly, the matter is adjourned by four weeks to enable the petitioner to engage a lawyer to appear and argue on its behalf.

D.G. Matter adjourned.

M/S. RAJMAL LAKHICHAND AND ANR.
v.
COMMR. CEN. EXC. & CUSTOMS, AURNAGABAD
(Civil Appeal No. 4919 of 2011)

JULY 4, 2011

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

Customs Act, 1962: s.130(3) – Reference – Scope of – Confiscation of seized silver – Silver weighing 194.250 kgs. which was locally purchased confiscated u/s.120(2) and silver weighing 1713.807 kgs. imported illegally from abroad confiscated u/s.111(d) – Tribunal directed confiscation of entire quantity of silver u/s.120(2) – Provision of s.120(2) was not invoked in the show cause notice for silver weighing 194.250 kgs. – Reference application before High Court – Question referred to High Court that whether Tribunal was justified in invoking s.120(2) to order confiscation of silver when the said provision was not invoked in the show cause notice and when the appellants were not given any opportunity of being heard in the matter by the Tribunal – High Court answered the reference in favour of appellant holding that Tribunal was not justified in invoking s120(2) to confiscate entire silver – It refused to expand the scope of reference to confiscation of silver to the extent of 1713.807 Kgs. and restricted it to the silver weighing 194.250 Kgs. only – Correctness of – Held: Correct – Tribunal was not justified in invoking the provisions of s.120(2) to order confiscation of silver when the said provision was not invoked in the show cause notice and when the appellant was not given any opportunity of being heard in the matter by the Tribunal – High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated u/s. 111(d) of the Act while hearing the reference with regard to silver weighing 194.250 kgs. but

confiscated under a different provision of law, namely, u/s.120(2) of the Act – High Court rightly held since two different laws are applicable there was no scope of expanding reference to include silver weighing 1713.807 Kgs also – Reference.

During search, the Directorate of Revenue Intelligence, seized silver weighing 1913.256 Kgs. from the premises of the appellants. Pursuant to the same, a show cause notice was issued to the appellants. The adjudicating authority discharged the show cause notice holding that the evidence collected were not convincing enough to hold the allegations as proved. The Tribunal allowed the appeals and ordered for confiscation of the seized silver absolutely and also imposed penalty on the appellants.

The appellants filed applications in which they framed as many as 11 questions and prayed for reference to the High Court. The Tribunal by its order dated 26.09.1996 rejected the reference applications holding that none of the questions raised therein required consideration by the High Court and also directed confiscation of silver weighing 194.250 kgs. which was locally purchased from "M/s. D" and for confiscation of another quantity of silver weighing 1713.807 kgs. as it was imported illegally from abroad.

Aggrieved, the appellants filed the application under Section 130(3) of the Customs Act before the High Court seeking direction to the Tribunal to refer the questions of law which the Tribunal refused to refer. The High Court passed the order to the effect that the question of law arose whether the Tribunal was justified in invoking the provisions of Section 120(2) of the Customs Act, 1962 to order confiscation of silver weighing 194.250 kgs. purchased from "M/s. D" when the said provisions was not invoked in the Show Cause Notice and when the

appellant was not given any opportunity of being heard in the matter by the Tribunal.

The appellant sought modification of the order which subsequently came to be modified deleting the words "weighing 194.250 kgs. purchased from M/s. D". Consequent upon the said modification, the modified question was referred to the High Court deleting the words "weighing 194.250 kgs. purchased from M/s. D". The High Court answered the said question in favour of the appellant and held that the Tribunal was not justified in invoking the provision of Section 120(2) of the Customs Act, 1962 to confiscate the seized silver to the extent it was confiscated in exercise of that power in absence of any show cause notice and also in absence of opportunity of being heard. By the said judgment and order, however, the High Court refused to expand the scope of reference to the confiscated seized silver to the extent of 1713.807 kgs. and restricted it to the silver of 194.250 kgs. only. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. Since, silver weighing 1713.807 kgs. was confiscated under Section 111(d), law applicable to the said confiscation was totally different from the confiscation of silver weighing 194.250 kgs. which was directed to be confiscated by applying the provisions of Section 120(2) of the Customs Act. The High Court was right in holding that since two different laws are applicable there is no question of getting the scope of reference expanded to include the silver weighing 1713.807 Kgs also for consideration while hearing the reference restricted only to the sliver weighing 194.250 Kgs. The confiscation of silver weighing 194.250 Kgs. by applying provisions of Section 120(2) of the Act was illegal and without jurisdiction as the show cause notice

was not issued proposing to make the said provisions applicable and, therefore, there was a violation of principle of natural justice. Section 120(2) of the Customs Act on which the confiscation of silver weighing 194.250 kgs. was concerned, cannot by any stretch of imagination be said to be similar or applicable to the other quantity of silver which was confiscated. Legal position is totally different and legal principles which are applicable also being different there was no scope for extending the reference by the High Court nor was there any scope for reframing or redrafting the question referred by including another separate and independent question of confiscation of silver weighing 1713.870 kgs. [Paras 13, 14] [860-E-H; 861-A-B]

2. Bare reading of Section 130(4) shows that the said provision came into the statute book only with effect from 2003 and, therefore, said provision is not applicable to the facts of the instant case. Section 130B is also not applicable to the instant case for the said provision applicable only for the purpose of amendment of the statement of the case. It has no relevance so far as the issue with regard to redrafting or reframing of a question of law is concerned. Therefore, the High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated under Section 111(d) while hearing the reference with regard to silver weighing 194.250 kgs. but confiscated under a different provision of law, namely, under Section 120(2) of the Customs Act. [Paras 16, 18, 19] [861-D-G-H; 862-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4919 of 2011.

From the Judgment & Order dated 20.4.2010 of the High Court of Bombay in Custom Reference No. 1 of 2002.

Soli Sorabjee, Preetesh Kapur, Seema Bengani, Sanbha Giri Rumnong, Dr. Kailash Chand for the Appellants.

B. Bhattacharya, ASG, Rajiv Nanda, Sunita Rani Singh, B. Krishna Prasad for the Respondent.

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 20.04.2010 passed by the Bombay High Court in Custom Reference No. 1 of 2002 whereby the High Court answered the question referred to it by the Customs, Excise and Gold (Control) Appellate Tribunal [for short "the Tribunal"] in favour of the appellant and against the Revenue holding that the Tribunal was not justified in invoking the provision of Section 120(2) of the Customs Act, 1962 to confiscate the seized silver to the extent it was confiscated in exercise of that power in absence of any show cause notice and also in absence of opportunity of being heard. By the aforesaid judgment and order, however, the High Court refused to expand the scope of reference to the confiscated seized silver to the extent of 1713.807 kgs. and restricted it to the silver of 194.250 kgs. only.

3. The Directorate of Revenue Intelligence [for short "the DRI"] searched the premises of the appellants on the basis of information gathered by it to the effect that large quantity of about 132 bricks of silver had been smuggled through sea route and diverted to Jalgaon. During the aforesaid search the DRI seized silver in Choursa form weighing 1913.256 kgs. Pursuant to the same, a show-cause notice was issued to the appellants dated 07.08.1993 to which they submitted their replies. The adjudicating authority took up the matter for consideration and by its order dated 30.08.1994 discharged the show-cause notices holding that the evidence collected were not convincing enough to hold the allegations as proved. The Central Board of Excise and Customs, New Delhi exercising powers under Section 129D of the Customs Act directed the

collector to apply to the Tribunal for determination of the issues specified in the review order, consequent upon which, the Tribunal was approached. The Tribunal by its order dated 19th March, 1996 allowed the appeals by setting aside the impugned order and ordered for confiscation of the seized silver absolutely. The Tribunal further held that Mr. Ishwarlal Lalwani and M/s. Rajmal Lakhichand, in whose custody the seized silver was found were liable for imposition of penalty under Section 112(b) of the Customs Act. Accordingly, a penalty of Rs. 10 lakhs was imposed as personal penalty on Mr. Ishwarlal Lalwani for acquiring the smuggled silver. The Tribunal, however, did not impose separate penalty on M/s. Rajmal Lakhichand since personal penalty on the person managing the affairs of the firm was imposed. The Tribunal also imposed penalty of Rs. 1 lakh on Mr. Sureshkumar Seth who had procured smuggled silver and delivered it to Mr. Ishwarlal Lalwani. M/s. Rajmal lakhichand and Mr. Ishwarlal Lalwani being aggrieved by the order dated 19th March, 1996 filed two reference applications in which they framed as many as 11 questions and prayed for reference to the High Court. The Tribunal by its order dated 29.09.1996 rejected the reference applications holding that none of the questions raised therein required consideration at the hands of the High Court.

4. Being aggrieved by the aforesaid order of the Tribunal rejecting the reference applications the appellants moved the High Court by way of application under Section 130(3) of the Customs Act. By filing the aforesaid applications the appellant-assessee sought for a direction to the Tribunal to refer the questions of law which the Tribunal refused to refer. The High Court took up the aforesaid application for consideration and passed an order on 17.03.1999 to the following effect: -

> "2. We have heard the learned counsel for the parties. The learned counsel for the Petitioners has submitted redrafted questions which according to him bring out the real controversy that arises from the order of Tribunal. We have carefully considered the questions proposed by the

> Petitioners before Tribunal and the redrafted questions submitted before us. We have also heard Mr. R.V. Desai, learned counsel for the Respondent. In our opinion, the following question of law arises from the order of the Tribunal:
>
> > "Whether the Tribunal was justified in invoking the provisions of Section 120(2) of the Customs Act, 1962 to order confiscation of silver weighing 194.250 kgs. purchased from M/s. Dilipkumar Harichand & Sons, Jalgaon, when the said provisions had not been invoked in the Show Cause Notice and when the applicants were not given any opportunity of being heard in the matter by the Customs, Excise & Gold (Control) Appellate Tribunal?"
>
> 3. We accordingly direct the Tribunal to refer the above question to this court for opinion under Section 130(3) of the Customs Act, 1962. Rule is made absolute in the above terms."

5. It is thus established from the aforesaid order passed by the High Court that only one question of law was found to have arisen from the order of the Tribunal dated 26.09.1996 which required consideration at the hands of the High Court. The prayer before the High Court was also to refer the other questions but the High Court felt that only the reframed question to the aforesaid effect only is a question of law arising from the order of the Tribunal, which was accordingly directed to be referred. Consequent upon the said order the Tribunal prepared the statement of case and referred the aforesaid question for the consideration of the High Court for its opinion under Section 130(3) of the Customs Act, 1962. Subsequent to the receipt of the aforesaid statement of case from the Tribunal the assessee took out a motion to the minutes of the order dated 17th March, 1999 passed by the High Court and sought modification of the order which subsequently came to be

modified deleting the words "weighing 194.250 kgs. purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon". Consequent upon the aforesaid modification, the modified question thus referred to the High Court for its opinion reads as under: -

> "Whether the Tribunal was justified in invoking the provision of Section 120(2) of the Customs Act, 1962 to order confiscation of silver, when the said provisions had not been invoked in the Show Cause Notice and when the applicants were not given any opportunity of being heard in the matter by the Customs, Excise & Gold (Control) Appellate Tribunal?"

6. The aforesaid reference was taken up for consideration by the High Court and during the course of arguments counsel appearing for the appellant sought to get the scope of the reference extended by making the submission that the question referred would also bring within its fold the entire quantity of silver weighing 1913.256 kgs. and not restricted to only 194.250 kgs. purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon. It was also submitted on behalf of the appellant that while considering the question referred to the High Court for its opinion it would have to deal with the legality of the confiscation of the entire quantity of silver weighing 1913.256 kgs. and if that is not done the very purpose of deleting the aforesaid words would get frustrated and would be rendered otiose.

7. The counsel appearing for the respondent, however, refuted the aforesaid submissions contenting inter alia that the High Court cannot expand the scope of the reference by including for its consideration the entire quantity of silver, i.e., 1913.256 kgs. It was also submitted by him that the attempt to widen the scope of the question to bring within its fold entire quantity of the confiscated silver weighing 1913.256 kgs. is nothing but an attempt to bring the question for consideration before this Court through back door which is not permissible in law. It was also submitted that the deletion of the words

referred to hereinabove would in no way enlarge the scope of the question referred for so far as the silver weighing 194.250 kgs. is concerned, as the same stood on completely different footing than the silver which was imported illegally and, therefore, confiscated. It was submitted by him that the silver weighing 1713.807 kgs. was confiscated under Section 111 (d) of the Customs Act, whereas rest of the silver weighing 194.250 kgs. was confiscated under sub-Section (2) of Section 120 of the Customs Act and, therefore, law applicable being different, the two types of silver stood apart from each other. It was also submitted by him that the two types of silver being in issue and only one of it having been referred there is no question of reframing or recasting the question of law as suggested by the counsel appearing for the appellant as the other quantity of silver weighing 1713.807 kgs. involves and revolves around a completely different law, namely, Section 111(d) and, therefore, cannot be held to be permissible to be raised on the same question as that of silver weighing 194.250 kgs.

8. In the light of the aforesaid submissions of the counsel appearing for the parties we have considered the records. It is disclosed from the records that the Tribunal by its order dated 29.09.1996 directed for confiscation of silver weighing 194.250 kgs. which was locally purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon, whereas the Tribunal also directed for confiscation of another quantity of silver weighing 1713.807 kgs. as it was imported illegally from abroad. Despite the fact that the silver weighing 194.250 kgs. was locally purchased the Tribunal directed for confiscation of the said quantity of silver also by applying the provisions of Section 120(2) of the Customs Act which provides that where smuggled goods are mixed with other goods in such a manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable for confiscation. The Tribunal also held that it was not possible to separate the quantity of silver weighing 194.250 kgs. from the rest of the smuggled silver and,

therefore, by virtue of Section 120(2) of the said quantity was also held liable for confiscation.

9. The aforesaid order of the Tribunal also makes it crystal clear that out of the entire quantity of silver weighing 1913.256 kgs., silver weighing 1713.807 kgs. was confiscated under Section 111(d) whereas silver weighing 194.250 kgs. was confiscated under Section 120(2) of the Customs Act.

10. The High Court in the impugned order took notice of the aforesaid difference of the orders of confiscation and the two types of silvers by applying two different provisions of law. The High Court observed that the Tribunal also considered the prayer of the counsel appearing for the appellant-assessee regarding the reframing of the question of law referred by the Tribunal to the High Court in terms of the order of the High Court as also the effect of the deletion of few words from the said question and that thereafter the Tribunal held that the deletion would not make any difference either way because the said deletion was in respect of applicability of the provisions of Section 120(2) of the Customs Act inasmuch as the powers under Section 120(2) were exercised with respect to the silver weighing 194.250 kgs. only.

11. Despite the deletion of the aforesaid words the issue that was required to be considered was only in respect of the provisions applicable being sub-Section (2) of Section 120 of the Customs Act and, therefore, in any event and even after the deletion of the said words the question of law which was referred and was required to be answered by the High Court was restricted only to the said quantity of silver weighing 194.250 kgs. for which only provisions of sub-Section (2) of Section 120 of the Customs Act was being made applicable.

12. In the present case, 11 questions were raised by the appellants before the Tribunal seeking for reference of the same as questions of law to the High Court by way of reference. The Tribunal rejected the said application seeking

for reference holding that none of the said 11 questions could be referred to the High Court by way of reference. As against the aforesaid decision of the Tribunal, the High Court directed that only one question out of the said 11 questions, particularly, question No. 11 is a question of law which could be referred to the High Court for its opinion and not any other question. At that stage, the appellant-assessee had the remedy to approach this Court as against the aforesaid order by the High Court calling for just one question out of the 11 questions to be referred to the High Court. The aforesaid remedy which was available to the appellant at that stage was not resorted to and only one question was then referred for the consideration and answer by the High Court. While the aforesaid question of law which was referred to the High Court for its opinion was being considered and argued, effort was made by the appellant-assessee to get the scope of reference expanded to other question for which earlier reference was sought and rejected by the Tribunal as also by the High Court.

13. Since, silver weighing 1713.807 kgs. was confiscated under Section 111(d), law applicable to the said confiscation was totally different from the confiscation of silver weighing 194.250 kgs. which was directed to be confiscated by applying the provisions of Section 120(2) of the Customs Act. The High Court in the impugned judgment and order held that since two different laws are applicable there is no question of getting the scope of reference expanded to include the silver weighing 1713.807 kgs. also for consideration while hearing the reference restricted only to the silver weighing 194.250 kgs. The High Court held that the confiscation of the aforesaid silver weighing 194.250 kgs. by applying provisions of Section 120(2) of the Customs Act is illegal and without jurisdiction as the show cause notice is not issued proposing to make the aforesaid provisions applicable and, therefore, there was a violation of principle of natural justice.

14. The aforesaid provision on which the said confiscation of silver weighing 194.250 kgs. is concerned, cannot by any

stretch of imagination could be said to be similar or applicable to the other quantity of silver which was confiscated. Legal position is totally different and legal principles which are applicable also being different there was no scope for extending the reference by the High Court nor was there any scope for reframing or redrafting the question referred by including another separate and independent question of confiscation of silver weighing 1713.870 kgs.

15. Mr. Soli Sorabjee, Sr. Advocate, appearing for the appellant sought to rely upon sub-Section (4) of Section 130 of the Customs Act to contend that the High Court has the power to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

16. We have considered the said submission of Mr. Sorabjee, but, unfortunately, we are not in a position to agree with him as it is clear on a bare reading of the said provision that the said provision came into the statute book only with effect from 2003 and, therefore, said provision is not applicable to the facts of the present case.

17. Mr. Soli Sorabjee, Sr. Advocate, also relied on Section 130B which is power of the High Court to require the statement to be amended. The said Section provides that if the High Court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

18. We have considered the said submission also of the counsel appearing for the appellant and are of the opinion that the said provision is not applicable to the present case for the said Section 130B is applicable only for the purpose of amendment of the statement of the case. It has no relevance so far as the issue with regard to redrafting or reframing of a question of law is concerned.

19. Therefore, we are of the considered opinion that the High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated under Section 111(d) while hearing the reference with regard to silver weighing 194.250 kgs. but confiscated under a different provision of law, namely, under Section 120(2) of the Customs Act.

20.Before parting with the case, however, we would like to observe that in the counter affidavit filed by the respondent certain observations have been made regarding the order passed by the High Court. Subsequently, however, the person who has filed the aforesaid counter affidavit had submitted an additional affidavit tendering his unqualified apology in the following manner: -

> "2. I state that the criticism, if any, of the Judgment of the High Court on merits, in the Counter-affidavit on behalf of the Respondents dated 2.2.2011 is not deliberate and totally unintentional. The inadvertence in this regard is highly regretted and deponent unconditionally withdraws any such criticism and tenders unconditional apology. The deponent has highest respects for the Hon'ble Courts and is duty bound to comply the directions passed by the Hon'ble Courts."

21. Although at one stage we were very unhappy with the language used by the deponent in the counter affidavit but since the concerned officer has tendered unqualified apology and has withdrawn the said statements made in the affidavit, we accept the aforesaid apology tendered and we do not intend to proceed any further in the matter and treat the said chapter closed.

22. In terms of the aforesaid observations and findings we dismiss this appeal leaving the parties to bear their own costs.

D.G. Appeal dismissed.