SUSHIL SURI
v.
C.B.I. & ANR.
(Criminal Appeal No. 1109 of 2011)

MAY 6, 2011

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

Code of Criminal Procedure, 1973:

s.482 – Inherent powers of the High Court – Scope and ambit of – Held: Section 482 of Cr.P.C. envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely: (i) to give effect to an order under the Cr.P.C.; (ii) to prevent an abuse of the process of Court; and (iii) to otherwise secure the ends of justice – Although the power possessed by the High Court under the said provision is very wide but it is not unbridled – It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the Court exists – The inherent powers should not be exercised to stifle a legitimate prosecution – The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material.

s.482 – Criminal proceedings for forgery/fabrication of documents with the intention of defrauding the bank as well as the exchequer – Charge-sheet against appellant and other directors of a company for offences punishable under ss. 120B, 420, 409, 468 and 471 of IPC – Allegation that they forged documents/vouchers to show purchase of machinery, a pre-condition for release of instalments of loan, and thus not

only duped the bank (PSB) but also defrauded the revenue by claiming depreciation on non-existent machinery and in the process cheated the public exchequer – Chief Metropolitan Magistrate took cognizance of the offences and summoned the appellant to stand trial – Appellant filed petition under s.482 CrPC – High Court declined to quash the chargesheet – Justification of – Held: Justified – On a conspectus of the factual scenario, prima facie, the chargesheet does disclose commission of offences by the appellant under ss. 120B, 420, 409, 468 and 471 of IPC – More than sufficient circumstances exist suggesting the hatching of criminal conspiracy and forgery of several documents leading to commission of the aforementioned offences – Having regard to the modus operandi adopted by the accused, as projected in the chargesheet, it is clear that it is not a fit case for exercise of jurisdiction by the High Court under s.482 Cr.P.C. as also by this Court under Article 142 of the Constitution – The accused had not only duped PSB, they had also availed of depreciation on the machinery, which was never purchased and used by them, causing loss to the exchequer, a serious economic offence against the society – Merely because the dues of the bank have been paid up, the accused-appellant cannot be exonerated from the criminal liability – Therefore, the chargesheet against him cannot be quashed – Trial Court directed to proceed with the case – Penal Code, 1860 – ss. 120B, 420, 409, 468 and 471.

Penal Code, 1860 – ss.120A and 120B – Offence of "criminal conspiracy" – Essential ingredients of, discussed.

Penal Code, 1860 – s.463 – Forgery – Definition of – Held: Is very wide – Basic elements of forgery stated.

Precedent – Ratio decidendi – Held: While applying ratio, the Court may not pick out a word or sentence from the judgment divorced from the context in which the said question arose for consideration – Even one additional or different fact may make a world of difference between the conclusions in

two cases and blindly placing reliance on a decision is never proper.

The Company in question and its directors, including the appellant, and other persons allegedly had conspired to forge, fabricate and use documents in order to avail loan from the Punjab and Sind Bank (PSB) and had opened or caused to be opened fictitious bank accounts in the names of machinery suppliers to encash the pay orders/demand drafts issued by PSB and played fraud with PSB as also on the public exchequer by claiming depreciation on the machinery, which was never purchased, and obtained pecuniary advantage for themselves.

Chargesheet was accordingly filed by the CBI in the Court of Chief Metropolitan Magistrate for offences punishable under Sections 120B, 420, 409, 468 and 471 of IPC. The Chief Metropolitan Magistrate took cognizance of the offences and summoned the accused to stand trial. On being so summoned, the appellant filed petition under Section 482 of Cr.P.C., praying for quashing of the Chargesheet mainly on the ground that once the Company had repaid the loan to PSB along with interest, no loss was caused to PSB and, therefore, they had not committed any offence for which Chargesheet had been filed. The High Court declined to quash the Chargesheet filed against the appellant and other directors of the Company holding that merely because the Company and its directors had repaid the loan to PSB they could not be exonerated of the offences committed by forging/fabricating the documents with the intention of defrauding the bank as well as the exchequer. Accordingly, the petition filed by the appellant was dismissed and he was directed to appear before the trial court.

The question which therefore arose for consideration

in the instant appeal was whether bearing in mind the object, scope and width of power of the High Court under Section 482 of the Cr.P.C., on the facts in hand, the High Court was correct in law in declining to exercise its jurisdiction under the said Section.

Dismissing the appeal, the Court

HELD:1.1. Section 482 of the Cr.P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely: (i) to give effect to an order under the Cr.P.C.; (ii) to prevent an abuse of the process of Court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Though exercise of inherent powers would depend on the facts and circumstances of each case, but, the Court would be justified in invoking its inherent jurisdiction where the allegations made in the Complaint or Chargesheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged. [Para 11] [16-D-G]

1.2. The exercise of inherent powers would entirely depend on the facts and circumstances of each case. The inherent powers should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a *prima facie* decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their

true perspective without sufficient material. [Para 14] [18-A-D]

R.P. Kapur v. State of Punjab **AIR 1960 SC 866: 1960 SCR 388;** *Dinesh Dutt Joshi v. State of Rajasthan and Anr.* **(2001) 8 SCC 570: 2001 (3) Suppl. SCR 465;** *Central Bureau of Investigation v. A. Ravishankar Prasad and Ors.* **(2009) 6 SCC 351 – relied on.**

State of Haryana and Ors. v. Bhajan Lal and Ors. **1992 Supp (1) SCC 335: 1991 (1) Suppl. SCR 387;** *Janata Dal v. H.S. Chowdhary and Ors.* **(1992) 4 SCC 305: 1992 (1) Suppl. SCR 226 – referred to.**

2.1. In the instant case, in light of the allegations in the Chargesheet, the view taken by the High Court in the matter cannot be flawed and deserves to be affirmed. It is manifest from a bare reading of the Chargesheet, placed on record, that the gravamen of the allegations against the appellant as also the co-accused is that the Company, acting through its directors in concert with the Chartered Accountants and some other persons: (i) conceived a criminal conspiracy and executed it by forging and fabricating a number of documents, like photographs of old machines, purchase orders and invoices showing purchase of machinery in order to support their claim to avail hire purchase loan from PSB; (ii) on the strength of these false documents, PSB parted with the money by issuing pay orders & demand drafts in favour of the Company and (iii) the accused opened six fictitious accounts in the banks (four accounts in Bank of Rajasthan and two in Bank of Madura) to encash the pay orders/bank drafts issued by PSB in favour of the suppliers of machines, thereby directly rotating back the loan amount to the borrower from these fictitious accounts, and in the process committed a systematic fraud on the Bank (PSB) and obtained pecuniary advantage for themselves. Precise details of all the

fictitious accounts as also the further flow of money realised on encashment of demand drafts/pay orders have been incorporated in the Chargesheet. Additionally, by allegedly claiming depreciation on the new machinery, which was never purchased, on the basis of forged invoices etc.; the accused cheated the public exchequer as well. [Para 16] [18-F-H; 19-A-D]

2.2. In the chargesheet, the accused are alleged to have committed offences punishable under Section 120B, read with Sections 420, 409, 468 and 471 IPC. At this preliminary stage of proceedings, it would neither be desirable nor proper to return a final finding as to whether the essential ingredients of the said Sections are satisfied. On a conspectus of the factual scenario, *prima facie,* the Chargesheet does disclose the commission of offences by the appellant under the afore-noted Sections. [Para 17] [19-D-F]

3. The essential ingredient of the offence of "criminal conspiracy", defined in Section 120A IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the Statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A IPC, then in that event mere proof of an agreement between the accused for commission of such crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. [Para 17] [19-F-H; 20-A-B]

Suresh Chandra Bahri v. State of Bihar **1995 Supp (1) SCC 80 – relied on.**

4. The definition of "forgery" in Section 463 IPC is also very wide. The basic elements of forgery are: (i) the making of a false document or part of it and (ii) such making should be with such intention as is specified in the Section viz. (a) to cause damage or injury to (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed. In the instant case more than sufficient circumstances exist suggesting the hatching of criminal conspiracy and forgery of several documents leading to commission of the aforementioned Sections. [Para 18] [20-C-E]

5.1. The judgments relied upon on behalf of the appellant are clearly distinguishable on facts. Even one additional or different fact may make a world of difference between the conclusions in two cases and blindly placing reliance on a decision is never proper. It is trite that while applying ratio, the Court may not pick out a word or sentence from the judgment divorced from the context in which the said question arose for consideration. [Para 20] [22-F-G]

5.2. In the present case, having regard to the modus operandi adopted by the accused, as projected in the Chargesheet, it is clear that it is not a fit case for exercise of jurisdiction by the High Court under Section 482 Cr.P.C. as also by this Court under Article 142 of the Constitution. The accused had not only duped PSB, they had also availed of depreciation on the machinery, which was never purchased and used by them, causing loss to the exchequer, a serious economic offence against the society. Merely because the dues of the bank have been

paid up, the appellant cannot be exonerated from the criminal liability. Therefore, the Chargesheet against him cannot be quashed. The Trial Court is directed to proceed with the case as expeditiously as possible without being influenced by any observations made by the High Court or in this judgment on the merits of the Chargesheet. [Paras 21, 23] [23-D-E; 24-B-C]

Nikhil Merchant v. Central Bureau of Investigation and Anr. **(2008) 9 SCC 677: 2008 (12) SCR 236;** *Madan Mohan Abbot v. State of Punjab* **(2008) 4 SCC 582: 2008 (5) SCR 526 and** B.S. J*oshi and Ors. v. State of Haryana and Anr.* **(2003) 4 SCC 675: 2003 (2) SCR 1104 – distinguished.**

Zee Telefilms Ltd. and Anr. v. Union of India and Anr. **(2005) 4 SCC 649: 2005 (1) SCR 913 and** *Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.* **(2002) 3 SCC 496: 2002 (1) SCR 621 and** *Rumi Dhar (Smt) v. State of West Bengal and Anr.* **(2009) 6 SCC 364: 2009 (5) SCR 553 – relied on.**

Sajjan Kumar v.Central Bureau of Investigation **(2010) 9 SCC 368: 2010 (11) SCR 669 – referred to.**

Case Law Reference:

2008 (12) SCR 236	**Distinguished.**	**Para 6**
2009 (5) SCR 553	**Relied on.**	**Para 7**
2003 (2) SCR 1104	**Distinguished.**	**Para 8**
2008 (5) SCR 526	**Distinguished.**	**Para 8**
(2009) 6 SCC 351	**Relied on.**	**Para 9**
2010 (11) SCR 669	**Referred to.**	**Para 9**
1960 SCR 388	**Relied on.**	**Para 12**
2001 (3) Suppl. SCR 465	**Relied on.**	**Para 13**

1991 (1) Suppl. SCR 387	**Referred to.**	**Para 13**
1992 (1) Suppl. SCR 226	**Referred to.**	**Para 14**
1995 Supp (1) SCC 80	**Relied on.**	**Para 18**
2005 (1) SCR 913	**Relied on.**	**Para 20**
2002 (1) SCR 621	**Relied on.**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Cirminal Appeal No. 1109 of 2011.

From the Judgment & Order daed 21.5.2009 of the High Court of Delhi at New Delhi in Criminal Miscellaneous Case No. 3842 of 2008.

H.P. Rawal, ASG, Vijay Aggarwal, Rajneesh Chopra, Sachin Midha, Priyanka Gupta, Rishabh Maheswari, Saurabh Seth, Yash Pal Dhingra, Vijay Aggarwal, Gurpeet Singh, Shekhar Kumar, Shweta Verma, Mukesh Verma, Arvind Kumar Sharma, Jayant K. Sud, Harendra Singh, Anil Katiyar for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. This appeal, by special leave, is directed against judgment dated 21st May 2009 delivered by the High Court of Delhi in Criminal Misc. Case No.3842 of 2008, in a petition filed by the appellant herein under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C."). By the impugned judgment, a learned Single Judge of the High Court has declined to quash the Chargesheet filed against the appellant and other directors of a Company, namely, M/s Morpen Laboratories Ltd. (for short "the Company") for offences punishable under Sections 120B, 420, 409, 468 and 471 of the Indian Penal Code, 1860 (for short "the IPC").

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

A source information was received by the Central Bureau of Investigation (for short "the CBI") that in the year 1999 two Chartered Accountants, namely, Sanjay Malik and Bipin Kakkar, had dishonestly and fraudulently opened/caused to be opened several fictitious accounts in some banks in the names of certain concerns, with an intention and object to facilitate the diversion of bank finance availed by various public limited companies for the purpose other than what had been stated in the loan application. On the basis of the said information, a First Information Report (FIR) was registered against the afore-mentioned Company and its directors. The relevant portion of the FIR reads thus:

> "That in June 1999, S/Sh. K.B. Suri, Sushil Suri and Smt. Kanta Suri, the Executive Directors of M/s. Morepen Labs Ltd. having their office at 416-418, Antriksh Bhawan (sic), 22, K.G. Marg, New Delhi, conspired together and in furtherance of the said criminal conspiracy they, dishonestly and fraudulently made an application to Punjab & Sind Bank, Connaught Place, New Delhi for Hire-Purchase Finance to the tune of Rs. 300 Lacs, by submitting fake and forged purchase orders, invoices and bills relating to supply of machineries and equipments to be installed in their factory/works situated in Distt. Solan (HP).
>
> That the above Executive Directors of the company, dishonestly, fraudulently and in conspiracy with other accused persons submitted to the bank, fake and forged invoices of fictitious/non-existent supplier i.e. M/s. R.K. Engineers, M/s. Teem Metals Pvt. Ltd. and M/s. Malson Impex, made accommodation payments representing as genuine advance payments to suppliers and thereby caused the bank to release funds to the tune of '300 lacs towards cost of machineries and equipments and pay orders in various amounts issued by the bank for the

purpose of making payments to suppliers. These amounts were then fraudulently deposited in several fictitious accounts of S/Sh. Sanjay Malik and Bipin Kakkar at Corporation Bank and Canara Bank and encashed. The bank finance raised by the company on the pretext of procurement of machineries and equipments were not used for the purpose stated in the application for loan, instead the bank loan was diverted by the above Executive Directors, in collusion with S/Sh. Sanjay Malik and Bipin Kakkar, for other undisclosed non-business purposes.

That during the year 1998 also the above Executive Directors of M/s. Morepen Labs Ltd. had adopted a similar modus-operandi in collusion with some other unknown persons/Chartered Accountants and applied for bank finance to the tune of Rs. 200 lacs for purchase of machineries and equipments with an object to divert bank finance for undisclosed non-business orders, invoices and bills of fictitious suppliers, i.e. M/s. B.K. Chemi-Plant Industries and M/s. Flexon Hose and Engineering Co. Pvt. Ltd. and caused the bank to release loan of Rs. 200 lacs for the purpose of procurement of machineries and equipments to be installed in their factory works situated in Distt. Solan (HP). The bank loan thus released by Punjab & Sind Bank (Hire-Purchase Branch), Connaught Circus, New Delhi was not actually used for the purpose stated in the loan proposal rather the pay orders issued by the bank in the name of fictitious suppliers M/s. Chemi-Plant Industries and M/s. Flexon Hose and Engineering Co. Pvt. Ltd. were deposited in fictitious accounts opened in the above name and style at Bank of Rajasthan, Kamla Nagar Branch, Delhi and encashed. No suppliers of machineries and equipments were made by M/s. B.K. Chemi-Plant Industries and M/s. Flexon Hose and Engineering Co. Pvt. Ltd. to M/s. Morepen Labs. Ltd. and bank finance availed by the company for the said purpose were again used for some undisclosed non-business purposes.

The above facts and circumstances disclose the commission of offences u/s 120-B, IPC r/w 420, 409, 468 and 471 IPC and substantive offences thereunder against Chartered Accountants S/Sh. Sanjay Malik and Bipin Kakkar and S/Sh. K.B. Suri, Sushil Suri and Smt. Kanta Suri, Executive Directors of M/s. Morepen Labs. Ltd., New Delhi and other unknown persons. Therefore, a regular case is registered and entrusted to Sh. A.K. Singh, Dy. SP/SIU-VII, for investigation."

4. The Company is a public limited company, engaged in the manufacturing of pharmaceutical products. In order to run its affairs, from time to time, the Company had been raising funds from different sources, like loans from different banks/ financial institutions as also from the open market by way of 'public issues', 'rights issues' and 'bonds' etc. Investigations revealed that in the year 1998, the Company, through its directors, including the appellant in this appeal, applied for a hire purchase advance of Rs. 2 crores from Punjab and Sind Bank (for short "PSB"), Hire Purchase Branch, New Delhi, for purchase of various machinery items to be installed at their manufacturing units at different places. It transpired that the machinery for which the loan was raised from PSB was never purchased by the Company and, in fact, to defraud PSB, photographs of the existing/some other machinery were taken by affixing labels of PSB and the same were filed with PSB, as confirmation for having purchased the machinery, for which the loan was raised under the hire purchase limit. It was discovered that although the loan taken by the Company from PSB had been repaid, but the Company never purchased any machinery, utilising the funds disbursed by PSB against the purchase of machinery. Furthermore, the value of the machinery, purportedly purchased with these funds, was reflected in the balance-sheet of the Company and even depreciation on the said machinery, amounting to Rs. 52,33,066/-, was also claimed in the Income Tax Return/Minimum Alternate Tax (MAT) for the assessment year 1998-1999, without any such

machinery having been actually acquired.

5. In the year 1999, the Company and its directors again applied for hire purchase advance of Rs. 3 crores from PSB for purchase of more machines. In their balance-sheet for the assessment year 1999-2000, the Company again claimed the benefit of depreciation in the Income Tax/Minimum Alternate Tax amounting to Rs. 1,44,88,605/- although no such machinery was purchased by the Company. It further transpired that loan proposals were supported by forged proforma invoices, purportedly issued by some suppliers in whose name fictitious bank accounts were opened to encash the Demand Drafts/Pay Orders issued by PSB in favour of these firms. The investigations thus, revealed that the appellant and a number of other persons had committed the afore-mentioned offences. Accordingly, a Chargesheet was filed by the CBI on 13th October, 2004 in the Court of Chief Metropolitan Magistrate, Delhi.

6. The Chief Metropolitan Magistrate took cognizance of the offences and summoned the accused to stand trial. On being so summoned, the appellant filed the afore-stated petition under Section 482 of the Cr.P.C., praying for quashing of the Chargesheet mainly on the ground that once the Company had repaid the loan to PSB along with interest, no loss was caused to PSB and, therefore, they had not committed any offence for which Chargesheet had been filed. In support of the said plea, decision of this Court in *Nikhil Merchant Vs. Central Bureau of Investigation & Anr*[1]*.* was pressed into service. On behalf of the CBI, it was pleaded that the appellant and others, by forging documents/vouchers to show purchase of machinery, a pre-condition for release of instalments of loan, had not only duped PSB but also defrauded the revenue by claiming depreciation on non-existent machinery and in the process cheated the public exchequer of crores of rupees.

1. (2008) 9 SCC 677

7. As already stated, the High Court has come to the conclusion that merely because the Company and its directors had repaid the loan to PSB they could not be exonerated of the offences committed by forging/fabricating the documents with the intention of defrauding the bank as well as the exchequer. The High Court was of the view that the ratio of the decision of this Court in *Rumi Dhar (Smt) Vs. State of West Bengal & Anr.*,[2] was applicable on the facts of the present case and the decision of this Court in *Nikhil Merchant* (supra) was clearly distinguishable on facts. Thus, the High Court held that on the peculiar facts of the case, the appellant was not entitled to any relief. Accordingly, the petition filed by the appellant was dismissed with costs. He was directed to appear before the trial court. Aggrieved thereby, the appellant is before us in this appeal.

8. Mr. Vijay Aggarwal, learned counsel appearing on behalf of the appellant assailed the judgment of the High Court on the ground that all the dues, as claimed by PSB having been paid by the debtor Company without demur, more so, when the Bank had not initiated any action for the recovery of money, the case of the appellant is on a much stronger footing as compared to the case of *Nikhil Merchant* (supra), wherein this Court had quashed the criminal proceedings initiated against the borrower in view of their compromise with the Bank. It was contended that since in the present case, there is no allegation that the appellant had committed any offence under the Prevention of Corruption Act 1988, at best, the allegation in the Chargesheet may attract Section 420 of the IPC, which offence is otherwise compoundable under Section 320 of the Cr.P.C. It was asserted that full amount in question having been paid to the Bank, there was no monetary loss to the Bank and, therefore, continuation of criminal proceedings against all the accused, including the appellant, would not only be an exercise in futility but an abuse of the process of law as well. It was thus, pleaded that it was a fit case where the High Court should have

2. (2009) 6 SCC 364

exercised its jurisdiction under Section 482 of the Cr.P.C. and quashed the Chargesheet. In support, while relying heavily on the decision in *Nikhil Merchant* (supra), learned counsel also commended us to the decisions of this Court in *B.S. Joshi & Ors. Vs. State of Haryana & Anr.*[3] and *Madan Mohan Abbot Vs. State of Punjab*[4]. The decision in *Rumi Dhar* (supra) relied upon by the High Court, was sought to be distinguished by submitting that in that case the provisions of the Prevention of Corruption Act, 1988 had been invoked; the Bank had to file a suit for recovery of the amount due to it and the Revision Petition filed against framing of charge against the accused in that case had also been dismissed, which is not the case here.

9. *Per contra*, Mr. H.P. Rawal, learned Additional Solicitor General of India, appearing for the CBI, supporting the impugned judgment, strenuously urged that having regard to the nature of the allegations against the appellant, based on the evidence collected during the course of investigations, the High Court has rightly refused to exercise its jurisdiction under Section 482 of the Cr.P.C. Relying on a decision of this Court in *Central Bureau of Investigation Vs. A. Ravishankar Prasad & Ors.*[5], learned counsel contended that overwhelming material is available on record which clearly shows that the Company and its directors, including the appellant, and other persons had conspired to forge, fabricate and use documents in order to avail loan from the bank and had opened or caused to be opened fictitious bank accounts in the names of the suppliers to encash the pay orders/demand drafts issued by PSB and played fraud with PSB as also on the public exchequer by claiming depreciation on the machinery, which was never purchased. It was argued that the offences for which the appellant has been Chargesheeted would survive irrespective of discharge of debt of PSB by the Company. Relying on the decision of this Court in *Sajjan Kumar Vs. Central Bureau of*

3. (2003) 9 SCC 677.

4. (2008) 4 SCC 582

5. (2009) 6 SCC 351.

Investigation[6], learned counsel asserted that when the material on record is *per se* sufficient for the Court to form an opinion that the accused have committed the offences alleged against them and frame the said charges, there is no reason why the Chargesheet against the appellant should be quashed at such a preliminary stage when he has only been summoned to stand trial.

10. Before embarking on an evaluation of the rival submissions, it would be instructive to briefly notice the scope and ambit of the inherent powers of the High Court under Section 482 of the Cr.P.C.

11. Section 482 of the Cr.P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely: (i) to give effect to an order under the Cr.P.C.; (ii) to prevent an abuse of the process of Court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdiction under Section 482 of the Cr.P.C. Though it is emphasised that exercise of inherent powers would depend on the facts and circumstances of each case, but, the common thread which runs through all the decisions on the subject is that the Court would be justified in invoking its inherent jurisdiction where the allegations made in the Complaint or Chargesheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged.

12. In one of the earlier cases in *R.P. Kapur Vs. State of*

6. (2010) 9 SCC 368.

Punjab[7] this Court had culled out some of the categories of cases where the inherent powers under Section 482 of the Cr.P.C. could be exercised by the High Court to quash criminal proceedings against the accused. These are:

> "(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings e.g. want of sanction;
>
> (ii) where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

13. In *Dinesh Dutt Joshi Vs. State of Rajasthan & Anr.,*[8] while explaining the object and purpose of Section 482 of the Cr.P.C., this Court had observed thus:

> "6…….The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."

7. AIR 1960 SC 866.

8. (2011) 8 SCC 570.

14. Recently, this Court in *A. Ravishankar Prasad & Ors.* (supra), relied upon by learned counsel for the CBI, referring to several earlier decisions on the point, including *R.P. Kapur* (supra); *State of Haryana & Ors. Vs. Bhajan Lal & Ors.*[9]*; Janata Dal Vs. H.S. Chowdhary & Ors.*[10]; *B.S. Joshi & Ors.* (supra); *Nikhil Merchant* (supra) etc. has reiterated that the exercise of inherent powers would entirely depend on the facts and circumstances of each case. It has been further observed that the inherent powers should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a *prima facie* decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material.

15. Bearing in mind the object, scope and width of power of the High Court under Section 482 of the Cr.P.C., enunciated above, the question for consideration is whether on facts in hand, the High Court was correct in law in declining to exercise its jurisdiction under the said Section?

16. Having examined the case in light of the allegations in the Chargesheet, we are of the opinion that the view taken by the High Court in the matter cannot be flawed and deserves to be affirmed. It is manifest from a bare reading of the Chargesheet, placed on record, that the gravamen of the allegations against the appellant as also the co-accused is that the Company, acting through its directors in concert with the Chartered Accountants and some other persons: (i) conceived a criminal conspiracy and executed it by forging and fabricating a number of documents, like photographs of old machines, purchase orders and invoices showing purchase of machinery in order to support their claim to avail hire purchase loan from

9. 1992 Supp (1) SCC 335.

10. (1992) 4 SCC 305.

PSB; (ii) on the strength of these false documents, PSB parted with the money by issuing pay orders & demand drafts in favour of the Company and (iii) the accused opened six fictitious accounts in the banks (four accounts in Bank of Rajasthan and two in Bank of Madura) to encash the pay orders/bank drafts issued by PSB in favour of the suppliers of machines, thereby directly rotating back the loan amount to the borrower from these fictitious accounts, and in the process committed a systematic fraud on the Bank (PSB) and obtained pecuniary advantage for themselves. Precise details of all the fictitious accounts as also the further flow of money realised on encashment of demand drafts/pay orders have been incorporated in the Chargesheet. Additionally, by allegedly claiming depreciation on the new machinery, which was never purchased, on the basis of forged invoices etc.; the accused cheated the public exchequer as well.

17. As afore-stated, in the Chargesheet, the accused are alleged to have committed offences punishable under Section 120B, read with Sections 420, 409, 468 and 471 IPC. We feel that at this preliminary stage of proceedings, it would neither be desirable nor proper to return a final finding as to whether the essential ingredients of the said Sections are satisfied. For the purpose of the present appeal, it will suffice to observe that on a conspectus of the factual scenario, noted above, *prima facie,* the Chargesheet does disclose the commission of offences by the appellant under the afore-noted Sections. The essential ingredient of the offence of "criminal conspiracy", defined in Section 120A IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the Statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-

section (2) of Section 120A IPC, then in that event mere proof of an agreement between the accused for commission of such crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. (See: *Suresh Chandra Bahri Vs. State of Bihar*[11]).

18. Similarly, the definition of "forgery" in Section 463 IPC is very wide. The basic elements of forgery are: (i) the making of a false document or part of it and (ii) such making should be with such intention as is specified in the Section viz. (a) to cause damage or injury to (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed. As stated above, in the instant case more than sufficient circumstances exist suggesting the hatching of criminal conspiracy and forgery of several documents leading to commission of the aforementioned Sections. We refrain from saying more on the subject at this juncture, lest it may cause prejudice to the appellant or the prosecution.

19. We may now advert to the decision of this Court in the case of *Nikhil Merchant* (supra), on which great emphasis was laid, on behalf of the appellant. In that case a Chargesheet was filed by the CBI against the accused under Section 120B read with Sections 420, 467, 468, 471 IPC read with Sections 5(2) and 5(1)(d) of the Prevention of Corruption Act, 1947 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The allegation under the Chargesheet was that the accused persons had conspired with each other in fraudulently diverting the funds of the Bank. Offence alleging forgery was also included in the Chargesheet. In the meantime, the suit for recovery of money filed by the Bank against the Company, to which the appellant in that case was also a party, was disposed of on a written compromise arrived at between

11. 1995 Supp (1) SCC 80.

the parties. Consequent upon the compromise of the suit and having regard to the contents of clause 11 of the consent terms, which stipulated that neither party had any claim against the other and parties were withdrawing all allegations and counter allegations made against each other, the said appellant filed an application for discharge. The application was rejected by the trial court. A petition preferred under Section 482 of the Cr.P.C. was also dismissed by the High Court. In further appeal to this Court, accepting the contention of the appellant that this Court could transcend the limitation imposed under Section 320 of the Cr.P.C. and pass orders quashing criminal proceedings even where non compoundable offences were involved, quashing the criminal proceedings the Court observed thus:

> "30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. *The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?*
>
> 31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in *B.S. Joshi case* and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance

> of the same after the compromise arrived at between the parties would be a futile exercise."
>
> [Emphasis supplied]

20. A bare reading of the afore-extracted paragraphs would indicate that the question posed for consideration in that case was with regard to the power of this Court under Article 142 of the Constitution of India to quash the criminal proceedings in the facts and circumstances of a given case and not in relation to the powers of the High Court under Section 482 of the Cr.P.C. The Court came to the conclusion that it was a fit case where it should exercise its powers under Article 142 of the Constitution. In our opinion, *Nikhil Merchant* (supra) does not hold as an absolute proposition of law that whenever a dispute between the parties, having overtones of a civil dispute with criminal facets is settled between them, continuance of criminal proceedings would be an exercise in futility and, therefore, should be quashed. Similarly, in *B.S. Joshi & Ors.* (supra), which has been relied upon in *Nikhil Merchant* (supra), the question for consideration was whether the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or Complaint for offences which are not compoundable under Section 320 of the Cr.P.C. It was held that Section 320 cannot limit or affect the powers of the High Court under Section 482 of the Cr.P.C., a well settled proposition of law. We are of the opinion that *Nikhil Merchant* (supra) as also the other two judgments relied upon on behalf of the appellant are clearly distinguishable on facts. It needs little emphasis that even one additional or different fact may make a world of difference between the conclusions in two cases and blindly placing reliance on a decision is never proper. It is trite that while applying ratio, the Court may not pick out a word or sentence from the judgment divorced from the context in which the said question arose for consideration. (See: *Zee Telefilms Ltd. & Anr. Vs. Union of India & Anr.*[12]). In this regard, the following

12. (2005) 4 SCC 649..

words of Lord Denning, quoted in *Haryana Financial Corporation & Anr. Vs. Jagdamba Oil Mills & Anr.*[13], are also quite apt:

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

21. In the present case, having regard to the modus operandi adopted by the accused, as projected in the Chargesheet and briefly referred to in para 17 (supra), we have no hesitation in holding that it is not a fit case for exercise of jurisdiction by the High Court under Section 482 of the Cr.P.C. as also by this Court under Article 142 of the Constitution of India. As noted above, the accused had not only duped PSB, they had also availed of depreciation on the machinery, which was never purchased and used by them, causing loss to the exchequer, a serious economic offence against the society.

22. The view we have taken above, gets fortified by a recent decision of this Court in *Rumi Dhar* (supra), wherein while dealing with a fact situation, akin to the present case, referring to the decision in *Nikhil Merchant* (supra), the Court declined to quash criminal proceedings in that case, observing thus:

> "24. The jurisdiction of the Court under Article 142 of the Constitution of India is not in dispute. Exercise of such power would, however, depend on the facts and circumstances of each case. The High Court, in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, and this Court, in terms of Article 142 of the Constitution of India, would not direct quashing of a case involving crime against the society particularly when both the learned Special Judge as also the High Court have found that a prima facie case has been made out against the appellant herein for framing the charge."

13. (2002) 3 SCC 496.

23. We respectfully concur with the afore-extracted observations. In the final analysis, we hold that merely because the dues of the bank have been paid up, the appellant cannot be exonerated from the criminal liability. Therefore, the Chargesheet against him cannot be quashed.

24. In view of the foregoing discussion, we do not find any merit in this appeal and it is dismissed accordingly. The Trial Court shall now proceed with the case as expeditiously as possible without being influenced by any observations made by the High Court or in this judgment on the merits of the Chargesheet.

B.B.B. Appeal dismissed.

NOIDA ENTREPRENEURS ASSOCIATION
v.
NOIDA & ORS.
(Writ Petition (Civil) No. 150 of 1997)

MAY 9, 2011

[G.S. SINGHVI AND DR. B.S. CHAUHAN, JJ.]

Prevention of Corruption Act, 1988 – s.13 – Criminal misconduct by public servant – Land scam – Respondent no.4 was CEO, New Okhla Industrial Development Authority (NOIDA) in 1993-1994 – Allegation that during this period, he committed three acts of misconduct - 1) that he allotted contracts worth Rs.10 crores to different contractors on selection basis without inviting tenders; 2) that he caused financial loss to NOIDA by not paying conversion charges with respect to the plot allotted to him and 3) that at his instance a 13 hectare City Park situated in NOIDA was destroyed and by changing the land use, a new residential Sector in violation of the Master Plan was carved out comprising of 200 plots – Held: The allegations being of a very serious nature and as alleged, the respondent no.4 having passed orders in colourable exercise of power favouring himself and certain contractors, require investigation – Central Bureau of Investigation (CBI) directed to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution, it may proceed in accordance with law – U.P. Industrial Area Development Act, 1976 – ss.6(2)(b) & 6(2)(c), 8, 9, 12, 14, 17, 18, 19 – U.P. Urban Planning and Development Act, 1973 – ss. 30, 32, 40 to 47, 49, 50, 51, 53 and 58 – New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations 1991.

Code of Criminal Procedure, 1973 – ss.468-471 and 473 – Delay in launching criminal prosecution – Held: Cannot

itself be a ground for dismissing the complaint, but may be a circumstance to be taken into consideration in arriving at a final decision – More so, the issue of limitation has to be examined in the light of the gravity of the charge.

Service Law – Disciplinary proceedings against retired IAS officer – Maintainability of – Held: On facts, the disciplinary proceedings were time barred – All India Services (Death-cum-Retirement Benefits) Rules, 1958 – Rule 6(b).

Rule of Law – Held: The Rule of Law is the foundation of a democratic society – It prohibits arbitrary action and commands the authority concerned to act in accordance with law.

Public Authority – Obligation of the State or its instrumentality – Public Trust Doctrine –Held: Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance – In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power – The power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest – An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred – In this context, "in good faith" means "for legitimate reasons" – It must be exercised bona fide for the purpose and for none other – Doctrines/Principles – Principle of legitimate expectation – Constitution of India, 1950 – Articles 14 and 21.

Doctrines/Principles – Principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud" – Meaning of – Held: Whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance.

Administrative Law – Act done in undue haste – Effect of – Held: In case an authority proceeds in undue haste, the Court may draw an adverse inference from such conduct.

Respondent no.4 was the CEO, New Okhla Industrial Development Authority (NOIDA) in 1993-94. It was alleged that during this period he committed three acts of misconduct - 1) that he allotted contracts worth Rs.10 crores to different contractors on selection basis without inviting tenders; 2) that he caused financial loss to NOIDA by not paying conversion charges with respect to the plot allotted to him and 3) that at his instance, a 13 hectare City Park situated in NOIDA was destroyed and by changing the land use, a new residential Sector in violation of the Master Plan was carved out comprising of 200 plots.

In the instant writ petition, this Court was required to examine as to 1) whether any action was warranted against respondent no.4 and if so, whether it was permissible to initiate disciplinary proceedings against him although in the meanwhile he had reached the age of superannuation and had retired, and as to 2) whether the misconduct was of such a grave nature that it warranted criminal prosecution and if so, what should be the agency which may be entrusted with the investigation and prosecution.

Disposing of the writ petitions, the Court

HELD:1. The services of respondent no.4 stood governed by All India Services (Death-cum-Retirement Benefits) Rules, 1958. Rule 6(b), thereof, provides that in case the delinquent had already retired, the proceedings shall not be instituted against him without the sanction of the Central Government and shall be in respect of an event which took place not more than four years before the institution of such proceedings. Thus, it is evident that

law does not permit holding disciplinary proceedings against respondent no.4 at this belated stage. [Para 15] [42-G-H;]

B.J. Shelat v. State of Gujarat & Ors. **AIR 1978 SC 1109: 1978 (3) SCR 553;** *State Bank of India v. A.N. Gupta & Ors.* **(1997) 8 SCC 60: 1997 (4) Suppl. SCR 383;** *State of U.P. & Ors. v. Harihar Bholenath* **(2006) 13 SCC 460: 2006 (8) Suppl. SCR 241;** *UCO Bank & Anr. v. Rajinder Lal Capoor* **AIR 2007 SC 2129: 2007 (7) SCR 543;** *Ramesh Chandra Sharma v. Punjab National Bank & Anr.* **(2007) 9 SCC 15: 2007 (7) SCR 585 and** *UCO Bank & Anr. v. Rajinder Lal Capoor* **AIR 2008 SC 1831: 2008 (5) SCR 775 – relied on.**

2. So far as the initiation of criminal proceedings is concerned it is governed by the provisions of Code of Criminal Procedure, 1973. Section 468 thereof puts an embargo on the court to take cognizance of an offence after expiry of limitation provided therein. However, there is no limitation prescribed for an offence punishable with more than 3 years imprisonment. Section 469 declares as to when the period of limitation would start. Sections 470-471 provide for exclusion of period of limitation in certain cases. Section 473 enables the court to condone the delay provided the court is satisfied with the explanation furnished by the prosecution or where the interest of justice demands extension of the period of limitation. It is evident that question of delay in launching criminal prosecution may be a circumstance to be taken into consideration in arriving at a final decision, but it cannot itself be a ground for dismissing the complaint. More so, the issue of limitation has to be examined in the light of the gravity of the charge. [Paras 16, 18] [43-C-E; 44-B-C]

Japani Sahoo v. Chandra Sekhar Mohanty **AIR 2007 SC 2762: 2007 (8) SCR 582;** *Sajjan Kumar v. Central Bureau of Investigation* **(2010) 9 SCC 368: 2010 (11) SCR 669 – relied on.**

3.1. It is evident from the record that one contractor, M/s Anil Kumar & Co., had been allotted originally the work on the basis of tender for Rs. 2.75 crores in Sector 'Gamma' in Greater NOIDA, in connection with the construction of water drains. However, they had been awarded additional work by respondent no. 4, worth Rs.3.75 crores on a "deviation basis". In fact, awarding such work cannot be termed as an 'addition' or 'additional work' because the work is worth Rs.1 crore more than the amount of original contract. In such a fact-situation, even if there had been no financial loss to the Greater NOIDA, indisputably, the additional work for such a huge amount had been awarded without following the procedure prescribed in law. More so, there is nothing on record to show as to whether the said contractor M/s Anil Kumar & Co. was eligible to carry out the contract worth Rs.6.50 crores. Awarding the contract under the garb of so-called extension, amounts to doing something indirectly which may not be permissible to do directly. Admittedly, such a course of action is not permissible in law. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "*quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud*", **which means" "whenever a thing is prohibited, it is prohibited whether done directly or indirectly". [Paras 21, 22] [47-G-H; 48-A-E]**

3.2. The second work had been allotted to M/s Techno Construction Co. worth Rs.1 crore without inviting fresh tenders etc., on the ground that earlier a contract for execution of similar work i.e. construction of road had been awarded to it. In view of the fact that there was no urgency, such a contract should not have been awarded. Undoubtedly, the respondent no.4 is guilty of proceeding in haste and that amounts to arbitrariness. In case an authority proceeds in undue haste, the Court may draw

an adverse inference from such conduct. It further creates a doubt that if there was no sufficient reason of urgency, what was the occasion for the respondent no.4 to proceed in such haste and why fresh tenders had not been invited. [Paras 24, 27] [49-A-B; E-F]

Swantraj & Ors. v. State of Maharashtra **AIR 1974 SC 517: 1974 (3) SCR 287;** *Commissioner of Central Excise, Pondicherry v. ACER India Ltd.* **(2004) 8 SCC 173: 2004 (4) Suppl. SCR 676;** *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.* **JT (2010) 11 SC 273: 2010 (13) SCR 621;** *Jagir Singh v. Ranbir Singh & Anr.* **AIR 1979 SC 381: 1979 (2) SCR 282;** *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia & Ors.*, **(2004) 2 SCC 65: 2003 (6) Suppl. SCR 1023;** *Zenit Mataplast Private Limited v. State of Maharashtra & Ors.* **(2009) 10 SCC 388: 2009 (14) SCR 403 – relied on.**

Dr. S.P. Kapoor v. State of Himachal Pradesh & Ors. **AIR 1981 SC 2181: 1982 (1) SCR 1043 – referred to.**

Fox v. Bishop of Chester, **(1824) 2 B &C 635 – referred to.**

4.1. It is evident from the record that the respondent no.4 had originally been allotted plot no.118, Sector-35 measuring 360 sq. meters which was converted to plot no.G-25, Sector-27 measuring 392 sq. meters. However, as the respondent no.4 did not deposit the required charges the said order of conversion stood withdrawn. By subsequent conversion, respondent no.4 got plot no.A-15 in Sector-44. Thus, two conversions had been made on different dates. However, he paid the transfer charges only once to the tune of Rs.1.80 lacs. It is alleged that by first conversion, the respondent no.4 not only got the plot in a better location, but also a plot of bigger size. Second allotment was further, as alleged, in a far better geographical position. [Para 28] [49-G-H; 50-A]

4.2. There is no provision under the U.P. Industrial Area Development Act, 1976 [under which Act NOIDA had been constituted] or New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations 1991 for conversion. It is rather governed by Office Order No.4070/NOIDA/DCEO/92 dated 3.7.1992 which basically provides that conversion was permissible only in case of residential plots. The aforesaid Office Order dated 3.7.1992 stood modified vide order dated 27.9.1993 (when the respondent no.4 was the CEO, NOIDA) to the effect that a large number of vacant plots were available in old developed sectors and the same could be included in the plots availability list. The list of available plots had been expanded during the period when the respondent no.4 was CEO, NOIDA and unallotted plots of various sectors including Sector 27 were also included in that list in which the respondent no.4 himself got the first conversion. It is a matter of investigation as to whether the Order dated 3.7.1992 was modified vide Order dated 27.9.1993 with ulterior purpose. [Paras 29, 30, 31] [50-B-C-H; 51-A-B]

5.1. Section 12 of the 1976 Act makes the provisions of Chapter VII and Sections 30, 32, 40 to 47, 49, 50, 51, 53 and 58 of the U.P. Urban Planning and Development Act, 1973 *mutatis mutandis* applicable to the 1976 Act. Section 17 of the 1976 Act declares that the 1976 Act would have an over-riding effect over the provisions of the 1973 Act. Section 18 confers the power on the State Government to make rules by issuing a Notification for carrying out the purposes of the 1976 Act. Section 19 of the 1976 Act provides for the framing of regulations by the NOIDA in respect of holding of meetings; defining the powers and duties of the CEO; and management of properties of the Authority etc. In view thereof, the New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations 1991 had been framed with the prior approval of the State Government as required under

Section 19 of the 1976 Act and, therefore, have statutory force. By virtue of the provisions of sub-section 2(b) of Section 6 of the 1976 Act, it is a statutory requirement that in the plan to be prepared by the NOIDA, it must necessarily provide as to for what particular purpose any area/site is to be used, namely, industrial, commercial or residential. The Authority is competent under sub-section 2(c) of Section 6, to regulate the construction etc. having regard to the nature for which the site has been earmarked. Section 8 of the 1976 Act restrains the use of any site for the purpose other than for which it is earmarked in the Master Plan. Section 9 prohibits the use of any area or erection of any building in contravention of the 1991 Regulations. Section 14 of the 1976 Act clearly provides for cancellation of allotment and resumption/re-entry, where the allotment had been made in contravention of the rules and regulations. In case the Authority wants to change the user of the land, condition precedent remains to amend the Master Plan. [Para 32] [51-C-H; 52-A-B]

5.2. There is nothing on record to show that any amendment had ever been made either in the Master Plan or in the Regulations 1991 before the change of user of land, when a 13 hectare City Park situated near Sectors 24, 33 and 35 was abolished and a new residential Sector 32 was carved out comprising 200 plots. Even if the said change made by respondent no.4 stood nullified, subsequently by respondent no.7, it does not exonerate him from committing an illegality. It is a matter of investigation as to what was the motive for which such a change had been made by respondent no.4, unauthorisedly and illegally. Admittedly he was not competent to do so without seeking the amendments as mentioned hereinabove. [Para 33] [52-C-D]

5.3. The State or the public authority which holds the

property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. [Para 34] [52-F-H; 53-A-C]

5.4. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot

play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. [Para 35] [53-E-G]

M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr. **AIR 1975 SC 266: 1975 (2) SCR 674;** *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.* **AIR 1979 SC 1628: 1979 (3) SCR 1014;** *Haji T.M. Hassan Rawther v. Kerala Financial Corporation* **AIR 1988 SC 157: 1988 (1) SCR 1079;** *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors.* **AIR 1991 SC 537: 1990 (1) Suppl. SCR 625;** *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu & Ors.* **AIR 1999 SC 2468: 1999 (3) SCR 1066;** *Commissioner of Police, Bombay v. Gordhandas Bhanji* **AIR 1952 SC 16: 1952 SCR 135;** *Sirsi Municipality v. Ceceila Kom Francis Tellis*, **AIR 1973 SC 855: 1973 (3) SCR 348;** *The State of Punjab & Anr. v. Gurdial Singh & Ors.* **AIR 1980 SC 319: 1980 (1) SCR 1071;** *The Collector (Distt. Magistrate) Allahabad & Anr. v. Raja Ram Jaiswal* **AIR 1985 SC 1622: 1985 (3) SCR 995;** *Delhi Administration (Now NCT of Delhi) v. Manohar Lal* **(2002) 7 SCC 222: 2002 (2) Suppl. SCR 1 and** *N.D. Jayal & Anr. v. Union of India & Ors.* **AIR 2004 SC 867: 2003 (3) Suppl. SCR 152 – relied on.**

6. In view of the above, this Court is of the considered opinion that these allegations being of a very serious nature and as alleged, the respondent no.4 had passed orders in colourable exercise of power favouring himself and certain contractors, require investigation. The CBI is directed to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution, may proceed in accordance with law. [Para 36] [54-B-C]

Case Law Reference:

1978 (3) SCR 553	**relied on**	**Para15**
1997 (4) Suppl. SCR 383	**relied on**	**Para 15**
2006 (8) Suppl. SCR 241	**relied on**	**Para 15**
2007 (7) SCR 543	**relied on**	**Para 15**
2007 (7) SCR 585	**relied on**	**Para 15**
2008 (5) SCR 775	**relied on**	**Para 15**
2007 (8) SCR 582	**relied on**	**Para 16**
2010 (11) SCR 669	**relied on**	**Para 17**
1974 (3) SCR 287	**relied on**	**Para 22**
2004 (4) Suppl. SCR 676	**relied on**	**Para 22**
2010 (13) SCR 621	**relied on**	**Para 22**
1979 (2) SCR 282	**relied on**	**Para 23**
(1824) 2 B & C 635	**referred to**	**Para 23**
2003 (6) Suppl. SCR 1023	**relied on**	**Para 25**
1982 (1) SCR 1043	**referred to**	**Para 25**
2009 (14) SCR 403	**relied on**	**Para 26**
1975 (2) SCR 674	**relied on**	**Para 34**
1979 (3) SCR 1014	**relied on**	**Para 34**
1988 (1) SCR 1079	**relied on**	**Para 34**
1990 (1) Suppl. SCR 625	**relied on**	**Para 34**
1999 (3) SCR 1066	**relied on**	**Para 34**
1952 SCR 135	**relied on**	**Para 35**
1973 (3) SCR 348	**relied on**	**Para 35**
1980 (1) SCR 1071	**relied on**	**Para 35**
1985 (3) SCR 995	**relied on**	**Para 35**
2002 (2) Suppl. SCR 1	**relied on**	**Para 35**
2003 (3) Suppl. SCR 152	**relied on**	**Para 35**

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

Writ Petition (Civil) No. 150 of 1997.

WITH

Writ Petition (Civil) No. 529 of 1999.

P.P. Malhotra, ASG, Rajeev Dhawan, (A.C), P.S. Narasimhan, K.T.S. Tulsi, Rakesh Dwivedi, Nikhil Nayyar (A.C.), Dayan Krishnan (A.C.) Rakesh U. Upadhyay, Abhijeet Kaketi, E.C. Vidya Sagar, Sangeeta Kumar, Nikhil Sharma, T.A. Khan, M. Khairati, A.K. Sharma, Ravi Prakash Malhotra, Vibhu Tiwari, Deepti R. Mehrotra, Ravinder Singh, M.S. Yadav, Jogy Scaria for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The Legislature of Uttar Pradesh enacted the U.P. Industrial Area Development Act, 1976, (hereinafter referred to as 'Act 1976') for the purpose of proper planning and development of industrial and residential units and to acquire and develop the land for the same. The New Okhla Industrial Development Authority (hereinafter referred to as the 'Authority'), has been constituted under the said Act, 1976. The object of the Act had been that genuine and deserving entrepreneurs may be provided industrial and residential plots and other necessary amenities and facilities. Thus, in order to carry out the aforesaid object, a new township came into existence. All the activities in the Authority had to be regulated in strict adherence to all the statutory provisions

contained in relevant Acts, Rules and Regulations framed for this purpose. However, from the very inception of the township, there has always been a public hue and cry that officials responsible for managing the Authority are guilty of manipulation, nepotism and corruption. Wild and serious allegations of a very high magnitude had been leveled against some of the officials carrying out the responsibilities of implementing the Act and other statutory provisions.

2. The instant writ petition was originally filed seeking a large number of reliefs including the allotment of industrial and residential plots to the members of the petitioner-Association and a large number of officials who had acted as Chief Executive Officers (hereinafter referred to as 'CEO') of the Authority had been impleaded therein as respondents. However, considering the fact that relief for personal benefits of the members had been sought and alternative means for seeking the redressal of grievances in that respect were available, the petitioner made a request to the Court that its petition may be treated as a public interest litigation (in short 'PIL') for a limited purpose. This Court vide order dated 21.4.1997 treated the matter as PIL and issued show cause notice only to the extent of the following reliefs:

> "(1) Issue writ of mandamus and/or any appropriate writ and direct the CBI to investigate into all the land allotments and conversion of lands made by the NOIDA during the past 10 years.
>
> (2) Issue an appropriate writ and directions and frame guidelines for allotment of lands by the NOIDA."

3. Dr. Rajeev Dhavan, learned senior counsel who had been appearing for the petitioner in the matter was requested by this Court vide order dated 29.8.1997 to act as Amicus Curiae.

The matter was heard several times by this Court and after scrutinising of a very large number of documents, the Court was

of the opinion that the allegations made in the petition required investigation. Thus, vide order dated 15.12.1997, this Court issued notice to the State of U.P. to indicate its consent to an investigation being made by the Central Bureau of Investigation (hereinafter referred to as CBI), in view of the very serious nature of the allegations. The State of U.P. had also received similar complaints and thus, it constituted a Commission of Inquiry headed by Justice Murtaza Hussain, a former Judge of Allahabad High Court to enquire about the same. The Commission completed its task and submitted its report. The said report was also placed before this Court in the first week of January 1998. As the report indicated, prima facie view of the Commission, that Mrs. Neera Yadav, IAS, respondent no.7 had committed serious irregularities and illegalities, a copy of the report of the Commission was also directed to be given to her and this Court vide order dated 6.1.1998 asked the State of U.P. as to whether this report had been accepted by the State Government and, if so, what was the likely follow up measure pursuant thereto. The State Government submitted a reply in response to the said show cause pointing out that the State Government proposed to initiate disciplinary proceedings against her.

4. In view of the material on record, this Court expressed tentative opinion that it would be more appropriate that the matter is investigated by the CBI and if such investigation discloses the commission of criminal offence(s), the persons found responsible should be prosecuted in a criminal court. However, considering the fact that allegations of a very high magnitude and gravity had been made against a large number of officials, this Court wanted the CBI to investigate first the cases against Mrs. Neera Yadav, IAS, respondent no.7, as is evident from the proceedings dated 20.1.1998, which reads as under:

> *"For the time being,* we are directing the CBI to conduct an investigation in respect of the irregularities in the matter of allotments and conversions of the plots…….

Shri G.L. Sanghi, the learned senior counsel appearing for respondent no.7 states that though the respondent no.7 does not admit that she has committed any irregularity in the matter of allotment or conversion of plots in NOIDA but according to respondent no.7 *there are other persons who might have committed such irregularity and she seeks leave to file an affidavit in this regard. She may file an affidavit giving particulars of such irregular allotments and in the event of such affidavit being filed further directions in that regard will be given."*
(Emphasis added)

This Court by the same order also issued certain directions with regard to irregular allotments and conversion of plots which had been found to have been made in the report of Justice Murtaza Hussain Commission.

5. In view of the above referred to order, Mrs. Neera Yadav, IAS, respondent no.7 filed her affidavit with regard to irregularities committed by other officers, namely, Shri P.K. Mishra, respondent no.5; Shri Bijendra Sahay, respondent no.8; Shri Ravi Mathur, respondent no.4; and one Shri S.C. Tripathi. The affidavit filed by Mrs. Neera Yadav, IAS, respondent no.7 was considered by this Court on 24.2.1998 and took note of the fact that in respect of the same/similar allegations made against Shri Bijendra Sahay, respondent no.8, the State Government had already accepted his explanation. So far as the allegations made against Shri Ravi Mathur, IAS, and Shri P.K. Mishra, respondent nos. 4 and 5 respectively and one Shri S.C. Tripathi are concerned, the State Government vide order dated 18.7.1997 had referred the same to the Chairman of the Board of Revenue for inquiry and the same was pending.

6. In the meanwhile, Shri Mahinder Singh Yadav, husband of Mrs. Neera Yadav, IAS, respondent no.7 and one Shri Bali Ram, Ex. Member of Parliament also filed complaints against the aforesaid officials in 1996-1997, which were also referred to the Chairman, Board of Revenue for inquiry.

7. One Shri Naresh Pratap Singh also filed a complaint against some officers including Shri Ravi Mathur, IAS, respondent no.4 on 27.6.1997 before the Lok-Ayukta of U.P. However, the Lok-Ayukta vide letter dated 21.4.1998 to the State Government expressed his inability to conduct an enquiry against Shri Ravi Mathur, IAS, respondent no.4 and suggested that the matter be referred to the CBI.

8. This Court vide order dated 11.1.2005 constituted a Commission headed by Justice K.T. Thomas to examine a large number of issues, including as to why disciplinary proceedings had been dropped by the State of U.P. against several officials who had been impleaded as respondents in this case. The Commission submitted the report dated 24.12.2005, and after considering the same, this Court vide order dated 8.12.2008 closed the proceedings against Shri Bijendra Sahay, respondent no.8. One Shri S.C. Tripathi also stood exonerated in earlier proceedings.

In view of the order passed by this Court, the CBI conducted the enquiry against Mrs. Neera Yadav, IAS, respondent no.7 and filed a charge sheet against her. She was put on trial and proceeded with in accordance with law.

9. Thus, in view of the aforesaid factual matrix, this Court has to examine as to whether any action is warranted against Shri Ravi Mathur, IAS, respondent no.4 and if so, whether it is permissible to initiate the disciplinary proceedings against him as he reached the age of superannuation and has retired and the alleged misconduct had been committed by him in 1993-94, and as to whether the misconduct is of such a grave nature that it warrants the criminal prosecution and if so, what should be the agency which may be entrusted with the investigation and prosecution.

10. Shri K.T.S. Tulsi, learned senior counsel appearing for respondent no.7 submitted that on similar allegations, this Court had directed CBI to initiate criminal proceedings against his

client and criminal prosecution has been launched and ended in logical conclusion, thus, there could be no justification not to initiate the similar proceedings against Shri Ravi Mathur, IAS, respondent no.4. Not initiating the proceedings on the similar or more grave charges would amount to treating the said respondent no.7 with hostile discrimination. The disciplinary proceedings cannot be initiated against him in view of delay and latches as the statutory rules applicable do not permit such a course at such a belated stage. The criminal prosecution can easily be launched. The matter requires investigation as to whether the said respondent no.4 had committed an offence under the provisions of Prevention of Corruption Act, 1988 (hereinafter called the Act 1988).

11. Dr. Rajeev Dhavan, learned senior counsel/Amicus Curiae would submit that the gravity of allegations made against the said respondent no.4 is of such a high magnitude that it warrants the same treatment as given to Mrs. Neera Yadav, IAS, respondent no.7. Dr. Dhavan has taken us through all the proceedings including the reports of the Chairman, Board of Revenue and K.T. Thomas Commission and submitted that it is a fit case directing the CBI to conduct enquiry against the respondent no.4. However, Dr. Rajeev Dhavan has raised serious objection in respect of intervention of the respondent no. 7 and opportunity of hearing accorded to Shri K.T.S. Tulsi, learned senior counsel on her behalf that in a case of this nature the respondent no.7 had no locus standi and right to raise any grievance whatsoever.

12. Shri Rakesh Dwivedi, learned senior counsel appearing for respondent no.4, has vehemently opposed the initiation of disciplinary proceedings or criminal prosecution on the ground that the Authority did not suffer any financial loss. There is nothing on record to show that the said respondent indulged in corruption, thus, the provisions of the Act 1988 were attracted. The said respondent had acted in good faith. The disciplinary proceedings cannot be initiated, being time barred.

All the allegations had been made against the said respondent no.4 at the behest of respondent no.7, thus, suffers from mala fide and bias. The said respondent had paid the transfer charges only once to the tune of Rs.1.80 lacs. The second conversion had subsequently been cancelled by the respondent no.7 herself. Due to pendency of this case, the said respondent could not get the physical possession of any of the plots. The change of user of the land in Sector 32 was made in good faith. More so, such a change was cancelled and the green area was restored by the respondent no.7 herself. The contract given by the respondent no.4 to certain contractors had been at the rate on which they had been working earlier. Thus, the Authority did not suffer any loss whatsoever.

13. Before we proceed with the case on merits, we would like to make it clear that Mrs. Neera Yadav, IAS, respondent no.7, had been given an opportunity by this Court vide order dated 20.1.1998 to file her affidavit disclosing the delinquency committed by other officers. In pursuance of the said order, she submitted her affidavit. Therefore, it is not possible for us at such a belated stage to deny her the right of hearing and ignore the submissions made by her counsel, Shri K.T.S. Tulsi. (vide: *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* (2011) 3 SCC 317).

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

15. The services of Shri Ravi Mathur, IAS, respondent no.4 stood governed by All India Services (Death-cum-Retirement Benefits) Rules, 1958. Rule 6(b), thereof, provides that in case the delinquent had already retired, the proceedings shall not be instituted against him without the sanction of the Central Government and shall be in respect of an event which took place *not more than four years before the institution of such proceedings.* Thus, it is evident that law does not permit holding disciplinary proceedings against Shri Ravi Mathur, IAS, respondent no.4 at this belated stage and this view stands

fortified by the judgments of this Court in *B.J. Shelat v. State of Gujarat & Ors.,* AIR 1978 SC 1109; *State Bank of India v. A.N. Gupta & Ors.,* (1997) 8 SCC 60; *State of U.P. & Ors. v. Harihar Bholenath,* (2006) 13 SCC 460; *UCO Bank & Anr. v. Rajinder Lal Capoor,* AIR 2007 SC 2129; *Ramesh Chandra Sharma v. Punjab National Bank & Anr.,* (2007) 9 SCC 15; and *UCO Bank & Anr. v. Rajinder Lal Capoor,* AIR 2008 SC 1831.

16. So far as the initiation of criminal proceedings is concerned it is governed by the provisions of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.). Section 468 thereof puts an embargo on the court to take cognizance of an offence after expiry of limitation provided therein. However, there is no limitation prescribed for an offence punishable with more than 3 years imprisonment. Section 469 declares as to when the period of limitation would start. Sections 470-471 provide for exclusion of period of limitation in certain cases. Section 473 enables the court to condone the delay provided the court is satisfied with the explanation furnished by the prosecution or where the interest of justice demands extension of the period of limitation.

This Court in *Japani Sahoo v. Chandra Sekhar Mohanty,* AIR 2007 SC 2762, dealt with the issue and observed as under:

> "14. The general rule of criminal justice is that a crime never dies. The principle is reflected in the well-known maxim *nullum tempus aut locus occurrit regi* (lapse of time is no bar to Crown in proceeding against offenders)……. It is settled law that a criminal offence is considered as a wrong against the State and the Society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of Law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a Court of Law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict."

17. The aforesaid judgment was followed by this Court in *Sajjan Kumar v. Central Bureau of Investigation,* (2010) 9 SCC 368.

18. Thus, it is evident that question of delay in launching criminal prosecution may be a circumstance to be taken into consideration in arriving at a final decision, but it cannot itself be a ground for dismissing the complaint. More so, the issue of limitation has to be examined in the light of the gravity of the charge.

19. Thus, we have to examine as to whether the said respondent could be tried for commission of an offence, if any, under the provisions of the Act, 1988.

Section 13 thereof, reads:

> *"Criminal misconduct by a public servant.-* (1) A public servant is said to commit the offence of criminal misconduct,-
>
> (b) …….
>
> (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so; or
>
> (d) if he, -
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (ii) *by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage;* or
>
> (iii) while holding office as a public servant, *obtains for any*

person any valuable thing or *pecuniary advantage without any public interest."* (Emphasis added)

20. Shri Ravi Mathur, IAS, respondent no.4 had been the CEO, NOIDA from July 1993 to 9.1.1994 and the CEO, Greater NOIDA from 10.1.1994 to 26.1.1995. Altogether, there had been 14 allegations against him which the Chairman, Board of Revenue had examined. The findings recorded by the Chairman, Board of Revenue were also placed before Justice K.T. Thomas Commission. However, at the time of arguments, Dr. Rajeev Dhavan, learned Amicus Curiae has submitted that there are three major allegations in respect of which this Court must direct the CBI enquiry. He has drawn our attention to the findings recorded by the Chairman, Board of Revenue on allegation nos. (iv), (ix) and (xiii) which are as under :

Allegation No. (iv) :

Shri Ravi Mathur allotted contracts worth Rs.10 crores to different contractors on selection basis without inviting tenders.

Findings:

(i) The award of the contract to M/s. Anil Kumar & Co., was approved by the CEO. The argument that the usual process was not followed on account of urgency is not acceptable. (para 1.4.3.2)

(ii) The award of the contract to M/s. Techno Construction Co. was a pre-detemined decision. No satisfactory explanation why this company only was selected. (para 1.4.3.3.)

(iii) The notes in the file for the award of the contract to M/s. Anil Kumar & Co. in Sector Gamma were tailor made and the urgency projected cannot be accepted. (para 1.4.3.4)

(iv) There was no urgency warranting the award of contract to Mr. J.K. Jain, which was approved by the CEO also. (para 1.4.3.5)

(v) The proposal to award work to M/s. Fair Deal Engineers was faulty and the urgency clause was not well defined. The note was approved by the CEO. (para 1.4.3.6)

(vi) The argument of urgency advanced is not acceptable in some cases (para 1.4.4). At least in one case there was not even a necessity to award the work. (para 1.4.4)

(vii) No cogent regions were given in the note file for selecting a particular contractor. Some of the notes appear to be tailor made. The works were got done by the Manager/Senior Manager through hand picked contractors without inviting tenders and without following financial norms. (para 1.4.4.)

Allegation No. (ix):

Shri Ravi Mathur caused financial loss to NOIDA by not paying conversion charges with respect to the plot allotted to him. He initially asked for conversion from Sector 35 to Sector 27 but since he did not deposit the required amount the offer of conversion was withdrawn. Subsequently he applied for conversion from Sector 35 to Sector 44.

Findings:

The only conversion which took place was from Sector 35 to Sector 44 for which conversion charges were deposited. It is a matter under the exclusive competence of the Authority and its Chief Executive as to whether it was to be treated as two conversions or one conversion only. It appears that it was a subtle and fine way to help a fellow officer. In any event Smt. Neera Yadav had approved the second application on 26.10.1994. The file regarding the

allotment and conversion of plot of Shri Ravi Mathur is not traceable in NOIDA but that is for the Authority to take appropriate action. (para 1.9.5)

Allegation No. (xiii):

A 13 hectare City Park situated near Sectors 24, 33 and 35 in NOIDA was destroyed and a new residential Sector 32 in violation of the Master Plan was carved out comprising of 200 plots.

Findings:

(i) The procedure as prescribed in the 1991 Regulations was not followed while making the change of land use. (para 1.13.7)

(ii) The decision of land use change was based on logic but the proposal should have been put up before the Board. The then Chief Architect Planner did not point out this legal requirement and failed in his primary duty in advising the ACEO and CCEO. (para 1.13.7)

(iii) There was no urgency for the development work in this sector. The development work was started and awarded without following the tender procedure in flagrant violation of established procedure for which the then Chief Project Engineer and the then General Manager (F) are responsible. (para 1.13.7)

(iv) The Board has taken its duties casually and there was no serious effort to check, analyse and advise. (para 1.13.7)

21. So far as these allegations are concerned, it is evident from the record that M/s Anil Kumar & Co. had been allotted originally the work on the basis of tender for Rs. 2.75 crores in Sector 'Gamma' in Greater NOIDA, in connection with the construction of water drains. However, they had been awarded

additional work by Shri Ravi Mathur, IAS, respondent no. 4, worth Rs.3.75 crores on a "deviation basis". In fact, awarding such work cannot be termed as an 'addition' or 'additional work' because the work is worth Rs.1 crore more than the amount of original contract. In such a fact-situation, even if there had been no financial loss to the Greater NOIDA, indisputably, the additional work for such a huge amount had been awarded without following the procedure prescribed in law. More so, there is nothing on record to show as to whether the said contractor M/s Anil Kumar & Co. was eligible to carry out the contract worth Rs.6.50 crores. Awarding the contract under the garb of so-called extension, amounts to doing something indirectly which may not be permissible to do directly. Admittedly, such a course of action is not permissible in law.

22. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of "*quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud"*, which means" "whenever a thing is prohibited, it is prohibited whether done directly or indirectly". (See: *Swantraj & Ors. v. State of Maharashtra,* AIR 1974 SC 517; *Commissioner of Central Excise, Pondicherry v. ACER India Ltd.,* (2004) 8 SCC 173; and *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.,* JT (2010) 11 SC 273).

23. In *Jagir Singh v. Ranbir Singh & Anr.,* AIR 1979 SC 381, this Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance." While deciding the said case, the Court placed reliance on the judgment in *Fox v. Bishop of Chester,* (1824) 2 B &C 635, wherein it has been observed as under:–

> "To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing in an indirect or circuitous manner that which it has prohibited or enjoined."

24. The second work had been allotted to M/s Techno Construction Co. worth Rs.1.00 crore without inviting fresh tenders etc., on the ground that earlier a contract for execution of similar work i.e. construction of road had been awarded to it. In view of the fact that there was no urgency, such a contract should not have been awarded. Undoubtedly, the respondent no.4 is guilty of proceeding in haste and that amounts to arbitrariness.

25. While dealing with the issue of haste, this Court in the case of *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia & Ors.,* (2004) 2 SCC 65, referred to the case of *Dr. S.P. Kapoor v. State of Himachal Pradesh & Ors.,* AIR 1981 SC 2181 and held that:

> "…..when a thing is done in a post-haste manner, mala fide would be presumed."

26. In *Zenit Mataplast Private Limited v. State of Maharashtra & Ors.,* (2009) 10 SCC 388, this Court held :

> "Anything done in undue haste can also be termed as arbitrary and cannot be condoned in law".

27. Thus, in case an authority proceeds in undue haste, the Court may *draw an adverse inference* from such conduct. It further creates a doubt that if there was no sufficient reason of urgency, what was the occasion for the respondent no.4 to proceed in such haste and why fresh tenders had not been invited.

28. It is evident from the record that the respondent no.4 had originally been allotted plot no.118, Sector-35 measuring 360 sq. meters which was converted to plot no.G-25, Sector-27 measuring 392 sq. meters. However, as the respondent no.4 did not deposit the required charges the said order of conversion stood withdrawn. By subsequent conversion, respondent no.4 got plot no.A-15 in Sector-44. Thus, two conversions had been made on different dates. However, he

paid the transfer charges only once to the tune of Rs.1.80 lacs. It is alleged that by first conversion, the respondent no.4 not only got the plot in a better location, but also a plot of bigger size. Second allotment was further, as alleged, in a far better geographical position.

29. There is no provision under the Act 1976 or Regulation 1991 for conversion. It is rather governed by Office Order No.4070/ NOIDA/DCEO/92 dated 3.7.1992. The relevant part thereof basically provides that conversion was permissible only in case of residential plots. Relevant part thereof reads as under:

> "3. In case of residential plots, only cancelled and surrendered properties shall be offered for conversion……
>
> The details of availability of properties shall be available in the office of Dy. Chief Executive Officer.
>
> xx xx xx
>
> xx xx xx
>
> 6. All expenses pertaining to conversion such as conversion charges, locational benefit charges, stamp duty, registration charges etc. shall be borne by the allottee.
>
> xx xx xx
>
> 8. Conversion shall not be allowed more than once to any allottee.
>
> xx xx xx
>
> 11. Chairman-cum-Chief Executive Officer may relax the above guidelines in exceptional circumstances."

30. The aforesaid Office Order dated 3.7.1992 stood modified vide order dated 27.9.1993 (when the respondent no.4 was the CEO, NOIDA) to the effect that a large number of vacant plots were available in old developed sectors. The

same may be included in the plots availability list.

31. That the list of available plots had been expanded during the period when the respondent no.4 was CEO, NOIDA and unallotted plots of various sectors including Sector 27 were also included in that list in which the respondent no.4 himself got the first conversion. It is a matter of investigation as to whether the Order dated 3.7.1992 was modified vide Order dated 27.9.1993 with ulterior purpose.

32. Section 12 of the Act 1976 makes the provisions of Chapter VII and Sections 30, 32, 40 to 47, 49, 50, 51, 53 and 58 of the U.P. Urban Planning and Development Act 1973 (hereinafter referred to as the 'Act 1973') *mutatis mutandis* applicable to the Act 1976. Section 17 of the Act 1976 declares that the Act 1976 would have an over-riding effect over the provisions of the Act 1973. Section 18 confers the power on the State Government to make rules by issuing a Notification for carrying out the purposes of the Act 1976. Section 19 of the Act 1976 provides for the framing of regulations by the NOIDA in respect of holding of meetings; defining the powers and duties of the CEO; and management of properties of the Authority etc. In view thereof, the New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations 1991 (hereinafter called as 'Regulations 1991') had been framed with the prior approval of the State Government as required under Section 19 of the Act 1976 and, therefore, have statutory force. By virtue of the provisions of sub-section 2(b) of Section 6 of the Act 1976, it is a statutory requirement that in the plan to be prepared by the NOIDA, it must necessarily provide as to for what particular purpose any area/site is to be used, namely, industrial, commercial or residential. The Authority is competent under sub-section 2(c) of Section 6, to regulate the construction etc. having regard to the nature for which the site has been earmarked. Section 8 of the Act 1976 restrains the use of any site for the purpose other than for which it is earmarked in the Master Plan. Section 9 prohibits the use of any area or erection of any building in

contravention of Regulations 1991. Section 14 of the Act 1976 clearly provides for cancellation of allotment and resumption/ re-entry, where the allotment had been made in contravention of the rules and regulations. In case the Authority wants to change the user of the land, condition precedent remains to amend the Master Plan.

33. There is nothing on record to show that any amendment had ever been made either in the Master Plan or in the Regulations 1991 before the change of user of land, when a 13 hectare City Park situated near Sectors 24, 33 and 35 was abolished and a new residential Sector 32 was carved out comprising 200 plots. Even if the said change made by Shri Ravi Mathur, IAS, respondent no.4 stood nullified, subsequently by Smt. Neera Yadav, respondent no.7, it does not exonerate him from committing an illegality. It is a matter of investigation as to what was the motive for which such a change had been made by Shri Ravi Mathur, IAS, respondent no.4, unauthorisedly and illegally. Admittedly he was not competent to do so without seeking the amendments as mentioned hereinabove.

34. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority

concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. (Vide: *M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr.,* AIR 1975 SC 266; *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.,* AIR 1979 SC 1628; *Haji T.M. Hassan Rawther v. Kerala Financial Corporation,* AIR 1988 SC 157; *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors.,* AIR 1991 SC 537; and *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu & Ors.,* AIR 1999 SC 2468).

35. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. (Vide: *Commissioner of Police, Bombay v. Gordhandas Bhanji,* AIR 1952 SC 16; *Sirsi Municipality v. Ceceila Kom Francis Tellis,* AIR 1973 SC 855**;** *The State of Punjab & Anr. v. Gurdial Singh & Ors.,* AIR 1980 SC 319**;** *The Collector (Distt. Magistrate) Allahabad & Anr. v. Raja Ram Jaiswal,* AIR 1985 SC 1622**;** *Delhi Administration (Now NCT of Delhi) v. Manohar Lal,* (2002) 7 SCC 222; and *N.D. Jayal & Anr. v. Union of India & Ors.,* AIR 2004 SC 867)**.**

36. In view of the above, we are of the considered opinion that these allegations being of a very serious nature and as alleged, the respondent no.4 had passed orders in colourable exercise of power favouring himself and certain contractors, require investigation. Thus, in view of the above, we direct the CBI to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution, may proceed in accordance with law.

It may be pertinent to mention that any observation made herein against respondent no.4 would be treated necessary to decide the present controversy. The CBI shall investigate the matter without being influenced by any observation made in this judgment.

The writ petition stands disposed of accordingly.

Before parting with the case, we would like to express our gratitude and record appreciation to Dr. Rajeev Dhavan, learned senior counsel for rendering commendable assistance to the Court as Amicus Curiae.

WRIT PETITION (C) NO. 529 OF 1998

NARESH PRATAP SINGH ....PETITONER

Versus

STATE OF U.P. ...RESPONDENT

DR. B.S. CHAUHAN, J. In view of our Judgment delivered today in Writ Petition (C) No. 150 of 1997 (Noida Entrepreneurs Association v. Noida & Ors.), no separate order is required in this writ petition which is accordingly disposed of.

B.B.B. Writ Petitions disposed of.

PREMA

v.

NANJE GOWDA AND OTHERS

(Civil Appeal No. 2481 of 2005)

MAY 10, 2011

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

Hindu Law:

Hindu Succession Act, 1956 – s.6A – Hindu Succession (Karnataka Amendment) Act, 1990 [Karnataka Act No.23 of 1994] – Preamble and ss.1 and 2 – Modification of preliminary decree in final decree proceedings – Scope – Joint family property – Respondent no.1 filed partition suit – Preliminary decree passed by trial court whereby plaintiff-respondent no.1 and defendant no.3 were held entitled to 2/7th share whereas defendant nos. 1, 4, 5 and defendant no.6-daughter (appellant) were held entitled to 1/28th share each – Preliminary decree confirmed by first appellate court and High Court – Respondent No.1 instituted final decree proceedings – Meanwhile the Karnataka legislature made a State amendment in the Hindu Succession Act vide Karnataka Act No.23 of 1994 by inserting s.6A whereby unmarried daughters were given equal rights in co-parcenary property – Appellant filed application under ss.151,152 and 153 of CPC for amendment of the preliminary decree and for grant of declaration that in terms of s.6A she was entitled to 2/7th share (higher share) in the suit property, claiming that she had not married till the enforcement of the Karnataka Act No.23 of 1994 – Trial Court dismissed the appellant's application holding that amendment made in the Act same cannot be relied upon for amending the decree, which had become final – High Court upheld the order of trial court – On appeal, held: By the preliminary decree, shares of the

parties were determined but the actual partition/division had not taken place –Therefore, the proceedings of the suit instituted by respondent No.1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned and it was open to the appellant to claim enhancement of her share in the joint family properties because she had not married till the enforcement of the Karnataka Act No.23 of 1994 – By virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed – If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings – Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same – If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order – In the instant case, the final decree proceedings were pending the day s.6A came into force – Therefore, the appellant had every right to seek enlargement of her share and there is no reason why the Court should hesitate in giving effect to an amendment made by the State legislature in exercise of the power vested in it under Article 15(3) of the Constitution – Consequently, the application filed by the appellant under ss.151, 152 and 153 CPC is allowed – Code of Civil Procedure, 1908 – ss. 151, 152 and 153 – Constitution of India, 1950 – Article 15(3).

Respondent no.1 filed suit for partition and separate

possession of his share in the joint family property. The preliminary decree was passed on 11.8.1992 whereby the trial court held that plaintiff-respondent no.1 and defendant no.3 were entitled to 2/7th share whereas defendant nos. 1, 4, 5 and defendant no.6-daughter (appellant) were entitled to 1/28th share each. The defendant no.6-appellant and defendant Nos.1, 4 and 5 filed a joint appeal which was dismissed by the first appellate court. The second Appeal filed by defendant Nos.1, 4 and 5 was dismissed by the High Court. Subsequently, Respondent No.1 instituted final decree proceedings. Meanwhile, the Karnataka legislature made a State amendment in the Hindu Succession Act, 1956 vide the Hindu Succession (Karnataka Amendment) Act, 1990 [Karnataka Act No.23 of 1994] by inserting s.6A whereby unmarried daughters were given equal rights in co-parcenary property. The appellant thereafter filed an application under Sections 151, 152 and 153 of CPC for amendment of the preliminary decree and for grant of a declaration that in terms of Section 6A she was entitled to 2/7th share (higher share) in the suit property, claiming that she had not married till the enforcement of the Karnataka Act No.23 of 1994.

The trial Court dismissed the appellant's application primarily on the ground that Section 6A of the Act is not retrospective. In the opinion of the trial Court, the amendment made in the Act can be applied only to those cases in which partition of the joint family properties is effected after 30.7.1994, but the same cannot be relied upon for amending the decree, which had become final. The appellant's challenge to the aforesaid order was negatived by the High Court, which held that with the dismissal of the second appeal, the preliminary decree passed by the trial Court had become final and during the pendency of the second appeal filed by defendant Nos. 1, 4 and 5, the appellant had not prayed for enhancement

of her share in the joint family property in terms of Section 6A, which was inserted by the State Amendment. The High Court held that the application filed by the appellant could not be entertained in the final decree proceedings instituted by respondent No.1.

In the instant appeal, the question which arose for consideration was whether the appellant, who failed in her challenge to the preliminary decree passed in a suit for partition filed by respondent No.1 could seek enhancement of her share in the joint family property in the final decree proceedings in terms of Section 6A inserted in the Hindu Succession Act, 1956 by the Hindu Succession (Karnataka Amendment) Act, 1990.

Allowing the appeal, the Court

HELD:1. With a view to achieve the goal of equality enshrined in Articles 14 and 15(1) of the Constitution and to eliminate discrimination against daughters, who were deprived of their right to participate in the coparcenary property, the Karnataka legislature amended the Hindu Succession Act, 1956 and inserted Sections 6A to 6C for ensuring that the unmarried daughters get equal share in the coparcenary property. This is evident from the preamble and Sections 1 and 2 of the Karnataka Act No.23 of 1994 i.e. the Hindu Succession (Karnataka Amendment) Act, 1990 [Para 10] [66-C-E]

2.1. The scope of Section 29A which was inserted in the Act by Andhra Pradesh Act No.13 of 1986 and which is *pari materia* to Section 6A of the Karnataka Act No.23 of 1994 was considered by the Andhra Pradesh High Court which after referring to Section 29A held that if after passing of preliminary decree in a partition suit but before passing of final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment,

the Court is duty bound to decide the matter and pass final decree keeping in view the change scenario. The appeal preferred against the judgment of the High Court was dismissed by the Supreme Court in *S. Sai Reddy v. S. Narayana Reddy* **[Paras 11, 12] [68-D-F; 69-B-C; 70-D]**

2.2. In the present case, the preliminary decree was passed on 11.8.1992. The first appeal was dismissed on 20.3.1998 and the second appeal was dismissed on 1.10.1999. By the preliminary decree, shares of the parties were determined but the actual partition/division had not taken place. Therefore, the proceedings of the suit instituted by respondent No.1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned and it was open to the appellant to claim enhancement of her share in the joint family properties because she had not married till the enforcement of the Karnataka Act No.23 of 1994. Section 6A of the Karnataka Act No.23 of 1994 is identical to Section 29A of the Andhra Pradesh Act. Therefore, there is no reason why ratio of the judgment of the Supreme Court in *S. Sai Reddy v. S. Narayana Reddy* should not be applied for deciding the appellant's claim for grant of share at par with male members of the joint family. In the considered view of this Court, the trial Court and the Single Judge were clearly in error when they held that the appellant was not entitled to the benefit of the Karnataka Act No.23 of 1994 because she had not filed an application for enforcing the right accruing to her under Section 6A during the pendency of the first and the second appeals or that she had not challenged the preliminary decree by joining defendant Nos.1, 4 and 5 in filing the second appeal. [Para 13] [75-F-H; 76-A-C]

2.3. By virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will

be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order. In this case, the Act was amended by the State legislature and Sections 6A to 6C were inserted for achieving the goal of equality set out in the Preamble of the Constitution. In terms of Section 2 of the Karnataka Act No.23 of 1994, Section 6A came into force on 30.7.1994, i.e. the date on which the amendment was published. As on that day, the final decree proceedings were pending. Therefore, the appellant had every right to seek enlargement of her share by pointing out that the discrimination practiced against the unmarried daughter had been removed by the legislative intervention and there is no reason why the Court should hesitate in giving effect to an amendment made by the State legislature in exercise of the power vested in it under Article 15(3) of the Constitution. [Para 14] [72-D-H; 73-A-B]

2.4. The trial Court and the High Court committed serious error by dismissing the application filed by the appellant for grant of equal share in the suit property in terms of Section 6A of the Karnataka Act No.23 of 1994. As a sequel to this, the application filed by the appellant under Sections 151, 152 and 153 CPC is allowed in terms

of the prayer made. If the final decree has not been passed so far, then the trial Court shall do so within six months from the date of production/receipt of the copy of this judgment. If the final decree has already been passed, then the trial Court shall amend the same in terms of this judgment and give effect to the right acquired by the appellant under Section 6A of the Karnataka Act No.23 of 1994. [Paras 20, 21] [82-B-F]

Phoolchand v. Gopal Lal **AIR 1967 SC 1470: 1967 SCR 153 and** *S. Sai Reddy v. S. Narayana Reddy* **(1991) 3 SCC 647 – relied on.**

Venkata Reddy v. Pethi Reddy **AIR 1963 SC 992: 1963 Suppl. SCR 616;** *Gyarsi Bai v. Dhansukh* ***Lal*** **AIR 1965 SC 1055;** *Mool Chand v. Deputy Director, Consolidation* **(1995) 5 SCC 631: 1995 (2) Suppl. SCR 763;** *S. Narayana Reddy v. S. Sai Reddy*, **AIR 1990 Andhra Pradesh 263;** *R. Gurubasaviah Rumale Karibasappa and others* **AIR 1955 Mysore 6,** *Parshuram Rajaram Tiwari v. Hirabai Rajaram Tiwari*, **AIR 1957 Bombay 59 and** *Jadunath Roy and others v. Parameswar Mullick and others* **AIR 1940 PC 11 – referred to.**

Case Law Reference:

1963 Suppl. SCR 616	**referred to**	**Para 6,15,17**
AIR 1965 SC 1055	**referred to**	**Para 6,18**
1995 (2) Suppl. SCR 763	**referred to**	**Para 6,19**
(1991) 3 SCC 647	**relied on**	**Para 6, 7, 11, 15, 20**
1967 SCR 153	**relied on**	**Para 7, 11, 13, 15,16,20**
AIR 1990 Andhra Pradesh 263	**referred to**	**Para 11**
AIR 1955 Mysore 6	**referred to**	**Para 11**
AIR 1957 Bombay 59	**referred to**	**Para 11**
AIR 1940 PC 11	**referred to**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2481 of 2005.

From the Judgment & Order dated 13.8.2002 of the High Court of Karnataka at Bangalore in Civil Revision Petition No. 3079 of 2000.

S.N. Bhat for the Appellant.

K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. The question which arises for consideration in this appeal is whether the appellant, who failed in her challenge to the preliminary decree passed in a suit for partition filed by respondent No.1 can seek enhancement of her share in the joint family property in the final decree proceedings in terms of Section 6A inserted in the Hindu Succession Act, 1956 (for short, "the Act") by the Hindu Succession (Karnataka Amendment) Act, 1990, which received Presidential assent on 28.7.1994 and was published in the Karnataka Gazette dated 30.7.1994.

2. The suit for partition and separate possession of his share filed by respondent No.1, which came to be registered as O.S. No.425 of 1989, was decreed by Munsiff, Srirangapatna (hereinafter described as, 'the trial Court') vide judgment dated 11.8.1992. The trial Court held that plaintiff-respondent No.1 and defendant No.3 are entitled to 2/7th share and defendant Nos.1, 4, 5 and 6 are entitled to 1/28th share each.

3. Regular Appeal No.69 of 1992 jointly filed by the appellant, who was defendant No.6 in the suit and defendant Nos.1, 4 and 5 was dismissed by Civil Judge (Senior Division), Srirangapatna (hereinafter described as 'the lower appellate

Court') vide judgment dated 20.3.1998. Regular Second Appeal No.624 of 1998 filed by defendant Nos.1, 4 and 5 was dismissed by the High Court vide order dated 1.10.1999 on the ground that the same was barred by limitation.

4. In the meanwhile, respondent No.1 instituted final decree proceedings (FDP No.5 of 1999). On being noticed by the trial Court, the appellant filed an application under Sections 151, 152 and 153 of the Code of Civil Procedure (CPC) for amendment of the preliminary decree and for grant of a declaration that in terms of Section 6A inserted in the Act by the State Amendment, she was entitled to 2/7th share in the suit property. The appellant averred that she had married one Shri M.B. Srinivasaiah on 9.8.1994, i.e. after coming into force of the State Amendment and, as such, she is entitled to higher share in the joint family property. Respondent No.1 contested the application by asserting that with the dismissal of Regular Second Appeal No. 624 of 1998, the preliminary decree passed in O.S. No.425 of 1989 will be deemed to have become final and in the final decree proceedings the appellant cannot claim higher share by relying upon Section 6A which came into force in 1994. He denied the appellant's assertion about her marriage on 9.8.1994. In the alternative, he pleaded that even if the marriage certificate produced by the appellant is treated as genuine, she cannot claim higher share by relying upon the State Amendment.

5. By an order dated 10.7.2000, the trial Court dismissed the appellant's application primarily on the ground that Section 6A of the Act is not retrospective. In the opinion of the trial Court, the amendment made in the Act can be applied only to those cases in which partition of the joint family properties is effected after 30.7.1994, but the same cannot be relied upon for amending the decree, which has become final. The trial Court observed that even if the daughter remains unmarried, she cannot be treated as coparcener because after partition, there remains no joint family property. The trial Court also held that

the application filed by the appellant was barred by time.

6. The appellant's challenge to the aforesaid order was negatived by the learned Single Judge, who held that with the dismissal of the second appeal, the preliminary decree passed by the trial Court had become final and during the pendency of the second appeal filed by defendant Nos. 1, 4 and 5, the appellant had not prayed for enhancement of her share in the joint family property in terms of Section 6A, which was inserted by the State Amendment. The learned Single Judge relied upon the judgments of this Court in *Venkata Reddy v. Pethi Reddy* AIR 1963 SC 992, *Gyarsi Bai v. Dhansukh Lal* AIR 1965 SC 1055 and *Mool Chand v. Deputy Director, Consolidation* (1995) 5 SCC 631 and held that the application filed by the appellant could not be entertained in the final decree proceedings instituted by respondent No.1. The learned Single Judge distinguished the judgment in *S. Sai Reddy v. S. Narayana Reddy* (1991) 3 SCC 647, upon which reliance was placed by the appellant by observing that the two-Judge Bench had not referred to the earlier judgments of the larger Benches.

7. Shri S.N. Bhat, learned counsel for the appellant argued that even though the appellant did not seek modification of the preliminary decree by joining other defendants who had filed Regular Second Appeal No. 624/1998, the application filed by her could not have been dismissed as not maintainable because till then the joint family property had not been partitioned. He submitted that in a partition suit, the preliminary decree passed by the competent Court does not become effective till the suit property is actually divided in accordance with law and the same can be modified for good and sufficient reasons. Learned counsel submitted that by virtue of Section 6A, the appellant had become entitle to higher share in the joint family property and the trial Court and the High Court committed serious error by negating her claim on a wrong assumption that the benefit of amendment cannot be availed by the appellant in the final decree proceedings. In support of his arguments, Shri Bhat

relied upon the judgments of this Court in *Phoolchand v. Gopal Lal* AIR 1967 SC 1470 and *S. Sai Reddy v. S. Narayana Reddy* (supra).

8. Mrs. K. Sarada Devi, learned counsel for the respondents argued that the trial Court and the High Court did not commit any error by rejecting the appellant's claim for higher share because with the passing of decree for partition and separate possession, the suit property lost its character as joint family property and the appellant was not entitled to claim anything from the shares already allotted to other members of the erstwhile joint family property.

9. In the pre-Independence era, social reformers like Raja Ram Mohan Roy, Lokmanya Tilak, Mahatma Phule and Mahatma Gandhi took up the cause of women and relentlessly worked for promotion of female education, re-marriage of widows and elimination of child marriage. The concept of widow's estate was also developed during that period which led to enactment of Hindu Women's Right to Property Act, 1937. The framers of the Constitution were great visionaries. They not only placed justice and equality at the highest pedestal, but also incorporated several provisions for ensuring that the people are not subjected to discrimination on the ground of caste, colour, religion or sex. Article 14 of the Constitution declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 lays down that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and no citizen shall be subjected to any disability, liability, restriction or condition on grounds of religion, race, caste, sex, place of birth or any of them in the matter of access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds dedicated to the use of the general public. Clause (3) of Article 15 contains

an enabling provision and lays down that nothing in that article shall prevent the State from making any special provision for women and children. Similar provisions have been made in Article 16 in the matter of public employment.

10. With a view to achieve the goal of equality enshrined in Articles 14 and 15(1) of the Constitution and to eliminate discrimination against daughters, who were deprived of their right to participate in the coparcenary property, the Karnataka legislature amended the Act and inserted Sections 6A to 6C for ensuring that the unmarried daughters get equal share in the coparcenary property. This is evident from the preamble and Sections 1 and 2 of the Karnataka Act No.23 of 1994, the relevant portions of which are reproduced below:

"KARNATAKA ACT No. 23 OF 1994

THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

An Act to amend the Hindu Succession Act, 1956 in its application to the State of Karnataka;

WHEREAS the Constitution of India has proclaimed equality before law as a fundamental right;

And whereas the exclusion of the daughter from participation in co-parcenary ownership merely by reason of her sex is contrary thereto;

And whereas the beneful system of dowry has to be eradicated by positive measure which will simultaneously ameliorate the condition of women in the Hindu society;

Be it enacted by the Karnataka State Legislature in the Forty-first year of the Republic of India as follows:

1. Short title and commencement. – (1) This Act may be called the Hindu Succession (Karnataka Amendment) Act,

1990.

(2) It shall come into force at once.

2. Insertion of new sections in Central Act XXX of 1956. – In the Hindu Succession Act, 1956 (Central Act XXX of 1956) after Section 6, the following sections shall be inserted, namely:–

6A. Equal rights to daughter in co-parcenary property. – Notwithstanding anything contained in Section 6 of this Act,-

(a) in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(b) at a partition in such Joint Hindu Family the co-parcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son;

Provided that the share which a predeceased son or a predeceased daughter would have got at the partition if he or she had been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter;

Provided further that the share allotable to the predeceased child of the predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of such predeceased daughter, as the case may be: –

(c) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (a) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(d) nothing in clause (b) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Karnataka Amendment) Act, 1990."

11. Similar provisions were inserted in the Act by the legislatures of the States of Andhra Pradesh, Maharashtra and Tamil Nadu. The scope of Section 29A which was inserted in the Act by Andhra Pradesh Act No.13 of 1986 and which is *pari materia* to Section 6A of the Karnataka Act No.23 of 1994 was considered by the learned Single Judge of the Andhra Pradesh High Court in *S. Narayana Reddy v. S. Sai Reddy,* AIR 1990 Andhra Pradesh 263. The facts of that case were that the preliminary decree passed by the trial Court in a partition suit was confirmed by the High Court with a direction that while passing final decree, the trial Court shall make appropriate provision for maintenance and marriage expenses of defendant Nos.5 to 9 and maintenance of the third defendant shall be borne equally by each of the plaintiff, first defendant and fourth defendant out of the joint family properties. After insertion of Section 29A in the Act by Andhra Pradesh Act No.13 of 1986, the first defendant claimed that defendant Nos.6 to 9 being unmarried daughters are entitled to shares at par with their brothers because the properties had not been divided by then. The trial Court rejected the claim of the first defendant by observing that with the dismissal of the appeal by the High Court, the preliminary decree had become final and the appellant was not entitled to indirectly challenge the same. The learned Single Judge referred to Section 29A, the judgments

of Mysore High Court in *R. Gurubasaviah Rumale Karibasappa and others* AIR 1955 Mysore 6, Parshuram Rajaram Tiwari v. Hirabai Rajaram Tiwari, AIR 1957 Bombay 59 and Jadunath Roy and others v. Parameswar Mullick and others AIR 1940 PC 11 and held that if after passing of preliminary decree in a partition suit but before passing of final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment, the Court is duty bound to decide the matter and pass final decree keeping in view the change scenario.

The learned Single Judge then referred to the judgment of this Court in Phoolchand v. Gopal Lal (supra) and observed:

> "19. Since the parties have invoked the jurisdiction of the Civil Court to decide their rights in a partition suit, their rights can be considered at any stage till the passing of the final decree. Till the final decree as stated above is passed in a partition suit, it is well settled that the suit is said to be pending, till the final decree is signed by the Judge after engrossing the same on the stamps. In view of the insertion of S. 29-A in the Hindu Succession Act by Act (13 of 1986) the statute conferred a right on the daughters and they become coparceners in their own right in the same manner as sons and have the same rights in the coparcenary property. In this case, admittedly the daughters are already on record and, therefore, they are entitled to claim a right and request the Court to pass a final decree by taking into account the altered situation……..
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> 20. As pointed out by the Supreme Court in Phoolchand's case, (AIR 1967 SC 1470) (supra) there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree particularly in partition suits where shares specified in the preliminary decree have to be adjusted so long as a final decree has not been passed in that suit. On facts in this case, a preliminary decree has

> been passed giving 1/3rd share to the plaintiff. The shares of the other persons also have to be ascertained and the rights of the unmarried daughters have been recognised in the preliminary decree. *There is a statutory change by the introduction of Section 29A of the Hindu Succession Act which came into force on 5th September, 1985 and the preliminary decree has been passed on 26th December, 1973, but no final decree has been passed. The plaintiff himself filed an application for passing a final decree and the trial court is bound to implement the statutory rights conferred on the daughters and it ought to have allowed the petition in accordance with law."*
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> (emphasis supplied)

12. While dismissing the appeal preferred against the judgment of the High Court, this Court observed as under:

> "……..The crucial question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. *When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be*

passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. …….. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. *The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment……"*

(emphasis supplied)

13. In the present case, the preliminary decree was passed on 11.8.1992. The first appeal was dismissed on 20.3.1998 and the second appeal was dismissed on 1.10.1999 as barred by limitation. By the preliminary decree, shares of the parties were determined but the actual partition/division had not taken place. Therefore, the proceedings of the suit instituted by respondent No.1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned and in view of the law laid down in *Phoolchand v. Gopal Lal* (supra) and *S. Sai Reddy v. S. Narayana Reddy* (supra), it was open to the appellant to claim enhancement of her share in the joint family properties because she had not married till

the enforcement of the Karnataka Act No.23 of 1994. Section 6A of the Karnataka Act No.23 of 1994 is identical to Section 29A of the Andhra Pradesh Act. Therefore, there is no reason why ratio of the judgment in *S. Sai Reddy v. S. Narayana Reddy* (supra) should not be applied for deciding the appellant's claim for grant of share at par with male members of the joint family. In our considered view, the trial Court and the learned Single Judge were clearly in error when they held that the appellant was not entitled to the benefit of the Karnataka Act No.23 of 1994 because she had not filed an application for enforcing the right accruing to her under Section 6A during the pendency of the first and the second appeals or that she had not challenged the preliminary decree by joining defendant Nos.1, 4 and 5 in filing the second appeal.

14. We may add that by virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order. In this case, the Act was amended by the State legislature and Sections 6A to 6C were inserted for achieving the goal of equality set out in the Preamble of the Constitution. In terms of Section 2 of the Karnataka Act No.23 of 1994, Section 6A came into force on 30.7.1994, i.e. the date on which the amendment was published. As on that day, the

final decree proceedings were pending. Therefore, the appellant had every right to seek enlargement of her share by pointing out that the discrimination practiced against the unmarried daughter had been removed by the legislative intervention and there is no reason why the Court should hesitate in giving effect to an amendment made by the State legislature in exercise of the power vested in it under Article 15(3) of the Constitution.

15. The issue which remains to be considered is whether the learned Single Judge of the High Court was justified in refusing to follow the law laid down in *S. Sai Reddy v. S. Narayana Reddy* (supra) on the ground that the same was based on the judgment of three-Judge Bench in *Phoolchand v. Gopal Lal* (supra) and a contrary view had been expressed by the larger Bench in *Venkata Reddy v. Pethi Reddy* (supra).

16. In *Phoolchand v. Gopal Lal* (supra), this Court considered the question whether the preliminary decree passed in a partition suit is conclusive for all purposes and the Court before whom final decree proceedings are pending cannot take note the changes which may have occurred after passing of the preliminary decree. The facts of that case were that appellant-Phoolchand had filed a suit in 1937 for partition of his 1/5th share in the plaint schedule properties. Sohanlal (father of the appellant), Gopal Lal (brother of the appellant), Rajmal (minor adopted son of Gokalchand (deceased), who was another brother of the appellant) and Smt. Gulab Bai (mother of the appellant) impleaded as defendants along with two other persons. The suit was contested up to Mahkma Khas of the former State of Jaipur and a preliminary decree for partition was passed on 1.8.1942 specifying the shares of the appellant and four defendants. Before a final decree could be passed, Sohanlal and his wife Smt Gulab Bai died. Gopal Lal claimed that his father Sohanlal had executed a Will in his favour on 2.6.1940 and bequeathed all his property to him. Appellant-Phoolchand challenged the genuineness of the Will. He also

claimed that Smt Gulab Bai had executed a sale deed dated 19.10.1947 in his favour, which was duly registered on 10.1.1948. Gopal Lal challenged the sale deed by contending that Gulab Bai had executed the sale deed because she was a limited owner of the share in the ancestral property. The trial Court held that the Will allegedly executed by Sohan Lal in favour of Gopal Lal had not been proved but the sale deed executed by Gulab Bai in favour of Phoolchand was valid. As a sequel to these findings, the trial Court redistributed the shares indicated in the preliminary decree. As a result, Phoolchand's share was increased from one-fifth to one-half and Gopal Lal's share was increased from one-fifth to one-fourth and that of Rajmal from one-fifth to one-fourth. The High Court allowed the appeal filed by Gopal Lal and held that Gulab Bai was not entitled to sell her share in favour of appellant-Phoolchand. The High Court also held that the Will executed by Sohan Lal in favour of Gopal Lal was genuine. One of the points considered by this Court was whether there could be more than one preliminary decree. This Court referred to the judgments of various High Courts, which took the view that in a partition suit, the High Court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed and then proceeded to observe:

> "We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. *If this is done, there is a clear*

determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed……"

(emphasis supplied)

17. In *Venkata Reddy v. Pethi Reddy* (supra), the Constitution Bench was called upon to consider the question as to what meaning should be given to the expression 'final decision' occurring in the first proviso to Section 28A of the Provincial Insolvency Act, 1920. The facts of that case were that Venkata Reddy, the father of the appellants, was adjudicated an insolvent by the Sub-Court, Salem in I.P. No. 73 of 1935. At that time only appellants Nos.1 and 2 were born while the third appellant was born later. The father's one-third share was put up for auction by the Official Receiver and was purchased by one Karuppan Pillai for Rs 80/-. The Official Receiver then put up for auction the two-third share belonging to appellant Nos.1 and 2 on 27.7.1936 which was purchased by the same person for Rs 341/-. He sold the entire property to the respondent Pethi Reddy on 25.5.1939 for Rs 300/-. The appellants instituted a suit on 1.2.1943 for the partition of the joint family property to

which suit they made Pethi Reddy a party and claimed thereunder two-third share in the property purchased by him. In that suit, it was contended on behalf of the respondent that on their father's insolvency the share of the appellants in the joint family property also vested in the Official Receiver and that he had the power to sell it. The contention was negatived by the trial Court which passed preliminary decree for partition in favour of the appellants. The decree was affirmed in appeal by the District Judge and eventually by the High Court in second appeal, except with a slight variation regarding the amount of mesne profits. On 18.1.1946, the appellants made an application for a final decree which was granted ex parte on 17.8.1946. However, the decree was set aside at the instance of the respondent. By relying upon Section 28A of the Provincial Insolvency Act, it was contended by the respondent that the appellants were not entitled to the allotment of their two-third share in the property purchased by him inasmuch as that share had vested in the Official Receiver. The District Munsiff rejected the contention of the respondent and restored the ex parte decree. The appeal preferred by the respondent was dismissed by Principal Subordinate Judge, Salem. However, the second appeal filed by him was allowed by the High Court and the application filed by the appellants for passing final decree was dismissed. The Constitution Bench referred to Section 28A of the Provincial Insolvency Act, which was as under:

> "The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge:
>
> Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or Receiver or the Collector acting under Section 60 made before the commencement of the

Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent court:

> Provided further that the property of the insolvent shall not be deemed by any reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after July 28, 1942 and before the commencement of the Provincial Insolvency (Amendment) Act, 1948."

The Court then referred to Objects and Reasons set out in the Bill, which led to the enactment of Section 28A and observed:

> "The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso. This proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent Court……."

The Court then held that the preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but is final in so far as the matters dealt with by it are concerned. This is evident from the following observations made in the judgment:

> "……A decision is said to be final when, so far as the court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal,

> modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. *A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree — the decree which would be executable would be the final decree.* But the finality of a decree or a decision does not necessarily depend upon its being executable. *The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it.* It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

(emphasis supplied)

18. In *Gyarsi Bai v. Dhansukh Lal* (supra), the three-Judge Bench considered the nature of the preliminary and final decrees in a mortgage suit and the question whether the mortgagor is entitled to raise the plea in the final decree proceedings which he did not raise during the pendency of the suit up to the stage of preliminary decree. The facts of the case,

as contained in the judgment, were that the plaint-schedule properties originally belonged to one Noor Mohammad, his wife and son. On 14.9.1936, they mortgaged the said properties with possession to B.F. Marfatia for a sum Rs. 25,000. On 22.2.1938, the said mortgagors executed a simple mortgage in respect of the same properties to one Novat Mal for Rs. 5000. On 21.12.1942, Radha Kishan, Har Prasad and Pokhi Ram acquired the equity of redemption in the said properties in an auction-sale held in execution of a money decree against the mortgagors. On 14.2.1950 and 13.3.1950, Seth Girdhari Lal, the husband of appellant No.1 herein, purchased the mortgagee rights of Novat Mal and Marfatia respectively. On 1.5.1950, Girdhari Lal was put in possession of the mortgaged properties. On 22.7.1950, respondent Nos.9 to 11 purchased the equity of redemption of the mortgaged properties from Radha Kishan, Har Prasad and Pokhi Ram. On 10.8.1950, Girdhari Lal instituted Civil Suit No. 739 of 1950 in the Court of the Senior Subordinate Judge, Ajmer, for enforcing the said two mortgages. In the suit, he claimed Rs. 48,919-12-6 as the amount due to him under the said two mortgages. On 25.4.1953, the Senior Subordinate Judge, Ajmer, gave a preliminary decree in the suit for the recovery of a sum of Rs. 34,003-1-6 with proportionate costs and future interest; he disallowed interest from 14.9.1936 to 13.3.1950, on the mortgage of Rs. 25,000. The plaintiff-mortgagee preferred an appeal, being Civil Appeal No.71 of 1953 to the Judicial Commissioner, Ajmer, against the said decree insofar as it disallowed interest to him. The defendants preferred cross-objections in respect of that part of the decree awarding costs against them. On 25.7.1953, the defendants filed an application under Order XXXIV Rule 5(1) of the CPC, seeking permission to deposit the decretal amount in court and praying that possession of the properties may be directed to be delivered to them and also for directing the decree-holder to render accounts of the profits of the mortgaged properties received by him. On 29.7.1953, the respondents deposited Rs. 35,155-

2-6 in the trial Court. On 17.8.1953, the decree-holder filed objections to the said deposit on the ground that it was much less than the decretal amount. On 27.8.1953, the trial Court made an order permitting the decree-holder to withdraw the said amount with the reservation that the question as to what was due under the decree would be decided later. On 25.8.1954, both the appeal of the decree-holder and the cross-objections of the defendants were dismissed. On 7.12.1954, the defendants filed an application in the trial Court for the determination of the amount due under the decree and for directing the decree-holder to render accounts of all the realizations from the mortgaged properties. On 14.3.1955, this Court granted special leave to the decree-holder for preferring an appeal against the judgment of the Judicial Commissioner dismissing Civil Appeal No. 71 of 1953. On 15.2.1956, the trial Court dismissed the application filed by the defendants for directions on the ground that the mortgage deed had merged in the preliminary decree and that the said decree contained no directions to the plaintiff to render accounts. On 29.2.1956, the defendants applied to the Judicial Commissioner, Ajmer under Section 152 of the CPC for amending the preliminary decree by including therein a direction against the plaintiff for rendition of account in respect of the profits received by him from the mortgaged properties. On 12.4.1956, the Judicial Commissioner dismissed the said application. On 25.4.1956, the defendants filed a revision petition against the order of the trial Court dated 15.2.1956, in the Court of the Judicial Commissioner, Ajmer. By judgment dated 16.12.1960, this Court modified the preliminary decree and directed the trial Court to pass a fresh final decree. Thereafter, the High Court allowed the revision filed by the defendants and remanded the case to the trial Court with a direction to take into account the receipts from the mortgaged properties and expenses properly incurred for management thereof and to determine what sum remained to be paid to the mortgagees taking into account the judgment of this Court. On appeal, this Court referred to Section

76(h) of the Transfer of Property Act and held that if the mortgagor does not raise a particular plea at the stage of preliminary decree, he would be debarred on the principle of *res judicata* from raising the same at a later stage and then proceeded to observe:

> "But the same cannot be said of the net receipts realized by the mortgagee subsequent to the preliminary decree. None of the principles relied upon by the learned counsel for the appellants helps him in this regard. It is true that a preliminary decree is final in respect of the matters to be decided before it is made: See *Venkata Reddy v. Pethi Reddy* AIR 1963 SC 992 and Section 97 of the Code of Civil Procedure. It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights: see *Talebali v. Abdul Azia,* ILR 57 Cal 1013; (AIR 1929 Cal 689 FB) and *Kausalya v. Kauleshwar,* ILR 25 Pat 305: (AIR 1947 Pat 113). It cannot also be disputed that a mortgage merges in the preliminary decree and the rights of the parties are thereafter governed by the said decree: See *Kusum Kumari v. Debi Prosad Dhandhania,* 63 Ind App 114: (AIR 1936 PC 63). But we do not see any relevancy of the said principles to the problem that arises in this case in regard to the liability of the mortgagee to account for the net receipts under Section 76(h) of the Transfer of Property Act. A preliminary decree is only concerned with disputes germane to the suit up to the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree: they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree."

19. In *Mool Chand v. Deputy Director, Consolidation*

(supra), the Court considered the provisions of the U.P. Consolidation of Holdings Act, 1953 and held that the preliminary decree passed in a suit for partition can be given effect to in proceedings before the consolidation authorities.

20. In our view, neither of the aforesaid three judgments can be read as laying down a proposition of law that in a partition suit, preliminary decree cannot be varied in the final decree proceedings despite amendment of the law governing the parties by which the discrimination practiced against unmarried daughter was removed and the statute was brought in conformity with Articles 14 and 15 of the Constitution. We are further of the view that the ratio of *Phoolchand v. Gopal Lal* (supra) and *S. Sai Reddy v. S. Narayana Reddy* (supra) has direct bearing on this case and the trial Court and the High Court committed serious error by dismissing the application filed by the appellant for grant of equal share in the suit property in terms of Section 6A of the Karnataka Act No.23 of 1994.

21. In the result, the appeal is allowed. The impugned judgment as also the order passed by the trial Court are set aside. As a sequel to this, the application filed by the appellant under Sections 151, 152 and 153 CPC is allowed in terms of the prayer made. If the final decree has not been passed so far, then the trial Court shall do so within six months from the date of production/receipt of the copy of this judgment. If the final decree has already been passed, then the trial Court shall amend the same in terms of this judgment and give effect to the right acquired by the appellant under Section 6A of the Karnataka Act No.23 of 1994. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

SK. YUSUF
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 831 of 2007)

JUNE 14, 2011

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

Penal Code, 1860 – ss. 302 and 201 – Murder and causing disappearance of evidence of offence – Prosecution case that before committing murder, the appellant tried to commit rape and on being resisted by the victim, the appellant assaulted her on her head with spade and murdered and buried her in the graveyard – Conviction and sentence u/ss. 302 and 201 by the courts below – On appeal, held: Circumstances have not been established – Courts below convicted the appellant on a mere superfluous approach without in depth analysis of the relevant facts – No evidence that the victim and the appellant were seen together at the place of occurrence or nearby the same in close proximity of time – Theory of extra-judicial confession revealed by the maternal uncle of the victim not corroborated from the statement of PW 13 or any other independent witness or police personnel – No evidence of sexual assault on victim – Mere abscondance of the appellant cannot be taken as a circumstance giving rise to adverse inference against him – Also, spade recovered by Investigating Officer not sent for chemical analysis – Thus, appellant given benefit of doubt and acquitted of the charges of offences punishable u/ss. 302 and 201.

According to the prosecution, on the fateful day daughter of PW 2 went to agricultural field and did not return. PW 2 alongwith H and S went to search her and recovered her dead body. PW1 lodged an FIR involving appellant as accused on the suspicion that appellant

was seen by PW5 and 'SM' adjoining the said field and was also seen talking with the victim. The appellant had spade in his hand and thereafter, he absconded. It was alleged that before committing the murder, the appellant tried to committee rape and on being resisted by the victim, the appellant assaulted her on her head with spade and murdered and buried her in the graveyard. Thereafter, the appellant was arrested. On his disclosure an old spade and other things were recovered. The trial court convicted the appellant for offences punishable under Sections 302 and 201 IPC. He was sentenced to rigorous imprisonment for life for commission of offence under Section 302 IPC and one year imprisonment for commission of offence under Section 201 IPC. The High Court upheld the order passed by the trial court. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. [Para 14] [97-A-B]

Mohd. Azad alias Samin v. State of West Bengal **(2008) 15 SCC 449:2008 (15) SCR 468;** *State thr. Central Bureau of Investigation v.Mahender Singh Dahiya* **(2011) 3 SCC 109: 2011 (1) SCR 1104 – relied on.**

1.2. It is evident that neither PW.4 nor PW.5 had stated that either of them had seen the deceased alongwith the appellant near the place of occurrence in close proximity of time. All the witnesses deposed that appellant alone was seen near the place of occurrence with spade as he had gone there for catching the fish. Thus, there is no evidence to the extent that the deceased and appellant

were seen together at the place of occurrence or nearby the same in close proximity of time. [Para 15] [97-C-D]

1.3. While the appellant-accused was examined by the trial court under Section 313 Cr.P.C., he was asked the question that during that time PW.5 and 'SM' (not examined) had seen him talking with the deceased. The appellant replied that he was innocent. It cannot be understood as no witness had deposed seeing the deceased talking with the appellant/accused, how such a question could be put to the accused. [Para 16 and 17] [97-E-F]

1.4. The court while dealing with a circumstance of extra-judicial confession must keep in mind that it is a very weak type of evidence and require appreciation with great caution. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The "extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility". [Para 22] [100-B-D]

State of Rajasthan v. Raja Ram **(2003) 8 SCC 180: 2003 (2) Suppl. SCR 445;** *Kulvinder Singh and Anr. v. State of Haryana* **(2011) 5 SCC 258 – relied on.**

1.5. PW.11 who is maternal uncle of the deceased had deposed about extra-judicial confession made by the accused in presence of others, though he was not able to explain who were the other persons as no other person has been examined in this respect. PW.19-IO had deposed that PW.11 had told him about the confession by the accused in presence of other persons and police personnel. The accused had told him also that dead body was buried in the courtyard. Thus, the theory of extra-judicial confession revealed by PW.11 does not get

corroboration from the statement of PW.13 or any other independent witness or police personnel. Nor the body of the deceased was recovered from the courtyard. While considering the material contradictions in the statement of PW.11 and PW.13, it would not be safe to accept his version in this respect. In the opinion of PW 18-doctor, death was due to combine effect of injuries and suffocation. The incised wound could be caused by a hit of sharp edge of the spade. The haema toma on the victim could be caused by a hit of heavy blunt weapon. PW 18 did not speak of any sign of sexual assault on the deceased before or after her death. [Paras 23 and 24] [100-E-H; 101-A-E]

1.6. In case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. Thus, mere abscondance of the appellant cannot be taken as a circumstance which give rise to draw an adverse inference against him. [Para 25] [101-G-H; 102-A-C]

Matru @ Girish Chandra v. The State of U.P. **AIR 1971 SC 1050: 1971 (3) SCR 914;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064;** *Rabindra Kumar Pal @ Dara Singh v. Republic of India* **(2011) 2 SCC 490: 2011 (1) SCR 929 – relied on.**

1.7. Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the

conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. [Para 26] [102-D-G]

Sharad Birdhichand Sarda v. State of Maharashtra **AIR 1984 SC 1622: 1985 (1) SCR 88;** *Krishnan v. State represented by Inspector of Police* **(2008) 15 SCC 430;** *Wakkar and Anr. v. State of Uttar Pradesh* **(2011) 3 SCC 306 – relied on.**

1.8. No presumption could be drawn on the issue of last seen together merely on the fact that PW.2, father of the deceased had stated that the victim had gone to pluck the jhinga and her dead body was recovered from there. The witnesses merely stated that the accused was present in the close proximity of that area. That does not itself establish the last seen theory because none of the witnesses said that the accused and deceased were seen together. Most of the witnesses had deposed that the accused was having spade. It may connect the appellant to the factum of digging the earth. A person going for catching fish normally does not take a spade with him. [Para 27] [102-H; 103-A-B]

1.9. The nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 of Evidence Act, 1872 is very limited. If an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such

disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused. The spade had not been sent for chemical analysis as admitted by PW.19-I.O. himself and there was no explanation furnished as for what reason it was not sent. In case of circumstantial evidence, not sending the weapon used in crime for chemical analysis is fatal for the reason that the circumstantial evidence may not lead to the only irresistible conclusion that the appellant was the perpetrator of the crime and none else and that in the absence of any report of Serologist as to the presence of human blood on the weapon may make the conviction of the accused unsustainable. Also, there is no medical evidence or suggestion by any person as to the sexual assault on the deceased. Therefore, it merely remained the guesswork of the people at large. Mere imagination that such thing might have happened is not enough to record conviction. There is no medical evidence or suggestion by any person as to the sexual assault on the deceased. Therefore, it merely remained the guesswork of the people at large. Mere imagination that such thing might have happened is not enough to record conviction. [Para 27] [103-C-H]

Akhilesh Hajam v. State of Bihar **(1995) Supp 3 SCC 357 – relied on.**

1.10. The incident occurred in a broad day light at 9.30 a.m. in the month of August in the agricultural field surrounded by agricultural field of others. Therefore, the presence of a large number of persons in the close vicinity of the place of occurrence can be presumed and it is apparent also from the statement of PW.6. Thus, had the deceased been with the appellant, somebody could have seen her at the place of occurrence. It cannot be a positive evidence as concluded by the courts below that

none other than the appellant could commit her murder because no one else had been there at the place of occurrence. In fact, nobody had ever seen the deceased at the place of occurrence. Digging the earth by a single person to the extent that a dead body be covered by earth requires a considerable time and there was a possibility that during such period somebody could have seen the person indulged in any of these activities, though no evidence is there to that extent. The circumstances from which the conclusion of guilt is to be drawn in such a case should be fully established. The circumstances concerned "must or should" and "not and may be" established. In the instant case, the circumstances have not been established. The courts below convicted the appellant on a mere superfluous approach without in depth analysis of the relevant facts. Thus, the appellant is given benefit of doubt and acquitted of the charges of offences punishable under Sections 302 and 201 IPC. [Paras 28, 29 and 30] [104-A-G]

Case Law Reference:

2008 (15) SCR 468	**Relied on.**	**Para 14**
2011 (1) SCR 1104	**Relied on.**	**Para 14**
2003 (2) Suppl. SCR 445	**Relied on.**	**Para 22**
(2011) 5 SCC 258	**Relied on.**	**Para 22**
1971 (3) SCR 914	**Relied on.**	**Para 25**
2010 (11) SCR 1064	**Relied on.**	**Para 25**
2011 (1) SCR 929	**Relied on.**	**Para 25**
1985 (1) SCR 88	**Relied on.**	**Para 26**
(2008) 15 SCC 430	**Relied on.**	**Para 26**
(2011) 3 SCC 306	**Relied on.**	**Para 26**
(1995) Supp 3 SCC 357	**Relied on.**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 831 of 2007.

From the Judgment & Order dated 28.6.2006 of the High Court at Calcutta in Criminal Appeal No. 229 of 2000.

R.K. Gupta (AC), M.K. Singh for the Appellant.

Tara Chandra Sharma, Kishan Datta, Neelam Sharma for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 28.06.2006 passed by the High Court of Calcutta in C.R.A.No. 229 of 2000, by which it dismissed the appeal of the appellant against the judgment and order of conviction dated 26.5.2000 passed by the Additional Sessions Judge, First Court, Burdwan in Sessions Trial No. 7 of 1999, convicting the appellant under Sections 302 and 201 of the Indian Penal code, 1860 (hereinafter referred to as 'IPC') and appellant has been imposed the sentence to suffer rigorous imprisonment for life under Section 302 IPC and sentence of one year under Section 201 IPC. Both the sentences have been directed to run concurrently.

2. The facts and circumstances giving rise to this case are that:

(A) On 31.08.1991, Sahanara Khatun, daughter of Abdul Rajak, resident of village Batrish Bigha, PS: Jamalpur, aged 13 years, had gone to pluck jhinga at about 9.30 A.M. from her jhinga field. She did not return till 10.30 A.M., her father Abdul Rajak alongwith Habibur Rahaman and Sirajul Islam went to search her, however, could not trace her in the jhinga field. They looked for her in bamboo grove in nearby graveyard

and found a freshly dug earth, thus, they removed the soil and found the dead body of Sahanara Khatun.

(B) Imdad Ali (PW.1) lodged the FIR on the same day at 12.05 hours under Sections 302 and 201 IPC at Police Station Jamalpur, District Burdwan at a distance of 8 kilometres from the place of occurrence, wherein the appellant was named as accused on the suspicion that appellant was seen by Abdul Rashid (PW.5) and Swapan Murmu catching fish in the canal adjoining his jhinga field and was also seen talking with deceased. The appellant was having a spade in his hand, when it is inquired from the appellant, he replied that he had gone to catch the fish near railway track. Subsequently, the appellant absconded. In the FIR, it had already been mentioned before committing the murder, Yusuf, the appellant tried to commit rape and on being resisted by the deceased, the appellant assaulted her on her head with spade and murdered and buried her in the graveyard. Thus, investigation ensued. The appellant was arrested on 7.9.1991 by the villagers in the paddy fields near Batrish Bigha and handed over to the police. It was on his disclosure that an old spade, one ghuni and one enamel thala (plate) were recovered. After completing the investigation, chargesheet was filed against the appellant. He denied his involvement in the crime pleading not guilty. Thus, he was put to trial. The prosecution examined 19 witnesses to prove its case.

(C) After conclusion of the trial, the Additional Sessions Judge, Burdwan, vide judgment and order dated 26.5.2000 found the appellant guilty of offences punishable under Sections 302 and 201 IPC and sentenced him to life imprisonment and fine of Rs.1,000/- under Section 302 IPC and further sentenced to one year rigorous imprisonment and fine of Rs.500/- under Section 201 IPC.

(D) Being aggrieved from the aforesaid judgment, the appellant preferred Criminal Appeal No. 229 of 2000 in the High Court of Calcutta which has been dismissed vide

judgment and order dated 28.6.2006. Hence, this appeal.

3. Shri R.K. Gupta, learned Amicus Curiae, has submitted that it is a case of circumstantial evidence. There is no evidence on record that Sahanara Khatun, deceased, was seen with the appellant at the place of occurrence. The spade recovered by the Investigating Officer during investigation had not been sent for chemical analysis. The trial court as well as the High Court placed a very heavy reliance upon extra-judicial confession allegedly made by the appellant before Nurul Islam (PW.11) and Ali Hossain (PW.13) and others though there was no such confession. Nurul Islam is the brother-in-law of Abdul Rajak (PW.2), father of the deceased. Ali Hossain (PW.13) is a resident of the village of Nurul Islam (PW.11). He did not support the version of extra-judicial confession put forward by Nurul Islam (PW.11). There are contradictory statements regarding catching hold of the appellant at Jamalpur after one week of the incidence. There is no evidence of sexual assault on the deceased. Dr. Samudra Chakraborty (PW.18), who conducted the post-mortem on the body of Sahanara Khatun (deceased) did not mention in his report that any sexual assault was made on the deceased prior to her death. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Tara Chandra Sharma, learned counsel appearing for the State, has vehemently opposed the appeal contending that there are concurrent findings of fact which do not require any interference by this Court. Undoubtedly, the case is based on circumstantial evidence but chain is complete and the circumstantial evidence is so strong that it unmistakably points to the guilt of the appellant and that circumstances are incapable of explanation upon any other reasonable hypothesis that of the guilt of the appellant. There have been sufficient material on the basis of which the two courts below have convicted the appellant and the said judgments do not require any interference. The appeal lacks merit and is liable to be dismissed.

5. We have considered the submissions made by the learned counsel for the parties and perused the record. Before proceeding further, it may be necessary to refer to the findings recorded by the courts below briefly.

6. **Trial Court's findings:**

I. It appears from the evidence of Nurul Islam (PW.11) and Ali Hossain (PW.13) that the accused made an extra-judicial confession before them and also before other villagers when he was caught by them about 7 days after his leaving away from his village after the date of occurrence. The court further held that there was no direct evidence and it was a case of circumstantial evidence and there was enough evidence on record, particularly, of Imdad Ali (PW.1), Abdul Rajak (PW.2), Habibar Rahaman (PW.3), Abdul Majid Mallick (PW.4), Abdul Rashid (PW.5), Alirul Rahmal (PW.6) and Abdul Salam Mallick (PW.7) that accused was present near the place of occurrence at the relevant time when Sahanara Khatun, deceased went to jhinga field and the accused was carrying at that time one spade.

II. It appears from the evidence of Abdul Rashid (PW.5) and Alirul Rahmal (PW.6) that there was no one else at the place of occurrence adjacent to jhinga field and the accused was carrying one spade on the basis of which the trial Court came to the following conclusion:

> "So there may be a reasonable inference that the accused, who had one spade in his hand and who was engaged in catching fish near the P.O., suddenly attacked the victim-Sahanara when she came to the jhinga field and thereafter attempted to rape her and when he was resisted by her he became violent and murdered Sahanara with the help of his spade. The medical evidence given by Dr. Samudra Chakraborty (PW.18) will corroborate that Sahanara was murdered by Yusuf with a sharp-cutting weapon, which may be a spade and also by suffocation. The accused only had

> the opportunity to assault Sahanara in such a way as he carried the spade with him at that time and there is no evidence from any side that except the accused such a spade was carried at that time by anybody else. Moreover, the accused himself had admitted in his extra-judicial confession before Nurul Islam (PW.11) and Ali Hossain (PW.13) and others that he murdered Sahanara at the relevant time when he was resisted by her from committing rape upon her at the relevant time".

III. Extra-judicial confession came from the mouth of the witnesses who appeared to be unbiased and not even remotely inimical to the accused. Undoubtedly, Nurul Islam (PW.11) was a maternal uncle of the deceased but another witness in this regard i.e. Habibar Rahaman (PW.3) had no relationship with the family of the victim. Therefore, his evidence to the extent of extra-judicial confession would be legally and validly taken into consideration. The trial Court basically found the incriminating circumstance against the appellant as he is absconding and ultimately it found that there was cogent evidence against the appellant.

7. **High Court's findings:**

The High Court has accepted the judgment of the trial Court in toto observing that depositions of the witnesses, particularly, Abdul Majid Mallick (PW.4) and Abdul Rashid (PW.5) remained unshaken to the extent that at the material time they found the accused near the place of graveyard with spade in his hand. Another circumstance which swayed with the High Court had been that just after the incident the appellant ran away. The High Court has accepted non-examination of some material witnesses, particularly, Swapan Murmu, Rejaul and Sirajul, accepting the explanation furnished by Abdul Majid Mallick (PW.4) that at the relevant point of leading evidence, none of these persons was available in that area. The extra-judicial confession made by the appellant-accused before Nurul Islam (PW.11) and Ali Hossain (PW.13) in presence of others has

also been accepted. Further, the High Court had accepted the explanation furnished by the prosecution that in case there has been some laches on the part of the Investigating Officer in sending the spade etc. for chemical analysis, no adverse presumption can be drawn against the prosecution. The motive had been found as to the possibility of the accused trying to commit sexual assault. All these factors had been found by the High Court of the conclusive nature as to exclude every other possibility except the accused being guilty of the offence.

8. The case requires to be examined as to whether the aforesaid findings are sustainable in the eyes of law.

LAST SEEN THEORY:

9. The courts below have concluded that there was sufficient material on record to show that the deceased and the appellant were seen together at the place of occurrence. Abdul Rashid (PW.5) is alleged to have stated in this regard. The relevant part of his statement reads as under:

> "When I was returning from my field at 9.00 A.M., I saw Yusuf, appellant, catching fish near the jhinga field adjacent to the graveyard. I talked with him there and thereafter returned home. *I did not see anybody else near that place.* At about 10.45 A.M., I heard that the dead body of the Sahanara Khatun was recovered from the graveyard as she had been murdered by someone. I went to graveyard alongwith others. When the police officer asked me as to who was the person, I told him that I saw Yusuf, appellant, catching fish in a nala near the graveyard."(Emphasis added)

10. Another star witness Abdul Majid Mallick (PW.4) stated :

> "I alongwith Rezwan Ali went to the house of Yusuf, appellant. We saw at the time that Yusuf, appellant, was going to his house with a spade and thala. Yusuf, appellant

> reported to us that he went to catch fish beside the nala. Rasid and Swapan firmly stated that they saw Yusuf, near the jhinga field. I again went to the house of Yusuf, and saw he fled away. Therefore, we could not apprehend Yusuf, in our village."

11. Abdul Majid Mallick (PW.4), a resident of the same village deposed that alongwith other persons particularly Rezwan Ali, he went to the house of Yusuf, appellant, and saw that he was going to his house with a spade and thala and Yusuf had told them that he had gone to catch fish beside the nala. He stated as under:

> "I do not know as to why Sahanara Khatun was murdered. Swapan Murmu is not a resident of our village. I cannot say where he is now residing. Rejowan Ali is an ailing person. Sirajul is now residing in Punjab. I saw Yusuf coming to his house carrying spade and a plate in his hand. I heard from Rashid and Swapan that they had seen the accused near the place of occurrence."

12. Imdad Ali (PW.1), informant has deposed that Abdul Rashid (PW.5) and Swapan Murmu (not examined) saw that Yusuf was talking with the deceased, Sahanara Khatun. Abdul Rajak (PW.2), father of the deceased had deposed as under:

> "I came to know that Yusuf murdered my daughter …I cannot say what was the reason for murder of my daughter".

13. The persons particularly Rezwan Ali and Sirajul who had told these witnesses that they had seen the appellant-accused near the jhinga field at the relevant time had not been examined. More so, it has not been stated by any of the aforesaid witnesses or persons not examined that Sahanara Khatun (deceased) was also seen there alongwith Yusuf, appellant. It has not been deposed by any of the witnesses that deceased was seen talking with the appellant at all.

14. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide: *Mohd. Azad alias Samin v. State of West Bengal,* (2008) 15 SCC 449; and *State thr. Central Bureau of Investigation v. Mahender Singh Dahiya,* (2011) 3 SCC 109).

15. From the above, it is evident that neither Abdul Majid Mallick (PW.4) nor Abdul Rashid (PW.5) had stated that either of them had seen Sahanara Khatun (deceased) alongwith Yusuf, near the place of occurrence in close proximity of time. All the witnesses deposed that appellant **alone** was seen near the place of occurrence with spade as he had gone there for catching the fish. Thus, there is no evidence to the extent that the deceased and appellant were seen together at the place of occurrence or nearby the same in close proximity of time.

16. While the appellant-accused was examined by the trial Court under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called as Cr.P.C.), he was asked the question that during that time Abdul Rashid (PW.5) and Swapan Murmu (not examined) had seen him talking with the deceased. The appellant replied that he was innocent.

17. We fail to understand as no witness had deposed seeing Sahanara Khatun, deceased talking with the appellant/accused, how such a question could be put to the accused.

EXTRA-JUDICIAL CONFESSION:

18. Nurul Islam (PW.11), maternal uncle of the deceased, resident of village Rupsona, is not a witness of incident, rather deposed that he was the person who chased and apprehended the appellant after about 7 days of the incident. The relevant part of his statement reads as under:

"After 6-7 days, when I went to Shyamsundar Bazar for my

business, I saw Yusuf on the roof of a bus. He got down from the bus after seeing me. *He told me that he did the wrong and begged apology for that* and pleaded not to assault him but take him to Jamalpur Police Station. I took Yusuf towards Batrish Bigha village by boat and when we crossed the river Damodar, Yusuf started running. I chased him but failed to catch him and then cried for help. Thereafter, public caught Yusuf at Jamalpur Poolmatha. *When we took him to the village, Yusuf admitted to him and others that he murdered Sahanara Khatun and, thereafter, he* asked the persons to take him to Jamalpur Police Station. Yusuf told **them** that **he attempted to commit rape upon Sahanara Khatun** and when she resisted, he assaulted her with the spade on her head and killed her and concealed the dead body in the graveyard".

(Emphasis added)

In his cross-examination, PW.11 repeated the same about the confession made by Yusuf, appellant before him in presence of other persons of the village.

19. Ali Hossain (PW.13) is a resident of the village of Nurul Islam (PW.11) and deposed :

"……I went to Shyamsundar Bazar for purchasing goats. At that time, we see the accused on the roof of a bus. My friend Nurul Islam who was with me asked the accused to come down and he came down from the roof of the bus and requested us not to assault him and to take him at the Police Station Jamalpur and thereafter Nurul Islam took the accused towards Jamapur Police Station."

In the cross examination, his deposition is as under:

"I did not state to I.O. that after crossing the river at Karalaghat the accused ran towards Jamalpur. I did not chase the accused by crying – catch, catch. I did not state to I.O. that some persons of Jamalpur caught the accused.

…. I alone went to Shyamsundar Bazar. Thereafter I purchased goats from Shyamsundar Bazar. I cannot say anything more about the occurrence."

20. By comparison of the statements of Nurul Islam (PW.11) and Ali Hossain, (PW.13), it is evident that Nurul Islam (PW.11) did not state anywhere in his statement in the court that at the time of apprehending the accused, Ali Hossian (PW.13) was also with him. It is only Ali Hossain (PW.13) who stated that his friend Nurul Islam (PW.11) was with him. He further stated that it was Nurul Islam who asked the accused to come down from the roof of the bus and the accused came down. The statement of Nurul Islam (PW.11) is otherwise that he saw Yusuf, appellant, on the roof of the bus. Yusuf, appellant, got down from the bus after seeing him and told him that he did the wrong and begged apology for that. Ali Hossain (PW.13) did not speak anywhere regarding any confession, though stated that the accused requested them not to assault, rather to take him to police station. The material contradictions are there in respect of the manner in which the appellant had been apprehended. Ali Hossain (PW.13) did not state that appellant made an attempt to runaway after making the said witness.

21. Digambar Mondal (PW.19), the Investigating Officer has deposed that he had noticed the marks of injury on the cheek, forehead and head of the deceased. The wearing apparels of the victim were not soaked with blood. He only sent the wearing pant of the victim for chemical examination. He seized spade but did not sent it for chemical analysis. In his cross-examination he has stated as under:

"The witness Nurul Islam stated to me that the accused was caught by some persons at Jamalpur Pool-matha and thereafter police came and at that time the accused stated *before those persons and police* that he tried to commit rape Sahanara on 31.8.1998 and when she resisted the accused hit her with a spade and

thereafter hid her body in the *court-yard* by digging some earth there".

(Emphasis added)

22. Both, Nurul Islam (PW.11) and Ali Hossain (PW.13) are chance witnesses as they alleged to be in Shyamsundar Bazar on that date for marketing and none of them had regular business in that bazar. The Court while dealing with a circumstance of extra-judicial confession must keep in mind that it is a very weak type of evidence and require appreciation with great caution.

Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The "extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility". (See: *State of Rajasthan v. Raja Ram,* (2003) 8 SCC 180; and *Kulvinder Singh & Anr. v. State of Haryana,* (2011) 5 SCC 258).

23. Nurul Islam (PW.11) who is maternal uncle of the deceased had deposed about extra-judicial confession made by the accused in presence of *others,* though he was not able to explain who were the other persons as no other person has been examined in this respect. Digambar Mondal (PW.19) had deposed that Nurul Islam (PW.11) had told him about the confession by the accused in presence of other persons and police personnel. The accused had told him also that dead body was buried in the *courtyard*. Thus, the theory of extra-judicial confession revealed by Nurul Islam (PW.11) does not get corroboration from the statement of Ali Hossain (PW.13) or any other independent witness or police personnel. Nor the body of the deceased was recovered from the *courtyard.* While considering the material contradictions in the statement of Nurul Islam (PW.11) and Ali Hossain (PW.13), we do not consider that it would be safe to accept his version in this respect.

24. Dr. Samudra Chakraborty (PW.18), who conducted the autopsy on the body of Sahanara Khatun found the following injuries:

(i) One incised wound 4" x 0.2" x scalp deep over middle 3rd of left parietal region (vault of the scalp) cutting through the skin, pussa, muscle, vessel and nerve and being placed 1.2" left on mid-line of the body;

(ii) Bruises over 1" x 0.6" x over left side of forehead and being placed 0.5" left of mid-line of the body;

(iii) One lacerated wound 0.6" x 0.4" muscle and bone deep over left molar region with extra-vesation of blood and blood-clot in around the wound;

(iv) Haema toma (red) 3.2" x 1.5" in area over left temporal parietal region;

(v) Subdural haemorrhage of both sides of tempero parietal region of the brain.

In the opinion of the doctor, death was due to combine effect of injuries and suffocation. The incised wound could be caused by a hit of sharp edge of the spade. The haema toma on the victim could be caused by a hit of heavy blunt weapon. This witness did not speak of any sign of sexual assault on the deceased before or after her death.

ABSCONDANCE:

25. Both the courts below have considered the circumstance of abscondance of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against

him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. (Vide: *Matru @ Girish Chandra v. The State of U.P.,* AIR 1971 SC 1050; *Paramjeet Singh @ Pamma v. State of Uttarakhand* AIR 2011 SC 200; and *Rabindra Kumar Pal @ Dara Singh v. Republic of India,* (2011) 2 SCC 490)

Thus, in view of the law referred to hereinabove, mere abscondance of the appellant cannot be taken as a circumstance which give rise to draw an adverse inference against him.

26. **CIRCUMSTANTIAL EVIDENCE:**

Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Vide: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622, *Krishnan v. State represented by Inspector of Police,* (2008) 15 SCC 430; and *Wakkar & Anr. v. State of Uttar Pradesh,* (2011) 3 SCC 306).

27. No presumption could be drawn on the issue of last seen together merely on the fact that Abdul Rajak (PW.2), father of the deceased had stated that Sahanara Khatun had gone

to pluck the jhinga and her dead body was recovered from there. The witnesses merely stated that the accused was present in the close proximity of that area. That does not itself establish the last seen theory because none of the witnesses said that the accused and deceased were seen together. Most of the witnesses had deposed that the accused was having spade. It may connect the appellant to the factum of digging the earth. A person going for catching fish normally does not take a spade with him.

The nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 of Indian Evidence Act, 1872 is very limited. If an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused.

Be that as it may, the spade had not been sent for chemical analysis as admitted by Digambar Mondal (PW.19), I.O. himself and there was no explanation furnished as for what reason it was not sent. In case of circumstantial evidence, not sending the weapon used in crime for chemical analysis is fatal for the reason that the circumstantial evidence may not lead to the only irresistible conclusion that the appellant was the perpetrator of the crime and none else and that in the absence of any report of Serologist as to the presence of human blood on the weapon may make the conviction of the accused unsustainable. (Vide: *Akhilesh Hajam v. State of Bihar* (1995) Supp 3 SCC 357).

There is no medical evidence or suggestion by any person as to the sexual assault on the deceased. Therefore, it merely remained the guesswork of the people at large. Mere imagination that such thing might have happened is not enough to record conviction.

28. This incident had occurred in a broad day light at 9.30 a.m. in the month of August in the agricultural field surrounded by agricultural field of others. Therefore, the presence of a large number of persons in the close vicinity of the place of occurrence can be presumed and it is apparent also from the statement of Aliful Rahmal (PW.6). Thus, had the deceased been with the appellant, somebody could have seen her at the place of occurrence. It cannot be a positive evidence as concluded by the courts below that none other than the appellant could commit her murder because no one else had been there at the place of occurrence. In fact, nobody had ever seen the deceased at the place of occurrence. Digging the earth by a single person to the extent that a dead body be covered by earth requires a considerable time and there was a possibility that during such period somebody could have seen the person indulged in any of these activities, though no evidence is there to that extent. The circumstances from which the conclusion of guilt is to be drawn in such a case should be fully established. The circumstances concerned "must or should" and "not and may be" established. In the instant case, the circumstances have not been established.

29. In view of the above, we are of the considered opinion that the courts below convicted the appellant on a mere superfluous approach without in depth analysis of the relevant facts.

30. In the facts and circumstances of the case, the appeal succeeds and is allowed. The appellant is given benefit of doubt and acquitted of the charges of offences punishable under Sections 302 and 201 IPC. Appellant is in jail. He be released forthwith unless his detention is required in any other case.

N.J. Appeal allowed.

VISHRAM SINGH RAGHUBANSHI

v.

STATE OF U.P.

(Criminal Appeal No. 697 of 2006)

JUNE 15, 2011

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

Contempt of Courts Act, 1971:

s.15 – Contempt by advocate – Appellant-advocate abused the Judge/Presiding Officer in most filthy words when the Presiding Officer alleged the involvement of appellant in the impersonification of the person who came to surrender before the Presiding Officer – Conviction of appellant for contempt of court – On appeal, held: The case of impersonification of a person to be surrendered is serious– If any issue was raised in this regard by the court, it was the duty of the appellant to satisfy the court and establish the identity of the person concerned – The conduct of the appellant in abusing the Presiding Officer was in complete violation and in contravention of the "standard of professional conduct and etiquette" laid in Section 1 of Chapter 2 (Part-VI) of the Bar Council of India Rules – Courts cannot be intimidated to seek favourable orders – Appellant intimidated the presiding officer by hurling filthiest abuses and lowered the authority of the Court, which tantamounted to interference with the due course of judicial proceedings – The charge stood proved against the appellant – In such a fact-situation the apology tendered by him, being not bona fide, is not acceptable – Bar Council of India Rules, Chapter 2 (Part-VI), s.1.

Contempt – Nature of – Held: It is the seriousness of the irresponsible acts of the contemnor and degree of harm caused to the administration of justice, which decisively

determine whether the matter should be tried as a criminal contempt or not – The court has to examine whether the wrong is done to the judge personally or it is done to the public – The act will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties – Administration of justice.

Apology tendered by contemnor – Acceptance of – Held: Can be accepted in case the conduct for which the apology is given is such that it can be "ignored without compromising the dignity of the court", or it is intended to be the evidence of real contrition – Apology for criminal contempt of court must be offered at the earliest since a belated apology hardly shows the "contrition which is the essence of the purging of a contempt" – However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the Court may refuse to accept it – Apology tendered is not to be accepted as a matter of course and the Court is not bound to accept the same and can impose the punishment recording reasons for the same – In the instant case, it was not the case of the appellant that he was not given full opportunity to defend himself or lead evidence in support of his case – The so-called apology tendered by the appellant contained ifs and buts – Apology was not tendered at the earliest opportunity, rather tendered belatedly just to escape the punishment for the grossest criminal contempt committed by him – There was no repent or remorse on the part of the appellant at an initial stage – Such attitude has a direct impact on the court's independence, dignity and decorum – In order to protect the administration of public justice, action has to be taken against the appellant as his conduct and utterances cannot be ignored or pardoned – Thus, the apology tendered by the appellant

had neither been sincere nor bona fide and thus, not worth acceptance.

Administration of justice: Where a person is really aggrieved of misbehaviour/conduct or bias of a judicial officer, he definitely has a right to raise his grievance, but it should be before the appropriate forum and by resorting to the procedure prescribed for it – Under no circumstances, such a person can be permitted to become the law unto himself and proceed in a manner he wishes, for the reason that it would render the very existence of the system of administration of justice at stake.

Jurisdiction: Contempt jurisdiction – Scope and purpose – Held: Contempt jurisdiction is to uphold majesty and dignity of the law courts – The superior courts have a duty to protect the reputation of judicial officers of subordinate courts, taking note of the growing tendency of maligning the reputation of judicial officers by unscrupulous practising advocates who either fail to secure desired orders or do not succeed in browbeating for achieving ulterior purpose – Such an issue touches upon the independence of not only the judicial officers but brings the question of protecting the reputation of the Institution as a whole – The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse – The Bench and the Bar have to avoid unwarranted situations that hamper the cause of justice and are in the interest of none.

Words and phrases: Apology – Meaning of.

The appellant was a practicing advocate. The allegation against him was that he was involved in impersonification of a person who was wanted in a criminal case in the District Court. Since the Presiding Officer doubted the genuineness of the person who came to surrender before him, he raised certain issues. At that

time, the appellant stepped over the dais and started abusing the Presiding Officer in the court and misbehaved with him. The Presiding Officer made a complaint to the U.P. Bar Council and made a reference to the High Court for initiating contempt proceedings under Section 15 of the Contempt of Courts Act, 1971 against him. The High Court issued a show cause notice to the appellant. In response, the appellant denied the allegations made against him but tendered an apology in the form of the affidavit stating that he placed the court in the highest esteem. The Bar Council dismissed the complaint, but the High Court did not accept the explanation and the apology tendered by him, rather it framed the charges against the appellant. The High Court after giving full opportunity to the appellant to defend himself held him guilty of contempt of court and sentenced him to undergo 3 months simple imprisonment with the fine of Rs.2000. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1.1. Admittedly, the case of impersonification of the person to be surrendered is a serious one. However, being an officer of the court, if any issue was raised in this regard either by the court or opposite counsel, it was the duty of the appellant to satisfy the Court and establish the identity of the person concerned. The conduct of the appellant had been in complete violation and in contravention of the "standard of professional conduct and etiquette" laid in Section 1 of Chapter 2 (Part-VI) of the Bar Council of India Rules which, inter-alia, provides that an advocate shall maintain towards the court a respectful attitude and protect the dignity of the judicial office and he shall use his best efforts to restrain and prevent his client from resorting to unfair practices and conduct himself with dignity and self

respect in the court etc. etc. Where a person is really aggrieved of misbehaviour/conduct or bias of a judicial officer, he definitely has a right to raise his grievance, but it should be before the appropriate forum and by resorting to the procedure prescribed for it. Under no circumstances, such a person can be permitted to become the law unto himself and proceed in a manner he wishes, for the reason that it would render the very existence of the system of administration of justice at a stake. It was not the case of the appellant that he was not given full opportunity to defend himself or lead evidence in support of his case. The appellant did not choose to defend himself on merit before the High Court, rather he merely tendered apology thrice. [Paras 7, 10] [118-D-H; 119-A; 120-C-D]

1.2. It is settled principles of law that it is the seriousness of the irresponsible acts of the contemnor and degree of harm caused to the administration of justice, which would decisively determine whether the matter should be tried as a criminal contempt or not. The court has to examine whether the wrong is done to the judge personally or it is done to the public. The act will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. [Paras 11, 12] [120-E-H]

The Aligarh Municipal Board & Ors. v. Ekka Tonga Mazdoor Union & Ors., **AIR 1970 SC 1767;** *Brahma Prakash Sharma & Ors. v. The State of U.P.* **AIR 1954 SC 10: 1954 SCR 1169;** *Perspective Publications (P.) Ltd. & Anr. v. The State of Maharashtra* **AIR 1971 SC 221: 1969 SCR 779;** *Delhi Judicial Service Association v. State of Gujarat & Ors.*

AIR 1991 SC 2176: 1991 (3) SCR 936; *E.M.Sankaran Namboodiripad v. T.Narayanan Nambiar* **AIR 1970 SC 2015: 1971 (1) SCR 697 – relied on.**

2. The contempt jurisdiction is to uphold majesty and dignity of the law courts and the image of such majesty in the minds of the public cannot be allowed to be distorted. Any action taken on contempt or punishment enforced is aimed at protection of the freedom of individuals and orderly and equal administration of laws and not for the purpose of providing immunity from criticism to the judges. The superior courts have a duty to protect the reputation of judicial officers of subordinate courts, taking note of the growing tendency of maligning the reputation of judicial officers by unscrupulous practising advocates who either fail to secure desired orders or do not succeed in browbeating for achieving ulterior purpose. Such an issue touches upon the independence of not only the judicial officers but brings the question of protecting the reputation of the Institution as a whole. The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the Institution of judiciary. An Advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. [Paras 15, 16] [121-H; 122-A-H]

O.P. Sharma & Ors. v. High Court of Punjab & Haryana **(2011) 5SCALE 518;** *M.B. Sanghi v. High Court of Punjab & Haryana & Ors.* **(1991) 3 SCC 600: 1991 (3) SCR 312 – relied on.**

3.1. Apology means a regretful acknowledge or excuse for failure or an explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given. Apology should be unquestionable in sincerity. It should be tempered with a sense of genuine remorse and repentance, and not a calculated strategy to avoid punishment. Clause 1 of Section 12 and Explanation attached thereto enables the court to remit the punishment awarded for committing the contempt of court on apology being made to the satisfaction of the court. However, an apology should not be rejected merely on the ground that it is qualified or tempered at a belated stage if the accused makes it bona fide. There can be cases where the wisdom of rendering an apology dawns only at a later stage. [Paras 18, 19] [123-E-H]

P.G. Wodehouse in his work "The Man Upstairs **(1914) – referred to.**

3.2. Undoubtedly, an apology cannot be a defence, a justification, or an appropriate punishment for an act which is in contempt of court. An apology can be accepted in case the conduct for which the apology is given is such that it can be "ignored without compromising the dignity of the court", or it is intended to be the evidence of real contrition. It should be sincere. Apology cannot be accepted in case it is hollow; there is no remorse; no regret; no repentance, or if it is only a device to escape the rigour of the law. Such an apology can merely be termed as paper apology. So an apology should not be paper apology and expression of sorrow

should come from the heart and not from the pen; for it is one thing to 'say' sorry-it is another to 'feel' sorry. [Paras 20, 22] [124-A-B; D-E]

Re: Bal Thackeray, Editor Samna, **(1998) 8 SCC 660;** *L.D. Jaikwal v. State of U.P.* **AIR 1984 SC 1374: 1984 (3) SCR 833;** *T.N. Godavarman Thirumulpad v. Ashok Khot & Anr.* **AIR 2006 SC 2007: 2006 (2) Suppl. SCR 215 – relied on.**

3.3. An apology for criminal contempt of court must be offered at the earliest since a belated apology hardly shows the "contrition which is the essence of the purging of a contempt". However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the Court may refuse to accept it. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing coward. Apology tendered is not to be accepted as a matter of course and the Court is not bound to accept the same. The court is competent to reject the apology and impose the punishment recording reasons for the same. The use of insulting language does not absolve the contemnor on any count whatsoever. If the words are calculated and clearly intended to cause any insult, an apology if tendered and lack penitence, regret or contrition, does not deserve to be accepted. [Paras 23, 25] [124-G-H; 125-A; E-F]

Mulkh Raj v. The State of Punjab **AIR 1972 SC 1197;** *The Secretary, Hailakandi Bar Association v. State of Assam & Anr.* **AIR 1996 SC 1925: 1996 (2) Suppl. SCR 573;** *C. Elumalai and Ors. v. A.G.L. Irudayaraj and Anr.* **AIR 2009 SC 2214: 2009 (4) SCR 774;** *Ranveer Yadav v. State of Bihar* **(2010) 11 SCC 493: 2010 (6) SCR 1073;** *Debabrata*

Bandopadhyay & Ors. v. The State of West Bengal & Anr. **AIR 1969 SC 189: 1969 SCR 304;** *Shri Baradakanta Mishra v. Registrar of Orissa High Court & Anr.* **AIR 1974 SC 710: 1974 (2) SCR 282;** *The Bar Council of Maharashtra v. M.V. Dabholkar etc.* **AIR 1976 SC 242: 1976 (2) SCR 48;** *Asharam M. Jain v. A.T. Gupta & Ors.* **AIR 1983 SC 1151: 1983 (3) SCR 719;** *Mohd. Zahir Khan v. Vijai Singh & Ors.* **AIR 1992 SC 642;** *In Re: Sanjiv Datta* **(1995) 3 SCC 619;** *Patel Rajnikant Dhulabhai & Ors. v. Patel Chandrakant Dhulabhai & Ors*. **AIR 2008 SC 3016: 2008 (10) SCR 1169 – relied on.**

3.4. The High Court considered the case elaborately examining every issue microscopically and held that there was no reason to disbelieve the facts stated by the judicial officer against the contemnor/appellant, the facts were acceptable, and it was clearly proved that the contemnor was guilty of gross criminal contempt. The charges levelled against the appellant stood proved. A Judge has to discharge his duty and passes order in the manner as he thinks fit to the best of his capability under the facts and circumstances of the case before him. No litigant, far less an advocate, has any right to take the law in his own hands. The contemnor abused the Judge in most filthy words unworthy of mouthing by an ordinary person. The courts certainly cannot be intimidated to seek the favourable orders. The appellant intimidated the presiding officer of the court hurling filthiest abuses and lowered the authority of the Court, which is tantamount to interfere with the due course of judicial proceedings. The charge which stood proved against the appellant could not be taken lightly and in such a fact-situation the apology tendered by him, being not *bona fide* was not acceptable. [Para 28] [126-H; 127-A-E]

3.5. The so-called apology tendered by the appellant contained ifs and buts. The appellant was not even sure as to whether he has committed the criminal contempt

of the court or whether the most filthy abuses could hurt the Presiding Officer. The appellant was of the view that the Officer was a robot and has no heart at all, thus incapable of having the feelings of being hurt. The appellant filed second affidavit tendering apology. The apology was tendered under pressure only after framing of the charges by the High Court in the Criminal Contempt when appellant realised that he could be punished. The apology was not tendered at the earliest opportunity, rather tendered belatedly just to escape the punishment for the grossest criminal contempt committed by him. The language used by the Advocate for a judicial officer where he practices regularly and earns his livelihood is such that any apology would fall short to meet the requirement of the statutory provisions. There was no repent or remorse on the part of the appellant at an initial stage. Had it been so, instead of making grossest and scandalous allegations against the judicial officer, writing complaint against him to the Administrative Judge in the High Court of Allahabad, the appellant could have gone to the concerned judicial officer and tendered apology in open court. The appellant instead of yielding to the court honestly and unconditionally, advanced a well guarded defence by referring to all the facts that led to the incident. Apology tendered by the appellant would give an impression that the same was in the alternative and not a complete surrender before the law. Such attitude has a direct impact on the court's independence, dignity and decorum. In order to protect the administration of public justice, action has to be taken against the appellant as his conduct and utterances cannot be ignored or pardoned. The appellant had no business to overawe the court. Thus, the apology tendered by the appellant had neither been sincere nor bona fide and thus, not worth acceptance. [Para 29] [127-F-H; 128-A-F]

Case Law Reference:

AIR 1970 SC 1767	**relied on**	**Para 11**
1954 SCR 1169	**relied on**	**Para 12**
1969 SCR 779	**relied on**	**Para 12**
1991 (3) SCR 936	**relied on**	**Para 13**
1971 (1) SCR 697	**relied on**	**Para 14**
(2011) 5 SCALE 518	**relied on**	**Para 16**
1991 (3) SCR 312	**relied on**	**Para 17**
(1998) 8 SCC 660	**relied on**	**Para 21**
1984 (3) SCR 833	**relied on**	**Para 22**
2006 (2) Suppl. SCR 215	**relied on**	**Para 22**
AIR 1972 SC 1197	**relied on**	**Para 23**
1996 (2) Suppl. SCR 573	**relied on**	**Para 23**
2009 (4) SCR 774	**relied on**	**Para 23**
2010 (6) SCR 1073	**relied on**	**Para 23**
1969 SCR 304	**relied on**	**Para 24**
1974 (2) SCR 282	**relied on**	**Para 25**
1976 (2) SCR 48	**relied on**	**Para 25**
1983 (3) SCR 719	**relied on**	**Para 25**
AIR 1992 SC 642	**relied on**	**Para 25**
2008 (10) SCR 1169	**relied on**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 697 of 2006.

From the Judgment & Order dated 5.5.2006 of the High Court of Judicature at Allahabad in Contempt of Court case No. 13 of 1999.

Sanjeev Bhatnagar (for Kusum Chaudhary) for the Appellant.

R.K. Gupta, Suraj Singh and Pradeep Misra for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred under Section 19 of the Contempt of Courts Act, 1971, (hereinafter called the 'Act 1971') arising out of impugned judgment and order dated 5.5.2006 passed by the Division Bench of the Allahabad High Court in Contempt of Court Case No. 13 of 1999.

2. FACTS:

(A) Appellant is an advocate practising for last 30 years in the District Court, Etawah (U.P.). On 25.7.1998, he produced one Om Prakash for the purpose of surrender, impersonating him as Ram Kishan S/o Ashrafi Lal who was wanted in a criminal case in the court of IInd ACJM, Etawah. There was some controversy regarding the genuineness of the person who came to surrender and therefore, the Presiding Officer of the Court raised certain issues. So, the appellant misbehaved with the said officer in the court and used abusive language.

(B) The Presiding Officer of the court vide letter dated 28.9.1998 made a complaint against the appellant to the U.P. Bar Council and vide letter dated 27.10.1998 made a reference to the High Court for initiating contempt proceedings under Section 15 of the Act, 1971 against him. The High Court considered the matter and issued show cause notice on 5.5.1999 to the appellant. In response to the said notice, the appellant submitted his

reply dated 24.5.1999, denying the allegations made against him, but, tendering an apology in the form of an affidavit stating that he was keeping the court in the highest esteem.

(C) The Bar Council of U.P. dismissed the complaint referred by the Presiding Officer vide order dated 18.3.2001, but the Allahabad High Court did not consider it proper to accept the explanation submitted by the appellant or accept the apology tendered by him, rather, it framed the charges against the appellant on 27.9.2004. In response to the same, the appellant again submitted an affidavit dated 18.10.2005 tendering an apology similar to one in the affidavit filed earlier.

(D) The Division Bench of Allahabad High Court considered the matter on judicial side, giving full opportunity to the appellant to defend himself. The High Court ultimately held the appellant guilty of committing the contempt and sentenced him to undergo 3 months simple imprisonment with a fine of Rs.2,000/-. Hence this appeal.

3. This Court vide order dated 26.6.2006 suspended the operation of sentence and directed the appellant to deposit the fine of Rs. 2,000/- in this Court, which seems to have been deposited.

4. Shri Sanjeev Bhatnagar, learned counsel appearing for the appellant, has submitted that he would not be in a position to defend the contemptuous behaviour of the appellant but insisted that the appellant is aged and ailing person and had tendered absolute and unconditional apologies several times. Thus, the apology may be accepted and the sentence of three months simple imprisonment be quashed.

5. On the contrary, Shri R.K. Gupta, learned counsel appearing for the respondent, has vehemently opposed the prayer made by Shri Bhatnagar and contended that the appellant does not deserve any lenient treatment considering

the language used by him to the Presiding Officer of the court and such a person does not deserve to remain in a noble profession. He further contended that the apology has not been tendered at the initial stage. The first apology was tendered only after receiving show cause notice dated 5.5.1999 from the High Court and under the pressure. More so, the language of the apology is not such which shows any kind of remorse by the appellant, thus, considering the gravity of the misbehaviour of the appellant, no interference is wanted. Therefore, the appeal is liable to be rejected.

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

7. Admittedly, the case of impersonification of the person to be surrendered is a serious one, however we are not concerned as to whether the appellant had any role in such impersonification, but being an officer of the court, if any issue had been raised in this regard either by the court or opposite counsel, it was the duty of the appellant to satisfy the Court and establish the identity of the person concerned. The conduct of the appellant seems to have been in complete violation and in contravention of the "standard of professional conduct and etiquette" laid in Section 1 of Chapter 2 (Part-VI) of the Bar Council of India Rules which, inter-alia, provides that an advocate shall maintain towards the court a respectful attitude and protect the dignity of the judicial office. He shall use his best efforts to restrain and prevent his client from resorting to unfair practices etc. The advocate would conduct himself with dignity and self respect in the court etc. etc.

There may be a case, where a person is really aggrieved of misbehaviour/conduct or bias of a judicial officer. He definitely has a right to raise his grievance, but it should be before the appropriate forum and by resorting to the procedure prescribed for it. Under no circumstances, such a person can be permitted to become the law unto himself and proceed in a manner he wishes, for the reason that it would render the very

existence of the system of administration of justice at a stake.

8. Before proceeding further with the case, it may be necessary to make reference to certain parts of the complaint lodged by the Presiding Officer to the High Court against the appellant:

(i) During the course of cross examination in a criminal case on 22.8.1998, the appellant was advised that he should ask questions peacefully to the witness on which the appellant stepped over dias of the court and tried to snatch the paper of statement from him and started abusing him that "Madarchod, Bahanchod, make reference of contempt to the High Court" and stepped out, abusing similarly from the court room.

(ii) In another incident on 25.7.1998, three accused persons namely, Ram Krishan, Ram Babu and Rampal surrendered before the court and filed an application no. 57Kha for cancellation for non-bailable warrants, and the whole proceeding was completed by him. Aforesaid three accused persons, namely, Ram Krishan and Ram Babu were real brothers and sons of Ashrafi Lal. On 30.7.1998 order was passed to release them on bail but before they could be released, it came to the knowledge of the court that right accused Ram Krishan son of Ashrafi Lal had surrendered and sent to jail. This fact was brought before the court by the mother of the person Om Prakash who was actually sent to jail on 1.8.1998, of which enquiry was done and after summoning from jail the person in the name of Ram Krishan stated in the court that his name was Om Prakash, son of Sh. Krishan Jatav. The complainant Bhaidayal was also summoned who also verified the above fact. Thereafter, an inquiry was conducted by the

Presiding Officer who found the involvement of the appellant in the above case of impersonification.

9. The High Court examined the complaint and the reply submitted by the appellant to show cause notice issued by the High Court. The High Court did not find the explanation worth acceptable and, thus, vide order dated 27.9.2004, framed charges against the appellant in respect of those allegations dated 22.8.1998 and 25.7.1998 respectively.

10. It is not the case of the appellant that he was not given full opportunity to defend himself or lead evidence in support of his case. The appellant has not chosen to defend himself on merit before the High Court, rather he merely tendered apology thrice. Even before us, Shri Sanjeev Bhatnagar, learned counsel for the appellant, has fairly conceded that the appellant had been insisting from the beginning to accept his apology and let him off. Mr. Bhatnagar's case has been that in the facts and circumstances of the case, particularly considering the age and ailment of the appellant, apology should be accepted and sentence of three months simple imprisonment be set aside.

11. It is settled principle of law that it is the seriousness of the irresponsible acts of the contemnor and degree of harm caused to the administration of justice, which would decisively determine whether the matter should be tried as a criminal contempt or not. (Vide: *The Aligarh Municipal Board & Ors. v. Ekka Tonga Mazdoor Union & Ors.,* AIR 1970 SC 1767).

12. The court has to examine whether the wrong is done to the judge personally or it is done to the public. The act will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. (See: *Brahma Prakash Sharma & Ors. v. The State of U.P.,* AIR 1954 SC 10; and *Perspective Publications (P.) Ltd. & Anr. v.*

The State of Maharashtra, AIR 1971 SC 221).

13. In the case of *Delhi Judicial Service Association v. State of Gujarat & Ors.,* AIR 1991 SC 2176, this Court held that the power to punish for contempt is vested in the judges not for their personal protection only, but for the protection of public justice, whose interest requires that decency and decorum is preserved in courts of justice. Those who have to discharge duty in a Court of Justice are protected by the law, and shielded in the discharge of their duties; any deliberate interference with the discharge of such duties either in court or outside the court by attacking the presiding officers of the court would amount to criminal contempt and the courts must take serious cognizance of such conduct.

14. In *E.M.Sankaran Namboodiripad v. T.Narayanan Nambiar,* AIR 1970 SC 2015, this Court observed that contempt of court has various kinds, e.g. insult to Judges; attacks upon them; comment on pending proceedings with a tendency to prejudice fair trial; obstruction to officers of Courts, witnesses or the parties; scandalising the Judges or the courts; conduct of a person which tends to bring the authority and administration of the law into disrespect or disregard. Such acts bring the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. In a given case, such a conduct be committed "in respect of the whole of the judiciary or judicial system".

The court rejected the argument that in particular circumstances conduct of the alleged contemnor may be protected by Article 19(1)(a) of the Constitution i.e. right to freedom of speech and expression, observing that the words of the second clause, of the same provision bring any existing law into operation, thus provisions of the Act 1971 would come into play and each case is to be examined on its own facts and the decision must be reached in the context of what was done or said.

15. Thus, it is apparent that the contempt jurisdiction is to

uphold majesty and dignity of the law courts and the image of such majesty in the minds of the public cannot be allowed to be distorted. Any action taken on contempt or punishment enforced is aimed at protection of the freedom of individuals and orderly and equal administration of laws and not for the purpose of providing immunity from criticism to the judges. The superior courts have a duty to protect the reputation of judicial officers of subordinate courts, taking note of the growing tendency of maligning the reputation of judicial officers by unscrupulous practising advocates who either fail to secure desired orders or do not succeed in browbeating for achieving ulterior purpose. Such an issue touches upon the independence of not only the judicial officers but brings the question of protecting the reputation of the Institution as a whole.

16. The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. "Liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution, much less the Judiciary". A lawyer cannot be a mere mouthpiece of his client and cannot associate himself with his client maligning the reputation of judicial officers merely because his client failed to secure the desired order from the said officer. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the Institution of judiciary. An Advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. (Vide: *O.P. Sharma & Ors. v. High Court of Punjab & Haryana,* (2011) 5 SCALE 518).

17. This Court in M.B. Sanghi v. High Court of Punjab & Haryana & Ors., (1991) 3 SCC 600, observed as under:

> "The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officer with impunity….It is high time that we realise that much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society".

18. This leads us to the question as to whether the facts and circumstances referred hereinabove warrant acceptance of apology tendered by the appellant.

The famous humorist P.G. Wodehouse in his work "The Man Upstairs (1914)" described apology :

> "The right sort of people do not want apologies, and the wrong sort take a mean advantage of them."

The apology means a regretful acknowledge or excuse for failure. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given. Apology should be unquestionable in sincerity. It should be tempered with a sense of genuine remorse and repentance, and not a calculated strategy to avoid punishment

19. Clause 1 of Section 12 and Explanation attached thereto enables the court to remit the punishment awarded for committing the contempt of court on apology being made to the satisfaction of the court. However, an apology should not be rejected merely on the ground that it is qualified or tempered at a belated stage if the accused makes it **bona fide.** There can be cases where the wisdom of rendering an apology dawns only at a later stage.

20. Undoubtedly, an apology cannot be a defence, a justification, or an appropriate punishment for an act which is in contempt of court. An apology can be accepted in case the conduct for which the apology is given is such that it can be "ignored without compromising the dignity of the court", or it is intended to be the evidence of real contrition. It should be sincere. Apology cannot be accepted in case it is hollow; there is no remorse; no regret; no repentance, or if it is only a device to escape the rigour of the law. Such an apology can merely be termed as paper apology.

21. In *Re: Bal Thackeray, Editor Samna,* (1998) 8 SCC 660, this Court accepted the apology tendered by the contemnor as the Court came to conclusion that apology was unconditional and it gave an expression of regret and realisation that mistake was genuine.

22. In *L.D. Jaikwal v. State of U.P.,* AIR 1984 SC 1374, the court noted that it cannot subscribe to the 'slap-say sorry-and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper poorer.

(See also: *T.N. Godavarman Thirumulpad v. Ashok Khot & Anr.,* AIR 2006 SC 2007)

So an apology should not be paper apology and expression of sorrow should come from the heart and not from the pen; for it is one thing to 'say' sorry-it is another to 'feel' sorry.

23. An apology for criminal contempt of court must be offered at the earliest since a belated apology hardly shows the "contrition which is the essence of the purging of a contempt". However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the Court may refuse to accept it. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing

coward. (Vide : *Mulkh Raj v. The State of Punjab,* AIR 1972 SC 1197**;** *The Secretary, Hailakandi Bar Association v. State of Assam & Anr.,* AIR 1996 SC 1925**;** *C. Elumalai and Ors. v. A.G.L. Irudayaraj and Anr.,* AIR 2009 SC 2214; and *Ranveer Yadav v. State of Bihar,* (2010) 11 SCC 493).

24. In *Debabrata Bandopadhyay & Ors. v. The State of West Bengal & Anr.,* AIR 1969 SC 189, this Court while dealing with a similar issue observed as under:

> "…..Of course, an apology must be offered and that too clearly and at the earliest opportunity. A person who offers a belated apology runs the risk that it may not be accepted for such an apology hardly shows the contrition which is the essence of the purging of a contempt. However, a man may have the courage of his convictions and may stake his on proving that he is not in contempt and may take the risk. In the present case the appellants ran the gauntlet of such risk and may be said to have fairly succeeded."

25. This Court has clearly laid down that apology tendered is not to be accepted as a matter of course and the Court is not bound to accept the same. The court is competent to reject the apology and impose the punishment recording reasons for the same. The use of insulting language does not absolve the contemnor on any count whatsoever. If the words are calculated and clearly intended to cause any insult, an apology if tendered and lack penitence, regret or contrition, does not deserve to be accepted. (Vide: *Shri Baradakanta Mishra v. Registrar of Orissa High Court & Anr.,* AIR 1974 SC 710; *The Bar Council of Maharashtra v. M.V. Dabholkar etc.,* AIR 1976 SC 242; *Asharam M. Jain v. A.T. Gupta & Ors.,* AIR 1983 SC 1151; *Mohd. Zahir Khan v. Vijai Singh & Ors.,* AIR 1992 SC 642; In *Re: Sanjiv Datta,* (1995) 3 SCC 619; and *Patel Rajnikant Dhulabhai & Ors. v. Patel Chandrakant Dhulabhai & Ors.,* AIR 2008 SC 3016).

26. In the instant case, the appellant has tendered the apology on 24.5.1999 after receiving the show cause notice

from the High Court as to why the proceedings for criminal contempt be not initiated against him. It may be necessary to make the reference to the said apology, the relevant part of which reads as under:

> "That from the above facts, it is evident that the *deponent has not shown any dis-regard nor abused the Presiding Officer,* learned Magistrate and so far as allegations against him regarding surrender of Om Prakash is the name of Ram Kishan are concerned, the deponent has no knowledge regarding fraud committed by Asharfi Lal in connivance with others and deponent cannot be blamed for any fraudulent act.
>
> *That notwithstanding mentioned in this affidavit,* the deponent tenders unconditional apology to Mr. S.C. Jain, IInd Addl. Chief Judicial Magistrate, Etawah **if** for any conduct of the deponent the feelings of Mr. S.C. Jain are hurt. The deponent shall do everything and protect the dignity of judiciary. (Emphasis added)

27. On 24.11.2005, the appellant has submitted an affidavit saying as under:

> "That the deponent expresses his unqualified remorse for the incident giving rise to the present contempt application. The deponent tenders his unconditional apology to this Hon'ble Court and to Shri Suresh Chandra Jain, the then A.C.J.M.-2 Etawah for the entire incident without any qualification or pre-condition. The deponent gives the following solemn undertaking that no such incident would occur in future. The deponent has immense respect for this Hon'ble Court and all other Courts of Law in the land.
>
> The deponent also expresses bona fide, genuine and heart-felt regret for the occurrence which the deponent consider a blot on him".

28. The High Court considered the case elaborately

examining every issue microscopically and held that there was no reason to disbelieve the facts stated by the judicial officer against the contemnor/appellant, the facts were acceptable, and it was clearly proved that the contemnor was guilty of gross criminal contempt. The charges levelled against the appellant stood proved. A Judge has to discharge his duty and passes order in the manner as he thinks fit to the best of his capability under the facts and circumstances of the case before him. No litigant, far less an advocate, has any right to take the law in his own hands. The contemnor abused the Judge in most filthy words unworthy of mouthing by an ordinary person and that is true without any justification for him ascending the dais during the course of the proceedings and then abusing the judicial officer in the words "Maaderchod, Bahanchod, High Court Ko Contempt Refer Kar". The courts certainly cannot be intimidated to seek the favourable orders. The appellant intimidated the presiding officer of the court hurling filthiest abuses and lowered the authority of the Court, which is tantamount to interfere with the due course of judicial proceedings. The charge which stood proved against the appellant could not be taken lightly and in such a fact-situation the apology tendered by him, being not bona fide, was not acceptable.

29. We have considered the facts and circumstances of the case. The show cause notice was given by the High Court on 5.5.1999. The appellant submitted his reply on 24.5.1999. The charges were framed against him on 27.9.2004 and in his first affidavit dated 18.10.2005, the appellant had denied all the allegations made against him. The so-called apology contained ifs and buts. Appellant is not even sure as to whether he has committed the criminal contempt of the court or whether the most filthy abuses could hurt the Presiding Officer. Appellant has been of the view that the Officer was a robot and has no heart at all, thus incapable of having the feelings of being hurt.

The appellant filed second affidavit dated 24.11.2005 tendering apology. The apology has been tendered under pressure only after framing of the charges by the High Court in

the Criminal Contempt when appellant realised that he could be punished. The apology was not tendered at the earliest opportunity, rather tendered belatedly just to escape the punishment for the grossest criminal contempt committed by him. The language used by the Advocate for a judicial officer where he practices regularly and earns his livelihood is such that any apology would fall short to meet the requirement of the statutory provisions. There has been no repent or remorse on the part of the appellant at an initial stage. Had it been so, instead of making grossest and scandalous allegations against the judicial officer, writing complaint against him to the Administrative Judge in the High Court of Allahabad, the appellant could have gone to the concerned judicial officer and tendered apology in open court.

The appellant instead of yielding to the court honestly and unconditionally, advanced a well guarded defence by referring to all the facts that led to the incident. Apology tendered by the appellant gives an impression that the same was in the alternative and not a complete surrender before the law. Such attitude has a direct impact on the court's independence, dignity and decorum. In order to protect the administration of public justice, we must take action as his conduct and utterances cannot be ignored or pardoned. The appellant had no business to overawe the court.

Thus, we are of the view that the apology tendered by the appellant had neither been sincere nor bona fide and thus, not worth acceptance.

30. The appeal lacks merit and is, accordingly, dismissed. A copy of the judgment and order be sent to the Chief Judicial Magistrate, Etawah, for taking the appellant into custody and send him to the jail to serve out the sentence.

D.G. Appeal dismissed.

MANGLURAM DEWANGAN
v.
SURENDRA SINGH AND ORS.
(Civil Appeal No. 4923 of 2011)

JULY 4, 2011

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

Code of Civil Procedure, 1908:

s.2(2) – Decree – Essential requirements for an order to be treated as decree – Discussed.

ss.2(2), 96, 104, 115, Or.43 r.1 – Decree and appealable order – Distinction between – Held: Where the order is a 'decree' as defined u/s.2(2), an appeal would lie u/s.96 (with a provision for a second appeal u/s.100) – When the order is not a 'decree', but is an order which is one among those enumerated in s.104 or r.1 of Or.43, an appeal would lie u/s.104 or u/s.104 r/w Or.43, r.1 (without any provision for a second appeal) – If the order is neither a 'decree', nor an appealable 'order' enumerated in s.104 or Or.43 r. 1, a revision would lie u/s.115, if it satisfies the requirements of that section – The difference between a 'decree' appealable u/s.96 and an 'order' appealable u/s.104 is that a second appeal is available in respect of decrees in first appeals u/s.96, whereas no further appeal lies from an order in an appeal u/s.104 and Or.43, r.1.

Or.22 r.9(2) – Application u/Or.22, r.9(2) can be filed only if there is abatement or dismissal u/Or.22 on account of no application being made – When an order is passed u/Or.22 rr.3 and 5 dismissing an application by a person claiming to be a legal representative on the ground that he is not a legal representative and consequently dismissing the suit, it will not be a dismissal u/r.9(2) of Or.22 which is amenable for an appeal u/s.104 r/w Or.43 r.1(k) – It, therefore, follows that an

order u/Or.22 rr.3 and 5 is not appealable u/s.104 or Or.43 r. 1.

s.115; Or.22 r.3 – Death of sole plaintiff – Application by appellant u/Or.22 r.3, for being added as a party to the suit as legal representative of the deceased plaintiff – Rejected by trial court and consequently suit dismissed in the absence of any legal heir – Remedy available to the appellant – Held: Remedy available with the appellant was to file a revision and not appeal – Appellant in an application u/Or.22 r.3 was not party to the suit – When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the rights of parties to the suit with regard to all or any of the matters in controversy in the suit – Therefore, an order dismissing an application u/Or.22 r.3 after an enquiry u/r.5 and consequently dismissing the suit, is not a decree – Moreover when an order passed u/Or.22 rr.3 and 5 dismissing an application on the ground that the applicant is not a legal representative and consequently dismissing the suit, it will not be a dismissal u/r.9(2) of Or.22 which is amenable for an appeal u/s.104 r/w Or.43 r.1(k) – It therefore follows that an order u/ Or.22 rr.3 and 5 is not appealable u/ s.104 or Or.43 r.1 – Trial court's order is neither a 'decree' appealable u/s.96 nor an order appealable u/s.104 and Or.43 Rule 1 and, therefore, remedy of the appellant was to file a revision – Revision.

Or.22 r.3 – Death of sole plaintiff – Effect on continuation of suit when right to sue survives and when the right to sue does not survive – Discussed.

Or.22 r.3 – Remedies available to an applicant whose application u/Or.22 Rule 3, for being added as a party to the suit as legal representative of the deceased plaintiff is rejected – Discussed.

Or.22 r.3 – Death of sole plaintiff – Application by

appellant for being added as a party to the suit as legal representative of the deceased plaintiff on the basis of Will – Trial court held that Will was not proved – But appellate court held that appellant duly proved the execution of the Will – Appellate court gave cogent reasons for accepting the appellant to be the legal representative of the deceased plaintiff, in pursuance of the Will – High Court, after holding that the appeal filed by appellant u/s.96 before the District Court was not maintainable, proceeded to consider the matter on merits – Held: Not proper – High Court chose to examine the merits of the matter, in a brief and casual manner and held that the finding of the trial court was preferable and finding of the first appellate court was erroneous – High Court failed to consider all the facts and circumstances considered by the appellate court – Having held that the appellate court could not have entertained the appeal, High Court was not required to examine the matter on merits – If it chose to do so, it ought to have done it thoroughly, which it did not – Will.

One 'P' (plaintiff) filed a suit against the respondents for declaration, possession and damages in regard to an immovable property. 'P' died during the pendency of the suit. The appellant filed an application under Order 22 Rule 3 of Civil Procedure Code to be added and substituted as the legal representative of 'P' claiming to be the sole legatee on the basis of a registered Will executed by 'P'. The trial court held that there was no evidence to prove the execution of Will and, therefore, the appellant could not be held to be the legal representative of 'P' and dismissed the application under Order 22 Rule 3 of the Code and consequently in the absence of any legal heir of 'P' dismissed the suit. Aggrieved, the appellant filed appeal. The appellate court held that registered Will was proved by examining one of the attesting witness. It held that the order of the trial court dismissing the suit as a consequence of the rejection of the application under Order 22 Rule 3 of the Code fell

within the definition of "decree" under section 2(2) of the Code. The appellate court, therefore, set aside the order passed by the trial court and permitted the appellant to be brought on record and continue the suit as legal representative of the plaintiff and remanded the suit to trial court under Order 41 Rule 23 of the Code for deciding the matter on merits.

On appeal, the High Court held that the order of the trial court did not amount to decree and, therefore, the appeal before the appellate court was not maintainable. It held that an order can be a "decree" if it conclusively determines the rights of parties, with regard to all or any of the matters in controversy in the suit; the question whether 'P' executed a Will in favour of appellant and, thus, appellant was a legal representative of 'P' was not an issue in controversy in the suit, but arose incidentally for determination in view of the application of appellant for being brought on record as the legal representative of 'P' and, therefore, an order on such an application did not decide all or any of the matters in controversy in the suit and was not a 'decree' as defined under Section 2(2). In view of that, only a revision was a remedy against such an order and not an appeal. The High Court after holding that the appeal was not maintainable also considered the matter on merits and held that the trial court was justified in dismissing the application under Order 22 Rule 3 of the Code by holding that the will was not proved.

The questions which arose for consideration in the instant appeal were whether an order of the trial court rejecting an application filed under Order 22 Rule 3 of the Code, by a person claiming to be the legatee under the Will of the plaintiff and consequently dismissing the suit in the absence of any legal heir, is an appealable decree; and (ii) whether the High Court was justified in upholding the decision of the trial court that the Will was not proved

and rejecting the application under Order 22 Rule 3 of the Code.

Partly allowing the appeal, the Court

HELD: 1.1. A combined reading of the several provisions of Order 22 of Code of Civil Procedure makes the following position clear: (a) when the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit; (b) if the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code; (c) even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code; (d)abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated; (e) even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code; (f) where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is

shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code; (g) a person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative. [Para 5] [143-F-H; 144-A-H]

1.2. Remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected.

The normal remedies available under the Code whenever a civil court makes an order under the Code are: (i) Where the order is a 'decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code). (ii) When the order is not a 'decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal). (iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section. When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1, CPC. The difference between a 'decree' appealable under section 96 and an

'order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. [Paras 6, 7] [145-A-H; 146-A-B]

1.3. A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree': (i) there should be an adjudication in a suit; (ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it; (iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and (iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default. There is no dispute that the order dated 31.8.1996 made on the application under Rules 3 and 5 of Order 22 of the trial court satisfies requirements (i) and (ii). The question is whether it satisfies the third and fourth requirements. The fourth requirement is considered first. No appeal is provided against an order under Order 22 Rule 3 and 5 of the Code, either under section 104 or Order 43 Rule 1 of the Code. Clause (k) of Rule 1 of Order 43 of the Code however provides that an appeal shall lie under Section 104 of the Code, from an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit. Sub-Rule (2) of Rule 9 of Order 22 permits a legal representative of a deceased plaintiff to apply for an order

to set aside the abatement or dismissal under Order 22 of the Code. An order under Rule 9(2) refusing to set aside an abatement or dismissal of the suit is contemplated, only where there is abatement or dismissal under order 22 and an application has been made by a legal representative to set aside such abatement or dismissal. But where a person claiming to be the legal representative had already filed an application under Order 22 Rule 3 within the period of limitation, and such application has been dismissed on the ground that he is not a legal representative, there is no question of such applicant under Order 22 Rule 3, filing an application under Rule 9(2) for setting aside the abatement or dismissal. An application under Rule 9(2) can be filed only if there is abatement or dismissal under Order 22 on account of no application being made. Therefore, when an order is passed under Order 22 Rules 3 and 5 of the Code, dismissing an application by a person claiming to be a legal representative on the ground that he is not a legal representative and consequently dismissing the suit, it will not be a dismissal under Rule 9(2) of Order 22 which is amenable for an appeal under section 104 read with Order 43 Rule 1(k) of the Code. It therefore follows that an order under Order 22 Rule 3 and 5 is not appealable under section 104 or Order 43 Rule 1, CPC and, therefore, requirement under clause (iv) is complied with. [Paras 7, 8] [146-G-H; 147-A-H; 148-A-C]

1.4. Having found that the order under Order dated 31.8.1996 complied with requirements (i), (ii) and (iv), what remains to be considered is whether it fulfils requirement (iii) also, so that it will answer the definition of decree in section 2(2) of the Code. Requirement (iii) is that the adjudication must determine the rights of the parties with regard to all or any of the matters in controversy in the suit. The applicant in an application under Order 22 Rule 3 is not a party to the suit. An application under Order 22

Rule 3 is by a non-party requesting the court to make him a party as the legal representative of the deceased plaintiff. Necessarily unless the application under Order 22 Rule 3 is allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the *rights of parties to the suit* with regard to all or any of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore, an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree. As the order dated 31.8.1996 is neither a 'decree' appealable under section 96 of the Code nor an order appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, is to file a revision. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a decree and therefore the remedy of the applicant was to file a revision. [Paras 9, 10] [148-C-H; 149-A-B]

1.5. The contention that even if the rejection of an application under Order 22 Rule 3 after an enquiry under Rule 5, may not amount to a decree, the consequential dismissal of the suit on the ground that there is no legal representative, is a denial of the substantive rights claimed by the plaintiff against the defendant in the suit is clearly flawed. If the court orders that suit has abated or dismissed the suit as having abated, as a

consequence of rejection of an application under Order 22 Rule 3 of the Code, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here. [Para 11] [149-C-F]

Niranjan Nath v. Afzal Hussain **AIR 1916 Lahore 245;** *Mitthulal vs.Badri Prasad* **AIR 1981 Madh. Pradesh 1 – referred to.**

2.1. The trial court concentrated upon the evidence of the attesting witness (Balwant) to the Will, and found it inadequate and therefore held that the will not proved. But the appellate court, in addition relied upon the fact that deceased plaintiff himself, when he was alive, had filed an application on 25.10.1994 where he referred to the execution of the Will. The appellate court concluded that the evidence of the attesting witness when read with statement/admission of the deceased plaintiff himself, established due execution of the Will and that the appellant was the legatee under the Will of plaintiff. Thus, the appellate court had given cogent reasons for accepting the appellant to be the legal representative of the deceased plaintiff, in pursuance of the Will. The High Court, after holding that the appeal filed by appellant under section 96 of the Code before the District Court was not maintainable, should not have proceeded to consider the matter on merits. But the High Court chose to examine the merits of the matter, in a brief and casual manner and held that the finding of the trial court was preferable and finding of the first appellate court was erroneous. The

High Court failed to consider all the facts and circumstances considered by the appellate court. Having held that the appellate court could not have entertained the appeal, the High Court was not required to examine the matter on merits. If it chose to do so, it ought to have done in thoroughly, which it did not. [Para 14] [152-F-H; 153-A-C]

2.2. The finding of the High Court that the order dated 31.1.1996 passed by the trial court, was not appealable is upheld. The finding of the High Court that the Will was not proved and therefore, the appellant was not a legal representative is set aside as the said finding was not warranted without consideration of the entire evidence. As a consequence, it will be open to the appellant to challenge the order dated 31.8.1996 in a revision petition before the High Court and if such a revision is filed, the period spent till now in *bona fide* litigation, shall have to be excluded for purposes of limitation. [Para 15] [153-D-E]

Case Law Reference:

AIR 1916 Lahore 245	**referred to**	**Para 12**
AIR 1981 Madh. Pradesh 1	**referred to**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4923 of 2011.

From the Judgment & Order dated 15.4.2008 of the High Court of Chhattisgarh at Bilaspur in Misc. Appeal No. 332 of 1998.

S.S. Khanduja, Yash Pal Dhingra for the Appellant.

K. Sarada Devi, Niraj Kumar Singh, V.N. Raghupathy for the Respondents.

The Judgment of the Court of was delivered by

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

2. One Prannath filed a suit against the respondents for declaration, possession and damages on 4.8.1989 in regard to an immovable property. Prannath died on 12.11.1994 during the pendency of the suit. The appellant filed an application under Order 22 Rule 3 of the Code of Civil Procedure ('Code' for short) on 27.1.1995 to be added and substituted as the legal representative of Prannath, claiming that he was the sole legatee under the registered will dated 10.10.1994 executed by Prannath. The said application was contested by the respondents-defendants. They denied the allegation that deceased plaintiff Prannath had executed any will in favour of the appellant. They contended that the appellant was not the legal heir nor legatee of Prannath and therefore not entitled to be added as a party, as the legal representative of the deceased plaintiff. In view of the contest to the application, the appellant examined one Balwant who was an attesting witness to the will. After considering the documentary and oral evidence, the trial court (IV Civil Judge, Class II, Bilaspur) made an order dated 31.8.1996, holding that there was no acceptable evidence to prove the will and therefore the appellant could not be held to be the legal representative of the plaintiff. The trial court held that the application by the appellant under Order 22 Rule 3 of the Code could not be entertained or accepted and consequently in the absence of any legal heir of the plaintiff dismissed the suit.

2. Feeling aggrieved the appellant filed an appeal in the court of the V Additional District Judge, Bilaspur. The appellate court allowed the appeal by order dated 28.1.1998. It held that the registered will was proved by examining one of the attesting witnesses; that deceased Prannath himself had submitted an application in court in the pending suit on 25.10.1994 referring to the execution of his will dated 10.10.1994 and praying that his evidence may be recorded without delay; and that therefore the appellant was entitled to be impleaded as the legal representative of the deceased plaintiff. The appellate court

rejected the contention of the respondents-defendants that the appeal was not maintainable. It held that the order of the trial court dismissing the suit as a consequence of the rejection of the application under Order 22 Rule 3 of the Code would fall within the definition of "decree" under section 2(2) of the Code. The appellate court therefore set aside the order dated 31.8.1996 passed by the trial court, permitted the appellant to be brought on record and continue the suit as legal representative of the plaintiff and remanded the suit to trial court under Order 41 Rule 23 of the Code for deciding the matter on merits.

3. Respondents 1 and 2 filed a miscellaneous appeal before the High Court, under Order 43 Rule 1(u) of the Code against the said appellate judgment. A learned Single Judge of the Chhattisgarh High Court, by the impugned order dated 15.4.2008 allowed the said appeal and set aside the order dated 28.1.1998 passed by the appellate court and restored the order dated 31.8.1996 passed by the trial court. The High Court held that the order dated 31.8.1996 of the trial court did not amount to a decree and therefore the appeal by the appellant before the appellate court was not maintainable. The High Court held that an order can be a "decree" if it conclusively determined the rights of parties, with regard to all or any of the matters in controversy in the suit. The question whether Prannath executed a will in favour of appellant and thus appellant was a legal representative of Prannath was not an issue in controversy in the suit, but arose incidentally for determination in view of the application of appellant for being brought on record as the legal representative of Prannath. An order on such an application did not decide all or any of the matters in controversy in the suit and not a 'decree' as defined under Order 2(2), and therefore, only a revision would be a remedy against such an order and not an appeal. The High Court after holding that the appeal was not maintainable also considered the matter on merits and held that the trial court was justified in dismissing the application under Order 22 Rule 3

of the Code by holding that the will was not proved.

4. The said order of the High Court is challenged in this appeal by special leave. The following questions arise for consideration on the contentions urged:

(i) Whether an order of the trial court rejecting an application filed under Order 22 Rule 3 of the Code, by a person claiming to be the legatee under the will of the plaintiff and consequently dismissing the suit in the absence of any legal heir, is an appealable decree?

(ii) Whether the High Court was justified in upholding the decision of the trial court that the will was not proved and rejecting the application under Order 22 Rule 3 of the Code?

Re : Question (i)

5. Order 22 deals with death of parties. Rules 1, 3, 5 and 9 of order 22 of the Code have a bearing on the issue and relevant portions thereof are extracted below :

"1. *No abatement by party's death if right to sue survives.*—The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

3. *Procedure in case of death of one of several plaintiffs or of sole plaintiff.*—(1) *Where* one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or *a sole plaintiff* or sole surviving plaintiff *dies and the right to the sue survives,* the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) *Where within the time limited by law no application is made under sub-rule (1) the suit shall abate* so far as the deceased plaintiff is concerned, and, on the application of

the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

5. *Determination of question as to legal representative.*— Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, *such question shall be determined by the Court:* x x x x x

9. *Effect of abatement or dismissal.*—(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or *the person claiming to be the legal representative of a deceased plaintiff* or the assignee or the receiver in the case of an insolvent plaintiff *may apply for an order to set aside the abatement or dismissal;* and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit".

x x x x x

(emphasis supplied)

A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the

suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

6. We may next consider the remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a 'decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code).

(ii) When the order is not a 'decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section.

When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1 of the Code. Be that as it may. The difference between a 'decree' appealable under section 96 and an 'order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. The question for consideration in this case is whether the order dated 31.8.1996 of the trial court dismissing an application under Order 22 Rule 3 and consequently dismissing the suit is an order amenable to the remedy of appeal or revision. If the remedy is by way of appeal, the incidental question would be whether it is under section 96, or under section 104 read with Order 43, Rule 1 of the Code.

7. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. The word 'decree' is defined under section 2(2) of the Code thus:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree' :

(i) there should be an adjudication in a suit;

(ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;

(iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and

(iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default.

(emphasis supplied)

8. There is no dispute that the order dated 31.8.1996 made on the application under Rules 3 and 5 of Order 22 of the trial court satisfies requirements (i) and (ii). The question is whether it satisfies the third and fourth requirements. We may first consider the fourth requirement. No appeal is provided against an order under Order 22 Rule 3 and 5 of the Code, either under section 104 or Order 43 Rule 1 of the Code. Clause (k) of Rule 1 of Order 43 of the Code however provides that an appeal shall lie under Section 104 of the Code, from an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit. Sub-Rule (2) of Rule 9 of Order 22 permits a legal representative of a deceased plaintiff to apply for an order to set aside the abatement or dismissal under Order 22 of the Code. An order under Rule 9(2) refusing to set aside an abatement or dismissal of the suit is contemplated, only where there is abatement or dismissal under order 22 and an application has been made by a legal representative to set aside such abatement or dismissal. But where a person claiming to be the legal representative had already filed an application under Order 22 Rule 3 within the period of limitation, and such application has been dismissed on the ground that he is not a legal representative, there is no question of such applicant under Order 22 Rule 3, filing an application under Rule 9(2) for setting aside the abatement or dismissal. An application under Rule 9(2) can be filed only if there is abatement or dismissal under Order 22 on account of

no application being made. Therefore when an order is passed under Order 22 Rules 3 and 5 of the Code, dismissing an application by a person claiming to be a legal representative on the ground that he is not a legal representative and consequently dismissing the suit, it will not be a dismissal under Rule 9(2) of Order 22 which is amenable for an appeal under section 104 read with Order 43 Rule 1(k) of the Code. It therefore follows that an order under Order 22 Rule 3 and 5 is not appealable under section 104 or Order 43 Rule 1 of the Code.

9. Having found that the order under Order dated 31.8.1996 complied with requirements (i), (ii) and (iv), what remains to be considered is whether it fulfils requirement (iii) also, so that it will answer the definition of decree in section 2(2) of the Code. Requirement (iii) is that the adjudication must determine the rights of the parties with regard to all or any of the matters in controversy in the suit. The applicant in an application under Order 22 Rule 3 is not a party to the suit. An application under Order 22 Rule 3 is by a non-party requesting the court to make him a party as the legal representative of the deceased plaintiff. Necessarily unless the applicant in the application under Order 22 Rule 3 allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the *rights of parties to the suit* with regard to all or any of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree.

10. As the order dated 31.8.1996 is neither a 'decree' appealable under section 96 of the Code nor an order

appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, is to file a revision. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a not a decree and therefore the remedy of the applicant was to file a revision.

11. The appellant submitted that even if the rejection of an application under Order 22 Rule 3 after an enquiry under Rule 5, may not amount to a decree, the consequential dismissal of the suit on the ground that there is no legal representative, is a denial of the substantive rights claimed by the plaintiff against the defendant in the suit. This contention is clearly flawed. If the court orders that suit has abated or dismissed the suit as having abated, as a consequence of rejection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here. Similar contention raised before various High Courts have repeatedly negatived by different High Courts. It is sufficient to refer to two of them with which we respectfully agree.

12. A full Bench decision of the Lahore High Court in *Niranjan Nath v. Afzal Hussain - AIR 1916 Lahore 245* held as follows:

> "After examining the matter carefully we consider that if a court passes a purely formal order recognizing the abatement, which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon

> any rights, and cannot be treated as a decree. An order of this nature, as observed already, merely records an abatement, which has already taken place by reason of the lapse of six months*, after the death of the plaintiff, and does not contain any decision arrived at by the court. In a case of this kind Order 22, Rule 9 allows the legal representative to make an application for the revival of the suit, and the only question the court is thereupon required to determine is whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is entitled to prefer an appeal against that order under Order 43 Rule 1(k). The decision of the appellate court is, however, made final and a second appeal is not competent.
>
> The language of Order 22, Rule 9(2) when carefully examined, leads us to the conclusion that it is confined to cases in which the abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff or the deceased defendant, and that it has no applicability to cases in which the suit has abated on account of some other cause. This view receives support from the decision of the Madras High Court in *Subramania Iyer v. Venkataramier* (1915) 31 I.C. 4. *Suppose, the sole plaintiff in a suit dies, and in spite of an application within six months* by his legal representative the court holds that the right to sue does not survive, and consequently directs the abatement* of the suit. An abatement of this character obviously stands on a different footing. It does no take place *ipso facto*. The court does not record a merely formal order reciting a past event, as in the case of an abatement in consequence of an application not having been made within the prescribed period to implead the legal representative, but it exercises its mind in the determination of a matter in controversy. The decision of the court directing the abatement of the suit is,

in our opinion, a decree, because the right to represent the deceased is a point in controversy between the claimant and the opposite party, and the adjudicator determines their rights with respect thereto, and puts an end to the case, there being no appeal from the adjudication as an appeal from an order. An application under Rule 9 is, as observed above, incompetent and it is difficult to believe that the Legislature intended that the decision of a matter, which concludes the suit, should be final and that the aggrieved party should have no remedy whatever.

(*what is referred as 'six months' is three months, under Article 120 of Limitation Act, 1963).

(emphasis supplied)

13. In *Mitthulal vs. Badri Prasad* – AIR 1981 Madh. Pradesh 1, a full Bench of the Madhya Pradesh High Court held as follows :

"There seems to be a general consensus of judicial opinion that all orders of abatement are not decrees. Only those orders of abatement are decrees in which the Court comes to the conclusion that the right to sue does not survive on the death of the sole plaintiff or on the death of one of the plaintiffs to the surviving plaintiffs. *The orders of abatement which follow consequent on the failure of the legal representative of plaintiff to be brought on record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, such orders do not amount to decree.* The reason being that the abatement is automatic consequent on the failure of the legal representative to be brought on record within the period of limitation and no formal order is necessary. So there is no adjudication on the rights of the parties in the suit or appeal by such an order. An order under Order 22, Rule 5 cannot obviously be said to fall within the

definition of decree for the following reasons (i) the order is made only for the purpose of determining who should continue the suit as brought by the original plaintiff. It is not intended to determine and it does not, in fact, determine the rights of the parties with regard to any of the matters in controversy in suit. The question that arises for decision and actually decided is not one arising in the suit itself but is one that arises in a collateral proceeding and has to be got decided before the suit can go on; and (ii) In order to operate as a decree, the adjudication must be one between the parties to the original suit or their legal representatives, and with regard to only matters in controversy between the original parties and, therefore, cannot include a decision of the question as to whether certain individual is or is not entitled to represent one of such parties. In cases where the Court comes to the conclusion that the right to sue does not survive consequent on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, there is final adjudication of the rights of the parties and the order amounts to decree."

(emphasis supplied)

Re: Question (ii)

14. The trial court concentrated upon the evidence of the attesting witness (Balwant) to the will, and found it inadequate and therefore held that the will not proved. But the appellate court, in addition relied upon the fact that deceased plaintiff himself, when he was alive, had filed an application on 25.10.1994 where he referred to the execution of the will. The appellate court concluded that the evidence of the attesting witness when read with statement/admission of the deceased plaintiff himself, established due execution of the will and that the appellant was the legatee under the will of plaintiff. Thus, the appellate court had given cogent reasons for accepting the appellant to be the legal representative of the deceased

plaintiff, in pursuance of the will. The High Court, after holding that the appeal filed by appellant under section 96 of the Code before the District Court was not maintainable, should not have proceeded to consider the matter on merits. But the High Court chose to examine the merits of the matter, in a brief and casual manner and held that the finding of the trial court was preferable and finding of the first appellate court was erroneous. The High Court failed to consider all the facts and circumstances considered by the appellate court. Having held that the appellate court could not have entertained the appeal, the High Court was not required to examine the matter on merits. If it chose to do so, it ought to have done in thoroughly, which it did not.

Conclusion

15. In view of the above, the finding of the High Court that the order dated 31.1.1996 passed by the trial court, was not appealable is upheld. The finding of the High Court that the will was not proved and therefore, the appellant was not a legal representative is set aside as the said finding was not warranted without consideration of the entire evidence. As a consequence, it will be open to the appellant to challenge the order dated 31.8.1996 in a revision petition before the High Court and if such a revision is filed, the period spent till now in *bona fide* litigation, shall have to be excluded for purposes of limitation.

16. We accordingly allow this appeal in part and set aside the finding of the High Court on the merits of the matter. As we have upheld the finding of the High Court that the order dated 31.8.1996 was not a decree and not appealable, we uphold the setting aside of the judgment dated 28.1.1998 of the appellate court, but reserve liberty to the appellant to challenge the order dated 31.8.1996 in revision. If a revision is filed within 90 days from today, the High Court will condone the delay in view of pendency of the matter till now.

D.G. Appeal partly allowed.

NANDIESHA REDDY

v.

MRS. KAVITHA MAHESH

(Civil Appeal No. 5142 of 2011)

JULY 8, 2011

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

REPRESENTATION OF THE PEOPLE ACT, 1951:

ss. 83, 87 and 100 (1)(c) of the Act and O. 6, r. 16, O. 7, r. 11 CPC – Election petition – Challenging the election of the Returned Candidate – On the ground that nomination of the election petitioner was illegally not accepted by the Returning Officer – Applications for striking off the pleadings and for dismissal of the petition for non-compliance of ss. 33 and 34 and on the ground that the election petition did not contain concise statement of material facts and that the material facts did not disclose any cause of action –"Material facts" – Connotation of – HELD: From a plain reading of the averments made in the election petition, it is evident that the election petitioner has averred that nomination paper was signed by 10 electors, she asked for the latest electoral roll for verifying and extracting the part numbers and serial numbers of the proposers, but it was denied and when she delivered the nomination paper to the Returning Officer, he did not receive the same – These statements at this stage have to be accepted as true – Thus, the election petition does contain material facts and one of the grounds for declaring the election as void in terms of s. 100 (1) (c) was specifically pleaded – Therefore, the election petition is not liable to be dismissed at the threshold and the matter is fit to go for trial – Whether the material facts are true or not is a matter of trial – The High Court has rightly rejected the applications – Code of Civil Procedure, 1908 – O. 6, r. 16 and O. 7, r. 1.

s. 81 – Election petition – Locus – "Candidate" – Connotation of – -HELD: An election petition, calling in question any election can be presented by any candidate at such election – Candidate would not be only such person whose nomination has been found valid – In the instant case, there is clear averment in the election petition that nomination paper was subscribed by 10 electors and delivered to the Returning Officer, but he did not receive the same – Thus, the election petitioner shall be deemed to be a candidate entitled to challenge the election of the returned candidate.

s. 33 – Election to the State Legislative Assembly – Rejection of nomination – HELD: When a nomination paper is presented, it is the bounden duty of the Returning Officer to receive the same, peruse it, point out the defects, if any, and allow the candidate to rectify the defects and when the defects are not removed, then alone the question of rejection of nomination would arise.

s. 34 –Election to State Legislative Assembly – Deposit to be made by the candidate – Nomination paper not received by the Returning Officer – HELD: There was still time for presenting the nomination paper and had the same been accepted for scrutiny the deposit could have been made by the election petitioner.

The election of the appellant to the State Legislative Assembly was challenged by the respondent in an election petition before the High Court on the ground that the nomination of the election petitioner was illegally not accepted by the Returning Officer. According to the election schedule, the last date for submission of nomination was 23.4.2008 whereas the scrutiny of the nomination papers was to be undertaken on 24.4.2008 and the date of election was 10.5.2008. After de-limitation, the original constituency was split in three constituencies. In order to contest the election from the

Constituency concerned, according to the election petitioner, she obtained a set of nomination forms from the Returning Officer on 19.4.2008 and delivered the same together with all annexures to the Returning Officer on 23.4.2008 and requested him to furnish the latest electoral roll of the Constituency concerned in order to extract the new part numbers of the proposers for incorporating the same in the appropriate column, but she was not supplied the latest electoral roll and when she submitted the nomination papers, the same were not received; and this rendered the election of the appellant null and void.

The appellant filed two applications – one under O. 6 r.16 CPC for striking off the pleadings from the election petition and the other u/ss 83 and 86 of the Representation of the People Act, 1951 read with O 7 r. 11 CPC for dismissal of the election petition. It was pointed out that the election petitioner was neither a candidate set up by any recognized political party nor was her nomination subscribed by ten electors of the Constituency; that she had not made any deposit as required u/s 34 of the Act; that there was non-compliance of s. 81 (3) of the Act as the appellant was not furnished with the true attested copy of the election petition and its annexures as presented to the court; and that the election petition did not contain concise statement of the material facts on which the election petitioner relied and the material facts averred did not disclose any cause of action for the relief sought for. The High Court rejected both the applications. Aggrieved, the returned candidate filed the appeal.

Dismissing the appeals, the Court

HELD: 1.1. From a plain reading of the averments made in the election petition, it is evident that the election petitioner has averred that nomination paper was signed

by 10 electors. It was delivered to the Returning Officer with a request to make available the latest electoral roll of newly created Constituency for filling up the new part numbers and serial numbers of the proposers in the respective columns. However, the Returning Officer stated that he is not in possession thereof and asked the election petitioner to approach the revenue office for verifying and extracting the part number and serial number of the proposers. Attempts made on behalf of the election petitioner to get those details from the revenue office were rendered futile. Thereafter, the election petitioner approached the Returning Officer again for delivering the nomination papers with the explanation. It did not yield any result. These averments at this stage have to be accepted as true. [para 12] [170-F-H; 171-A-D]

1.2. Section 81 of the Representation of the People Act, 1951 makes it clear that an election petition calling in question any election can be presented by any candidate at such election. Candidate would not be only such person whose nomination has been found valid. In the instant case, the election petitioner's plea is that the Returning Officer declined to accept the nomination papers. When a nomination paper is presented it is the bounden duty of the Returning Officer to receive the nomination, peruse it, point out the defects, if any, and allow the candidate to rectify the defects and when the defects are not removed then alone the question of rejection of nomination would arise. Any other view will lead to grave consequences. Section 33(4) of the Act casts a duty on the Returning Officers to satisfy himself that the names and the electoral roll numbers of the candidates and their proposers as entered in the nomination paper are the same as in the electoral rolls. [para 13] [172-B-F]

1.3. As regards failure to subscribe the nomination papers by 10 electors as required under the first proviso

to s.33 of the Act, there is clear averment in the election petition that nomination paper was subscribed by 10 electors. Whether in fact it was done or not is a matter of trial and at this stage this Court has to proceed on an assumption that the averments made in the election petition are true. Thus, the election petitioner shall be deemed to be a candidate and entitled to challenge the election of the Returned Candidate. [para 14] [172-G-H; 173-A]

Mithilesh K. Sinha v. Returning Officer for Presidential Election **1992 (1) Suppl. SCR 651 = 1993 Supp. (4) SCC 386 - distinguished**

Pothula Rama Rao v. Pendyala Venakata Krishna Rao **2007 (8) SCR 982 = (2007) 11 SCC 1 – held inapplicable.**

2. So far as compliance of s.34 of the Act is concerned, there was still time left for presenting the nomination paper and in case the same would have been accepted for scrutiny, the election petitioner could have made deposit within the time. It is only after expiry of the time had the election petitioner not made the deposit, the nomination was liable to be rejected. [para 18] [174-D-E]

3.1. Section 83(1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, s. 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order 6 of the Code is devoted to the pleadings generally and r. 2(i) thereof, inter alia, provides that every pleading shall contain statement in a concise form all the material facts on which the party pleading relies for claim. The phrase 'material fact' as used in s. 83(1)(a) of the Act or O. 6 r. 2 of the Code has not been defined in the Act or the Code.

All specific and primary facts which are required to be proved by a party for the relief claimed are material facts. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard. [para 21] [176-B-F]

3.2. In the instant case, the election petitioner has clearly averred that his nomination was subscribed by ten electors and presented before the Returning Officer but the same was not received and rejected. Thus one of the grounds for declaring the election to be void as provided u/s 100(1)(c) of the Act was specifically pleaded. Therefore, the election petition does contain material facts and the same is not liable to be dismissed at the threshold and the matter is fit to go for trial. Whether those material facts are true or false is a matter of trial. [para 16 and 22] [173-E-H; 176-G-H]

Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar, **2009 (14) SCR 10 = (2009) 9 SCC 310; and** *Ram Sukh v. Dinesh Aggarwal* **2009 (14) SCR 836 = (2009) 10 SCC 541 - held inapplicable**

Case Law Reference:

1992 (1) Suppl. SCR 651	**distinguished**	**para 10**
2007 (8) SCR 982	**held inapplicable**	**para 10**
2009 (14) SCR 10	**held inapplicable**	**para 19**
2009 (14) SCR 836	**held inapplicable**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5142 of 2011.

From the Judgment & Order dated 12.11.2009 of the High

Court of Karnataka at Bangalore in Misc. Civil No. 15572 of 2009 in Election Petition No. 7 of 2008.

WITH

C.A. No. 5143 of 2011.

Dushyant Dave, R.C. Hegde, C. Shashikant, Girish Ananthmurthy, P.P. Singh for the Appellant.

Respondent-In-Person.

The Judgment of the Court was delivered by

CHANDRMAULI KR.PRASAD, J. 1. Nandiesha Reddy got elected to the Karnataka Assembly in the general election from K.R.Pura Assembly Constituency held on 10th of May, 2008. His election was challenged by Kavitha Mahesh, inter alia, on the ground that her nomination was illegally not accepted by the Returning Officer which rendered Nandiesha Reddy's election void. Nandiesha Reddy (hereinafter to be referred to as 'the Returned Candidate') filed two applications; one under Order VI Rule 16 of the Code of Civil Procedure for striking out pleading from the election petition and another under Sections 83 and 86 of the Representation of the People Act, 1951 (hereinafter to be referred to as 'the Act') read with Order VII Rule 11 of the Code of Civil Procedure, 1908 for dismissal of the election petition. The Karnataka High Court by the impugned orders dated 8th October, 2009 and 12th November, 2009 dismissed the aforesaid applications.

2. The Returned Candidate assails aforesaid orders in the present Special Leave Petitions.

3. Leave granted.

4. Short facts giving rise to the present appeals are that the Election Commission of India on 16th of April, 2008 notified its intention to hold General election to the Karnataka State

Legislative Assembly and announced the election schedule. According to the schedule, the last date for submission of the nomination was 23rd of April, 2008 whereas the scrutiny of the nomination papers was to be undertaken on 24th of April, 2008. The date of election fixed was 10th of May, 2008. Kavitha Mahesh (hereinafter referred to as 'the Election Petitioner') was an electorate in the combined Varthur Assembly Constituency prior to de-limitation. After de-limitation the said constituency has been split into three constituencies, namely (i) Mahadevapura (ii) C.V.Raman Nagar and (iii) K.R.Pura. After the de-limitation, the Election Petitioner's name appeared in the electoral roll of C.V.Ramana Nagar Constituency. In order to contest the election from K.R.Pura Assembly Constituency, according to the Election Petitioner, on 19th of April, 2008 she obtained a set of nomination forms from the Returning Officer. It is her case that on 23rd of April, 2008 at about 2.00 P.M. she delivered the nomination papers together with all annexures to the Returning Officer and requested him to furnish the latest electoral roll of K.R.Pura Assembly Constituency in order to extract the new part number and serial number of the proposers who had signed on the nomination papers for incorporating the same in the appropriate column against their respective names. It is alleged that the Returning Officer instead of furnishing the latest electoral roll of K.R.Pura Assembly Constituency, asked the Election Petitioner to approach the Revenue Office to obtain those details. It has specifically been averred by the Election Petitioner that she went to the Revenue Office but could not get those details from the Revenue Officer and therefore, she went to file the nomination papers, presented the same before the Returning Officer but it was not received. It is her allegation that, thereafter, she attempted to give a handwritten representation to the Returning Officer but the same was also not accepted. Hence she left the place without filing the nomination. It is also her allegation that on 28th of April, 2008, she filed a complaint in this regard before the Chief Election Commissioner.

5. The election was held on 10th of May, 2008 and its

result was published on 27th of May, 2008 in which the Returned Candidate was declared elected from K.R.Pura Assembly Constituency. This was challenged by the Election Petitioner in an election petition before the Karnataka High Court. The Election of the Returned Candidate was sought to be declared null and void on the ground of illegal rejection of nomination paper at threshold by the Returning Officer.

6. As usual, the Returned Candidate filed applications for striking out various paragraphs from the election petition. This was registered as Misc. Civil No. 15204 of 2009. Another application for dismissal of the election petition was filed which was registered as Misc. Civil No. 15772 of 2009. In this application it was pointed out that as the Election Petitioner was not a candidate set up by any recognised political party, for valid nomination according to first proviso of Section 33 (1) of the Act the nomination paper was required to be subscribed by ten electors of the constituency. It was further pointed out that the Election Petitioner shall not be deemed to be duly nominated for election from the constituency as she had not made any deposit as required under Section 34 of the Act. The Returned Candidate further alleged non-compliance of Section 81(3) of the Act and contended that he has not been furnished with the true attested copy of the election petition and its annexures as presented to the Court. The Returned Candidate also sought dismissal of the election petition on the ground that the same did not contain concise statement of the material facts on which the Election Petitioner relied and the material facts averred did not disclose any cause of action for the relief sought for.

7. All these pleas raised by the Returned candidate were considered and have been overruled by the High Court by the impugned orders. While rejecting the application (Civil Misc. No. 15204 of 2009) for striking out the pleading from the election petition by order dated 8th October, 2009, the High Court observed as follows:

"53. It is for this reason, I am of the view that the pleadings in the petition does not warrant striking off and assuming that some pleadings are really not necessary, ultimately if the retaining or permitting the pleading to exist does not result in any prejudice or embarrassment to the respondent and at any rate, if at all there being certain complaint or allegation against the returning officer and his failure to adhere to the duties in terms of the statutory provisions and that being a relevant plea in the context of wrongful rejection of a nomination paper, I am of the view that there is no occasion to strike out the pleadings as is sought to be made out in the application."

8. The High Court rejected Civil Misc. No. 15772 of 2009 by order dated 12th of November, 2009 and while considering the plea that the averments in the election petition did not disclose any cause of action for granting the relief in terms of the prayer the High Court observed as follows:

" 55. Whether the nomination as was delivered to the returning officer by the petitioner as a candidate at 1400 hours on 23-4-2088 in fact, did amount to a valid nomination within the scope of the provisions of Section 33 or not, is not a question that surfaces itself for examination at this stage, but later and for the purpose of applying the drastic penal provision of Order VII Rule 11(a) CPC, we have to necessarily accept the plea at its face value and not by seeking for further elaboration or for the proof for the same.

56. ..... in my considered opinion, the petition averments contain sufficient plea to disclose a cause of action and for granting relief in terms of the prayer. It is, therefore, in my opinion, that the election petition cannot be dismissed on the application [filed by the respondent-returned candidate] applying the test of the provisions of Order VII Rule 11 (a) CPC."

9. As regards the plea of non-deposit as required under Section 34 of the Act, the High Court observed as follows:

" 105. Responding to this contention, petitioner has submitted that while the deposit is a requirement in law, a deposit can be made till the last moment; that there was still time for presenting the nomination paper, that when the petitioner attempted to present the nomination paper, time for presentation had not yet come to an end; that even assuming that there was no deposit, it was the bounden duty of the returning officer to point out the requirement of deposit fee and enable the candidate to arrange for deposit and it is only thereafter if the deposit is not made before the expiry of time of filing of nomination, then alone, the provisions of Section 34 of the Act can be said to come into play; that the provisions of sub-section (4) of Section 36 of the Act takes care of the situation and such a situation will arise only when the returning Officer having consciously and deliberately avoided even scrutinizing the nomination papers, by not even receiving the nomination paper, the argument is only hypothetical and is of no consequence in determining the validity of the election petition nor the validity of the nomination paper.

106. I have bestowed my attention to the submission made at the bar and I find that the argument is really hypothetical, particularly as the returning officer had not even cared to look into the nomination paper, as was presented by the petitioner-candidate or on her behalf by her supporters."

As regards the plea of the Returned Candidate that the Election Petitioner did not furnish the copy of the election petition and its annexures as was presented to the Court and that the copies were not duly attested, the High Court answered the same in the following words:

". . . What had been filed as election petition and annexures with the registry at the time of initial presentation

have all been, without dispute, furnished to the respondent. Even a discrepancy with regard to the so-called index, which has to be construed as a list of documents, in my considered opinion, does not make any difference for the understanding of the contents of the petition and the manner in which the election petitioner has sought for relief in the election petition and the grounds and materials relied upon by the petitioner, as copies of all original documents are provided to the respondent and even on a comparative perusal of the papers in the court, with the copies as received by the respondent-returned candidate made available by the learned counsel for the respondent, I do not find any additional papers having been filed by the petitioner copies of which are not made available to the respondent in the sense, which can make a material difference to the respondent to understand the precise case of the petitioner, which is not given by the election petitioner and therefore I am of the view that this is not a situation warranting dismissal of the election petition under Section 86 of the Act, on the premise of non-compliance with the requirement of the provisions of Section 81 of the Act."

The Returned Candidate's pleas that the election petition does not contain concise statement of material facts as contemplated under Section 83 (1) of the Act and has not been verified in the manner as laid down under Order VI Rule 15 (1) of the Act have also been rejected by the High Court. The High Court reproduced the verification in its impugned judgment and found the same to be in three parts and observed as follows:

"……. part-I is within the knowledge of the petitioner, para-II based on the information and belief and part-III on the information that the petitioner believes to be true etc. In my considered view, the verification even as it stands as of now, and with reference to the manner of presentation of the petition and having trifurcated or separated the petition to parts, sufficiently and in

substantial manner complies with the requirement of verification, In terms of clause –c of sub-section (1) of Section 83 of the Act and therefore this argument cannot be one to reject the election petition at the threshold, on the premise that certain requirements in law are not fulfilled."

10. Mr. Dushyant Dave, learned Senior Counsel appearing on behalf of the appellant points out that from the averments in the election petition it is apparent that Election Petitioner was not a candidate set up by a recognised political party and her nomination was not subscribed by 10 electors.Accordingly he submits that the Election Petitioner cannot be considered to be a candidate so as to maintain the election petition. He draws our attention to the first proviso of Section 33 of the Act and points out that for a valid nomination it has to be subscribed by 10 electors. In support of the submission learned counsel for the appellant relies on a Constitution Bench judgment of this Court in the case of *Mithilesh K. Sinha v. Returning Officer for Presidential Election* 1993 Supp. (4) SCC 386 and our attention is drawn to paragraphs 30 and 31 of the judgment which read as under:

"30. To be entitled to present an election petition calling in question an election, the petitioner should have been a 'candidate' at such election within the meaning of Section 13(*a*) for which he should have been "duly nominated as a candidate" and this he cannot claim unless the mandatory requirements of Section 5-B(1)(*a*) and Section 5-C were complied by him. Where on undisputed facts there was non-compliance of any of these mandatory requirements for a valid nomination, the petitioner was not a 'candidate' within the meaning of Section 13(*a*) and, therefore, not competent according to Section 14-A to present the petition.

31. It is also settled by the decisions of this Court that in order to have the requisite locus standi as a 'candidate'

within the meaning of Section 13(*a*) for being entitled to present such an election petition in accordance with Section 14-A of the Act the petitioner must be duly nominated as a candidate in accordance with Section 5-B(1)(*a*) and Section 5-C. Unless it is so the petitioner cannot even claim to have been duly nominated as a candidate at the election as required by Section 13(*a*). The above conclusion in respect of the nomination paper of the petitioner, Mithilesh Kumar Sinha, from the facts set out by him in the petition, stated by him at the hearing and evident from the documents filed by him makes it clear that the petitioner, Mithilesh Kumar Sinha, has no locus standi to challenge the election of the returned candidate, Dr Shanker Dayal Sharma as he is not competent to present the election petition in accordance with Section 14-A of the Act read with Order 39 Rule 7 of Supreme Court Rules. Even otherwise the ground under Section 18(1)(*c*) of the Act of wrongful rejection of his nomination paper urged in the election petition does not give rise to a triable issue on the above facts and the irresistible conclusion therefrom. The material facts to make out a prima facie case of existence of that ground are lacking in the pleadings and squarely negatived by petitioner's own statement."

Reliance has also been placed on a decision of this Court in the case of *Pothula Rama Rao v. Pendyala Venakata Krishna Rao* (2007) 11 SCC 1 and reference has been made to paragraphs 7 and 8 of the judgment which read as follows:

"7. The first respondent was the official candidate of TDP, as he was issued the B-Form by TDP. Atchuta Ramaiah's nomination was not subscribed by 10 proposers but by only one proposer. The nomination of Atchuta Ramaiah was rejected by the Returning Officer, not on the ground that he was a "dummy candidate" but because his nomination was not subscribed by ten voters of the

constituency, and thus there was non-compliance with the first proviso to Section 33(1). The rejection is under sub-section (2)(*b*) of Section 36 which provides for rejection of any nomination on the ground that there has been a failure to comply with provision of Section 33 or Section 34.

8. If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to sub-section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognised political party by issue of a valid B-Form and that his nomination was signed by an elector of the constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

11. Election Petitioner appears in person. She submits that her nomination paper was subscribed by ten electors of the Constituency and presented before the Returning Officer but the same was not accepted. We have bestowed our consideration to the rival submissions. The Election Petitioner, in the election petition, has stated that she had "obtained TEN PROPOSERS signatures in Part II of Annexure 'A' together with their true copies of their Elector Photo Identity Cards". Her further plea

in the election petition is that "as per the given new part number, when we checked for the names of the proposers in the concerned Electoral Roll, their names were not found". The relevant pleadings in this regard are at paragraphs 9, 10 and 11 of the election petition and we deem it expedient to reproduce the same as under:

> "9. It is most respectfully submitted that the petitioner on realizing the time factor to submit the nomination before the 4th respondent by 1500 hours and since the day being the last day for filing nomination papers, has presented her nomination papers together with all necessary enclosures before the 4th Respondent with sole intention to comply the requirements of new part number and serial number in respect of the proposers at the time of scrutiny of nomination paper, which is scheduled for next day the 24th April, 2008 wherein a clear 24 hours time would be available before the Petitioner to make good the requirements in her nomination paper. The petitioner also explained the reason and the actual position prevailing in the revenue office and also requested the 4th respondent to receive her nomination paper and allow time till scrutiny to comply the requirement whatsoever.
>
> 10. It is most respectfully submitted that to the petitioners surprise the 4th respondent spontaneously reacted and commented "I do not want to listen to all your stories and I will not receive your nomination paper without complying with the requirement of new part number and serial number against the proposers in Part-II of Annexure 'A' and if you compel me to receive now and tomorrow I will reject it". At that point of time the petitioner on realizing the language of the 4th respondent, his uncalled for, unwarranted comments, which clearly indicated pre-determined ulterior motive, has decided to submit the nomination paper together with a written representation addressed to Respondent No. 4, requesting him to receive the

> petitioners nomination papers, since true copies of Elector Photo Identity Cards issued prior to delimitation duly self attested by the respective proposers and true copy of enumeration details are being enclosed to prove the identity, address and authenticity of the proposers beyond any doubt. The Representation handwritten by the Petitioner and typed copy is marked as Annexure-'P', and requested him for time till scrutiny for complying with the requirements whatsoever as per law.
>
> 11. It is most respectfully submitted that the Respondent No. 4 once again reacted in the same manner and bluntly refused to receive petitioner's nomination papers and further adding insult to injury, he has commented "I will not receive your nomination paper or your representation or acknowledge any receipt and continued to say "for your negligence you cannot blame other people". The petitioner on observing 4th respondents illegal and improper rejection in violation of statutory law and election commission's guidelines, was left with no option but to presume the existence of prejudice and predetermined ulterior motive behind the fourth respondents illegal attitude and misuse of power. As such the petitioner left the premises humiliated, insulted by the illegal and improper rejection of her nomination paper by none other than a responsible neutral official like Returning Officer."

12. From a plain reading of these averments it is evident that the Election Petitioner has averred that nomination paper was signed by 10 electors. It was delivered to the Returning Officer with a request to make available latest electoral roll of K.R. Pura Constituency for filling up the new part number and serial number of the proposers in the respective columns. However, the Returning Officer stated that he is not in possession thereof and asked the Election Petitioner to approach the revenue office located at the ground floor for verifying and extracting the part number and serial number of

the proposers. Attempts made on behalf of the Election Petitioner to get those details from the revenue office were rendered futile. Thereafter, the Election Petitioner approached the Returning Officer again for delivering the nomination paper with the explanation. It did not yield any result and the Returning Officer stated that he "will not receive your nomination paper without complying the requirement of new part number and serial number against the proposers in Part-II of Annexure 'A' and if you compel me to receive now, tomorrow I will reject it". These averments at this stage have to be accepted as true and, therefore, the question is as to whether Election Petitioner can be said to be a candidate so as to maintain the election petition and further the Returning Officer was right in refusing to accept the nomination paper on the purported ground that it did not contain the serial number and part number of the proposers. Section 81 of the Act inter alia provides for presentation of election petition. It reads as follows:

> *"81. Presentation of petitions.*—(*1*) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (*1*) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.
>
> *Explanation.*—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.
>
> 1. * * * * *
>
> [(*3*) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition [***], and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]"

13. From a plain reading of the aforesaid provision it is evident that an election petition calling in question any election can be presented by any candidate at such election. Candidate, in our opinion, would not be only such person whose nomination form has been accepted for scrutiny or whose name appears in the list of validly nominated candidate, that is to say, candidates whose nominations have been found valid. Here, in the present case, the Election Petitioner's plea is that the Returning Officer declined to accept the nomination paper. We are of the opinion that when a nomination paper is presented it is the bounden duty of the Returning Officer to receive the nomination, peruse it, point out the defects, if any, and allow the candidate to rectify the defects and when the defects are not removed then alone the question of rejection of nomination would arise. Any other view, in our opinion, will lead to grave consequences and the Returning Officers may start refusing to accept the nomination at the threshold which may ensure victory to a particular candidate at the election. This is fraught with danger, difficult to fathom. Section 33(4) of the Act casts duty on a Returning Officers to satisfy himself that the names and the electoral roll numbers of the candidates and their proposers as entered in the nomination paper are the same as in the electoral rolls and, therefore, in our opinion, the Election Petitioner for the purpose of maintaining an election petition shall be deemed to be a candidate.

14. As regards failure to subscribe the nomination papers by 10 electors as required under the first proviso to Section 33 of the Act, the plea of the Election Petitioner is that it was so subscribed. Whether in fact was done or not is a matter of trial and at this stage we have to proceed on an assumption that the averments made in the election petition are true. There is clear averment in the election petition that nomination paper was subscribed by 10 electors. In the face of aforesaid there

is no escape from the conclusion that the Election Petitioner shall be deemed to be a candidate and entitled to challenge the election of the Returned Candidate.

15. Now we revert to the authority of this Court in the case of *Mithilesh K. Sinha* (supra). In the said case election of the President was challenged and it was found that the subsequently delivered nomination paper filed by the petitioner of the said case was not subscribed by at least ten electors as proposers and at least ten electors as seconders as required by Section 5(B)(1)(a) of the Presidential and Vice-Presidential Elections Act, 1952 and in that background it was held that he was not a candidate competent to present the petition. Here, in the present case, as stated earlier, the Election Petitioner has averred that **her** nomination was subscribed by ten electors and that averment at this stage has to be treated as correct and, therefore, this distinguishes the case in hand from the case of *Mithilesh K. Sinha* (supra).

16. In the case of *Pothula Rama Rao* (supra) the Election Petitioner's averment was that his nomination was rejected on the untenable ground that he was a dummy or substitute candidate set up by the TDP. However, there was no averment that he was set up as a candidate by TDP in the manner contemplated in paragraph 13 of the Symbols Order, that is, by issuing a valid B-Form in his favour. Nor did the election petition aver that his nomination paper was subscribed by ten electors. In the face of it this Court came to the conclusion that the election petition was lacking in material facts necessary to make out a cause of action. Here, in the present case, as stated earlier, the Election Petitioner has clearly averred that his nomination was subscribed by ten electors and presented before the Returning Officer but the same was not received and rejected. Thus one of the grounds for declaring the election to be void as provided under Section 100(1)(c) of the Act was specifically pleaded. Thus, the decision of this Court in the case of *Pothula Rama Rao* **(supra)** in no way supports the plea of the appellants.

17. Mr. Dushyant Dave, then contends that the Election Petitioner has nowhere averred that he had made the deposit as required under Section 34 of the Act. According to him Election Petitioner shall not be deemed to be duly nominated for election unless he deposits the amount provided therein. In answer thereto Election Petitioner submits that the deposit as contemplated under Section 34 of the Act can be made till the time of scrutiny of the nomination. According to her after accepting the nomination it was the bounden duty of the Returning Officer to point out the requirement of deposit and enable the candidate to arrange for deposit and it is only thereafter if the deposit is not made, the nomination can be rejected.

18. We have considered the rival submissions and we find substance in the submission of Mrs. Mahesh. We are of the opinion that there was still time left for presenting the nomination paper and in case the same would have been accepted for scrutiny, the Election Petitioner could had made deposit within the time. It is only after expiry of the time had the Election Petitioner not made the deposit, the nomination was liable to be rejected.

19. Mr. Dushyant Dave, lastly submits that the election petition does not contain material facts and on this ground alone the election petition deserves to be rejected at the threshold. Reliance has been placed on a decision of this Court in the case of *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar,* (2009) 9 SCC 310 and our attention has been drawn to paragraph 50 of the judgment which reads as follows:

> "**50.** The position is well settled that an election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with."

Yet another decision on which reliance is placed is the decision of this Court in the case of *Ram Sukh v. Dinesh Aggarwal* (2009) 10 SCC 541 and our attention has been drawn to paragraphs 24 and 25 of the judgment which read as follows:

"**24.** It needs little reiteration that for the purpose of Section 100(1)(*d*)(*iv*), it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent was materially affected due to the said omission on the part of the Returning Officer. Unfortunately, such averment is missing in the election petition.

25. In our judgment, therefore, the Election Tribunal/High Court was justified in coming to the conclusion that statement of material facts in the election petition was completely lacking and the petition was liable to be rejected at the threshold on that ground. We have, therefore, no hesitation in upholding the view taken by the High Court. Consequently, this appeal, being devoid of any merit, fails and is dismissed accordingly. Since the first respondent remained unrepresented, there will be no order as to costs."

20. Mrs. Mahesh has taken us through the averments made in the election petition including the paragraphs which we have reproduced in the preceding paragraphs of this judgment and contends that the election petition does contain a concise statement of material facts on which she had relied seeking the relief of declaration of the election of the Returned Candidate to be void.

21. We have considered the submission and the submission advanced by Mrs. Mahesh commend us. It is trite that if an Election Petitioner wants to put forth a plea that a nomination was improperly rejected to declare an election to be void it is necessary to set out the averments for making out

the said ground. The reason given by the Returning Officer for refusal to accept the nomination and the facts necessary to show that the refusal was improper is required to be set out in the election petition. In the absence of the necessary averments it cannot be said that the election petition contains the material facts to make out a cause of action. Section 83(1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, Section 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order VI of the Code of Civil Procedure is devoted to the pleadings generally and Rule 2(i) thereof, inter alia, provides that every pleading shall contain statement in a concise form all the material facts on which the party pleading relies for claim. In an election petition, which does not contain material facts, no relief can be granted. The phrase 'material fact' as used in Section 83(1)(a) of the Act or Order VI Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard.

22. Bearing in mind the aforesaid legal position when we proceed to consider the facts of the present case we are of the opinion that the Election Petitioner had disclosed material facts and the matter is fit to go for trial. Whether those material facts are true or false is a matter of trial. As regards authorities of this Court in the case of *Anil Vasudev Salgaonkar (supra)*

and Ram Sukh (supra) we are of the opinion that the same do not lend support to the contention of the appellant. In both the cases this Court on fact came to the conclusion that the election petition did not contain statement of material facts and accordingly the election petitions were dismissed at the threshold. However, in the present case, on facts we have found that the election petition does contain material facts and it is not liable to be dismissed at the threshold.

23. Any observation made by us in this judgment is for the purpose of disposal of these appeals and shall have no bearing at the final decision of the election petition.

24. Accordingly, we dismiss both the appeals with costs of Rs.25,000/- to be paid by the appellant to the respondent.

R.P. Appeals dismissed.

COMMISSIONER OF CENTRAL EXCISE, NAGPUR
v.
S. GURUKRIPA RESINS PVT. LTD.
(Civil Appeal No. 7627 of 2005.)

JULY 11, 2011

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

Central Excise Act, 1944:

S.2(f) – Manufacture of goods – 'Process' in or in relation to 'manufacture' of goods with the aid of power – Connotation of – Explained – Manufacture of "Turpentine oil" and "Rosin" from the raw material known as 'crude turpentine' through the process of distillation – Water lifted with the aid of electric motor from the well to ground level storage tank and again from ground level to overhead tanks for sprinkling water on condensers for the purpose of distillation – HELD: The operation of lifting water from the well to the higher levels is so integrally connected with the manufacture of "Turpentine oil" and "Rosin" that without this activity it is impossible to manufacture the said goods and, therefore, the processing of the raw material in or in relation to manufacture of the final goods is carried on with the aid of power – Central Excise Tariff Act, 1985 – First Schedule – Chapter Heading nos. 38.06 and 38.05 – "Rosin" and "Turpentine oil" – Levy of excise duty.

CIRCULARS:

Circulars – Binding effect of– Held: The Tribunal has failed to notice and consider the effect and implication of Circular No. 38/38/94-CX dated 27.5.1994, issued by the Central Board of Excise and Customs, withdrawing all instructions/guidelines/tariff advices issued in respect of the erstwhile First Schedule to the Central Excises and Salt Act, 1944, which *obviously included the 1978 clarification issued*

by the Ministry of Finance by letter No. B-36/11/77-TRU dated 10th/16th January, 1978 – Further – Circulars and instructions issued by the Central Board of Excise and Customs are no doubt binding in law on the authorities under the respective Statutes but when the Supreme Court or a High Court declares the law on the question arising for consideration, it would not be appropriate for the Courts or the Tribunal, as the case may be, to direct that the Board's Circular should be given effect to and not the view expressed in a decision of Supreme Court or a High Court – Precedent.

PRECEDENT:

Decision of superior court – Held: A decision is an authority for what it actually and explicitly decides and not for what logically flows from it.

The assessee was engaged in the manufacture and clearance of "Rosin" and "Turpentine Oil. The goods were classifiable under Chapter Heading Nos. 38.06 and 38.05 respectively of the First Schedule to the Central Excise Tariff Act, 1985. The assessee filed the requisite classification declarations with the Deputy Commissioner, Central Excise, classifying the finished goods i.e. "Rosin" under the Sub-heading 3806.19 and "Turpentine Oil" under Sub-heading 3805.19, both bearing 'nil' rate of duty, on the ground that the said goods were being manufactured without the aid of power. The Deputy Commissioner accepted the classifications, but treated the goods as "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power", attracting rate of duty @ 16%. It was held that the assessee was using 5 Hp electric motor for lifting water from the well to the storage tank at the ground level; and again 2 Hp electric motor was used for lifting water from ground level to overhead water tanks placed at a height of 30' ft. for sprinkling water on the condensers in order to get the final product,

namely, "Turpentine Oil" and "Rosin", by the process of distillation. The Commissioner (Appeals), affirmed the order. However, the appeals filed by the assessee, were allowed by the Customs, Excise and Service Tax Appellate Tribunal, placing reliance on the clarification issued by the Ministry of Finance by letter No. B-36/11/77-TRU dated 10/16.1.978. The application filed by revenue for rectification of CESTAT order, pointing out that the decision of the Supreme Court in *Rajasthan State Chemical Works*[1] **was applicable to the facts of the instant case and the circular dated 16.1.1978 had been rescinded by Circular No. 38/38/94-CX dated 27.5.1994, was rejected by the Tribunal.**

Allowing the appeals filed by the revenue, the Court

HELD: 1.1. 'Manufacture' is an end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one case to another. There may be several stages of processing, different kinds of processing at each stage and with each process suffered, original commodity experiences a change but it is only when a change or series of changes that takes the commodity to the point where commercially it can no longer be regarded as an original commodity but instead is recognized as a new and distinct article that "manufacture" can be said to have taken place. It is trite that in determining what constitutes manufacture no hard and fast rules of universal application can be devised and each case has to be decided on its own facts having regard to the context in which the term is used in the provision under consideration, but some broad parameters have been laid down in the decisions of this Court. [Para 12] [189-C-G]

1. Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana Rajasthan (1991) 4 SCC 473.

1.2. In the instant case, it is common ground that without sprinkling of water on the coils carrying the vapours of Turpentine Oil, condensation – a crucial component of distillation is not possible. Thus, without the process of condensation, "Turpentine Oil", and "Rosin" the final product, cannot be obtained. Similarly, without lifting water from the storage tanks at the ground level with the aid of electric motor to a higher level, the water cannot fall on the cooling coils with its gravitational force. In this fact situation, the operation of lifting of the water from the well to the higher levels, is so integrally connected with the manufacture of "Turpentine Oil" and "Rosin", that without this activity it is impossible to manufacture the said goods and, therefore, the processing of the said raw material in or in relation to manufacture of the said final goods is carried on with the aid of power. [Para 17] [193-B-F]

Impression Prints Vs. Commissioner of Central Excise, **Delhi-1(2005) 7 SCC 497;** *Union of India & Anr. Vs. Delhi Cloth & General Mills Co. Ltd.* **1963 Supp (1) S.C.R. 586 : AIR 1963 SC 791;** *Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan* **(1991) 4 SCC 473;** M/s J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur & Anr. **(1965) 1 S.C.R. 900: AIR 1965 SC 1310 – relied on**

2.1. The decision of the Tribunal in accepting the plea of the assessee that they could not be denied the benefit of the clarification issued by the Board by their letter dated 10th/16th January, 1978, despite the decision of this Court in Rajasthan State Chemical Works is clearly fallacious for more than one reason. Firstly, the Tribunal has failed to notice and consider the effect and implication of Circular No. 38/38/94-CX dated 27.5.1994, issued by the Central Board of Excise and Customs, withdrawing all instructions/guidelines/tariff advices issued in respect of the erstwhile First Schedule to the Central Excises and

Salt Act, 1944, which obviously included the 1978 clarification. Secondly, and more importantly, it has also erred in not appreciating the ratio decidendi of the decision in Rajasthan State Chemical Works. It is well settled proposition of law that a decision is an authority for what it actually and explicitly decides and not for what logically flows from it. [Para 18] [193-G-H; 194-A-C]

Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan **(1991) 4 SCC 473 – relied on.**

2.2. In Rajasthan State Chemical Works, it has been held that any activity or operation, which is an essential requirement and is so integrally connected with further operations for production of ultimate goods that but for that process, the manufacture of the final product is impossible, would be a process in or in relation to manufacture. In fact, in the said judgment the contention of the assessee that since the stage at which the power is used does not bring about any change in the raw material, it cannot be said that such process is carried on with the aid of power, was specifically rejected. Therefore, the observations of the Tribunal in the instant case, to the effect that since it is nobody's case that water that is pumped upto the overhead tank is a raw material used in the manufacture of "Rosin", are not only misplaced but are irrelevant also for deciding the issue at hand. [Para 18] [194-E-H]

2.3. When the law on the question at issue before the Tribunal had already been declared by this Court, the Tribunal should not have based its decisions on the clarification issued by the Board, which otherwise stood rescinded, on the specious ground that the said clarification issued by the Board was binding on the Deputy Commissioner as also on the Commissioner (Appeals). It is well settled proposition of law that Circulars and instructions issued by the Central Board of Excise

and Customs are no doubt binding in law on the authorities under the respective Statutes but when this Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Courts or the Tribunal, as the case may be, to direct that the Board's Circular should be given effect to and not the view expressed in a decision of this Court or a High Court. [para 19] [195-A-C]

3. The decisions of the Tribunal, impugned in these appeals, cannot be sustained and, as such are set aside. [para 20] [195-D-E]

Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries **(2002) 10 SCC 64;** *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries* **(2008) 13 SCC 1 – cited.**

Case Law Reference:

(2002) 10 SCC 64	**cited**	**para 5**
(1991) 4 SCC 473	**relied on**	**para 5**
(2005) 7 SCC 497	**relied on**	**para 8**
(2008) 13 SCC 1	**cited**	**para 8**
1963 Supp (1) S.C.R. 586	**relied on**	**para 8**
(1965) 1 S.C.R. 900	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7627 of 2005.

From the Judgment & Order dated 14.1.2004 of the Customs, Excise and Service Tax appellate Tribunal, West Regional Bench at Mumbai in Appeal No. E/1050/03-Mum.

WITH

C.A. Nos. 5809 of 2007 and 4663-4665 of 2008.

Devdatt Kamat, Arijit Prasad, D.L. Chidanand, B. Krishna Prasad, P. Parmeswaran for the Appellant.

Ajay Majthia, Rajesh Kumar, Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. The Commissioner of Central Excise has preferred this batch of Civil Appeals under Section 35-L(b) of the Central Excise Act, 1944 (for short "the Act"), questioning the correctness of the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai (for short "the Tribunal") whereby the appeals filed by the respondent-assessee (for short "the assessee") have been allowed and the applications filed by the Commissioner for rectification of mistakes in the main orders have been dismissed.

2. As all the appeals involved a common question of law, pertaining to the same assessee, these were heard together and are being disposed of by this common judgment. However, in order to appreciate the issue involved and the rival stands thereon, for the sake of convenience, we shall advert to the facts emerging from C.A. No. 7627 of 2005 arising out of Tribunal's order in appeal No. E/1050/03-Mum and E/Rom-691/04-Mum.

3. The assessee, a body Corporate, is engaged in the manufacture and clearance of "Rosin" and "Turpentine Oil". As per some literature placed on record, "Rosin" is the resinous constituent of the Oleo-resin exuded by various species of pine, known in commerce as crude turpentine. The separation of the Oleo-resin into the essential oil-spirit of turpentine and common Rosin is effected by distillation in large copper stills. "Rosin" and "Turpentine Oil" are classifiable under Chapter Heading Nos. 38.06 and 38.05 respectively of the First Schedule to the Central Excise Tariff Act, 1985 (for short "the Tariff Act"). The

assessee filed the requisite classification declarations with the Deputy Commissioner, Central Excise, classifying their finished goods i.e. "Rosin" under the Sub-heading 3806.19 and "Turpentine Oil" under Sub-heading 3805.19, both bearing 'nil' rate of duty, on the ground that the said goods were being manufactured by them without the aid of power. The Deputy Commissioner accepted the classifications under the said Sub-headings but treated the said goods as "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power", attracting rate of duty @ 16%. According to the Deputy Commissioner the assessee is using 5 Hp electric motor for lifting water from the well for storage tank at the ground level; the main raw material namely, Oleo-pine Rosin is lifted to the manufacturing platform by manually operated chain pulley block; the raw material is heated in a melting tank - a "Bhatti" fired with coal; the molten raw material is then transferred to settling tanks where it is kept in the liquid form and stirred by manually operated agitators so that the impurities may settle down; the impurities are separated and purified raw material is transferred in the main tank (Distillery) where it is again heated upto 1800C; at this temperature, the vapours of turpentine oil are formed and finally the "Turpentine Oil" is collected by the process of distillation through the condensers by sprinkling water on the condensers from the water storage tanks installed at a height of 30 ft.; water for the tanks is lifted from the storage tanks at the ground level by using 2 Hp electric motor. "Rosin" which settles down in the Distillery, is collected separately. The Deputy Commissioner was of the view that the water being an important input for the manufacturing process of "Rosin" and "Turpentine Oil", its further lifting upto the height of 30 ft. with the aid of an electric motor for the purpose of condensing the vapours of Turpentine Oil, it cannot be said that the said goods were being manufactured without the aid of power. He accordingly held that the assessee was liable to pay Central Excise duty at the aforesaid rate.

4. Being aggrieved, the assessee preferred appeal to the

Commissioner of Customs and Central Excise (Appeals). The Commissioner (Appeals), affirmed the view taken by the Deputy Commissioner, observing that the water stored in the overhead tank being pumped in the first instance by using electricity to operate pump before it falls on the condensers by gravity, it was clear that certain processes are undertaken in or in relation to the manufacture of the said products with the aid of power.

5. Being dissatisfied with the order passed by the Commissioner (Appeals), the assessee carried the matter in further appeal to the Tribunal. The Tribunal, placing reliance on the clarification issued by the Ministry of Finance vide letter No. B-36/11/77-TRU dated 10th/16th January, 1978, wherein it was clarified that so long as the use of power is limited to drawing water into a cooling tank through which condensation coils pass, manufacture of Rosin cannot be said to be with the aid of power, for the purpose of Notification No. 179/77-CE dated 18th June, 1977, came to the conclusion that the said clarification was binding on the revenue, including the Commissioner (Appeals), the same being a Circular beneficial to the assessee. Drawing support from the decision of this Court in *Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries*[1], the Tribunal came to the conclusion that in light of the said clarification the decision of this Court in *Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan*[2] cannot be relied upon by the revenue. Accordingly, the appeal preferred by the assessee was allowed by the Tribunal.

6. Thereafter, the revenue filed an application before the Tribunal for rectification of the said order. In the said application it was pointed out that apart from the fact that the decision of this Court in *Rajasthan State Chemical Works* (supra) was applicable on the facts of this case, the aforenoted Circular

1. (2002) 10 SCC 64.
2. (1991) 4 SCC 473.

relied upon by it had already been rescinded vide Circular No. 38/38/94-CX dated 27th May, 1994. However, distinguishing the decision in *Rajasthan State Chemical Works* (supra), and affirming its earlier view that the 1978 Circular still held the field, the Tribunal dismissed the application. Hence the present appeals by the Commissioner.

7. We have heard learned counsel for the parties.

8. Mr. Devadatt Kamat, learned counsel appearing on behalf of the revenue, strenuously urged that the decisions of the Tribunal are clearly erroneous in as much as it failed to appreciate that: (i) without the process of condensation of vapours, the final products i.e. "Turpentine Oil" & "Rosin" cannot be manufactured; (ii) condensation is not possible without sprinkling of water on the copper stills/coils containing vapours of Turpentine and (iii) for sprinkling of water lifting of water to a particular height with the aid of an electric motor is essential, otherwise water would not fall on the coils by the force of gravity. It was thus, argued that water being an integral part of the manufacturing process, which would include all stages and all processes which are necessary for the final product, its lifting to the overhead tank is a process in relation to the manufacture of the final product and since that process requiring the aid of power is integrally connected with the manufacture, the assessee is not entitled to exemption from duty. It was asserted that the clarification issued in the year 1978, having been rescinded vide Circular dated 27th May, 1994, the Tribunal was not justified in relying on the same, more so, when the issue before the Tribunal stood concluded by the decisions of this Court in *Rajasthan State Chemical Works* (supra) as also *Impression Prints Vs. Commissioner of Central Excise, Delhi-I*[3]*.* Placing reliance on the decision of the Constitution Bench of this Court in *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries*[4]*,* learned counsel contended

3. (2005) 7 SCC 497.

4. (2008) 13 SCC 1.

that the Circulars issued by the revenue department cannot be given primacy over the decisions of the Courts. In order to substantiate his point that it is not necessary that power should be used in all the processes involved in the manufacture of finished goods, learned counsel placed reliance on the decision rendered by the Constitution Bench of this Court in *Union of India & Anr. Vs. Delhi Cloth & General Mills Co. Ltd.*[5]*.* It was thus, stressed that in light of the settled legal position on the issue by this Court, the impugned decisions deserve to be set aside.

9. Per contra, Mr. Ajay Majithia, learned counsel appearing for the assessee, supporting the decisions of the Tribunal, argued that the water lifted with the aid of power and used for cooling the coils containing Turpentine vapours cannot be said to be an integral part of the manufacture of the final product because it does not bring about any change in the raw material i.e. Olio-pine-Rosin. According to the learned counsel what is relevant for deciding the issue is the stage at which the aid of power is required and therefore, in the present case once the water is lifted and stored in the storage tanks, no further use of power is required as the water falls on the coils by the force of gravity.

10. The short question in issue is whether or not the process of lifting of water with the use of power, to the extent and for the purpose mentioned above, constitutes a process in or in relation to manufacture of goods, viz. "Rosin" and "Turpentine Oil", with the aid of power?

11. In order to answer the question, it would be necessary to determine as to what activity amounts to a process in or in relation to manufacture of goods? Clause (f) of Section 2 of the Act, as it existed at the relevant time, defines the word "manufacture" as follows:-

"2(f) "manufacture" includes any process—

5. 1963 Supp (1) S.C.R. 586 : AIR 1963 SC 791.

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture;"

12. It is manifest that clause (f) gives an inclusive definition of the term "manufacture". According to the Dictionary meaning the term "manufacture" means a process which results in an alteration or change in the goods which are subjected to the process of manufacturing leading to the production of a commercially new article. Therefore, manufacture is an end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one case to another. There may be several stages of processing, different kinds of processing at each stage and with each process suffered, original commodity experiences a change but it is only when a change or series of changes that takes the commodity to the point where commercially it can no longer be regarded as an original commodity but instead is recognized as a new and distinct article that "manufacture" can be said to have taken place. It is trite that in determining what constitutes manufacture no hard and fast rules of universal application can be devised and each case has to be decided on its own facts having regard to the context in which the term is used in the provision under consideration, but some broad parameters laid down in the earlier decisions dealing with the question could be applied to determine the question whether a particular process carried on in relation to the final product amounts to manufacture of that product.

13. In *Delhi Cloth & General Mills Co. Ltd.* (supra), a question arose whether the assessee was liable to pay Excise duty on the manufacture of refined oil which fell within item 23 of the First Schedule to the Central Excises and Salt Act, 1944,

bearing the description of "vegetable non-essential oils, all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power"? Negativing the contention that the definition of the term "manufacture" in Section 2(f) of the Act included mere processing, a Constitution Bench of this Court held that processing was distinct from manufacture and that for a commodity to be excisable it must be new product known to the market as such. It was held that the definition of "manufacture" as in Section 2(f) puts it beyond any possibility of controversy that if power is used for any of the numerous processes that are required to turn the raw material in a finished article known to the market, the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available.

14. In *M/s J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur & Anr*[6]*.,* it was held that where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, the goods required in that process would fall within the expression "in the manufacture of".

15. In *Rajasthan State Chemical Works* (supra), on which heavy reliance was placed on behalf of the revenue, a bench of three learned Judges of this Court was considering the question whether the two assessees therein were entitled to the benefit of an exemption notification, which was available only to the goods "in or in relation to the manufacture of which no process is ordinarily carried on with the aid of power". In that case one of the assessees was manufacturing common salt and for its manufacture, brine was pumped into salt pans by using a diesel pump and then lifted to a platform by the aid of power. In the second case for manufacturing lime from coke and limestone, the raw materials were lifted to a platform at the

6. (1965) 1 S.C.R. 900 : AIR 1965 SC 1330.

head of the kiln with the aid of power. The question was as to whether lifting of salt pans to a platform by the aid of power and the lifting of raw material to a platform at the head of the kiln with the aid of power constituted process in or in relation to manufacture? Referring to earlier decisions of this Court, including *Delhi Cloth & General Mills Co. Ltd* (supra) and *M/s J.K. Cotton Spinning & Weaving Mills Co. Ltd.* (supra) the Court observed thus:

> "20. A process is a manufacturing process when it brings out a complete transformation for the whole components so as to produce a commercially different article or a commodity. But, that process itself may consist of several processes which may or may not bring about any change at every intermediate stage. But the activities or the operations may be so integrally connected that the final result is the production of a commercially different article. Therefore, any activity or operation which is the essential requirement and is so related to the further operations for the end result would also be a process in or in relation to manufacture to attract the relevant clause in the exemption notification. In our view, the word 'process' in the context in which it appears in the aforesaid notification includes an operation or activity in relation to manufacture".
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> 26. We are, therefore, of the view that if any operation in the course of manufacture is so integrally connected with the further operations which result in the emergence of manufactured goods and such operation is carried on with the aid of power, the process in or in relation to the manufacture must be deemed to be one carried on with the aid of power. In this view of the matter, we are unable to accept the contention that since the pumping of the brine into the salt pans or the lifting of coke and limestone with the aid of power does not bring about any change in the raw material, the case is not taken out of the notification.

> The exemption under the notification is not available in these cases. Accordingly, we allow these appeals."

16. A similar question came up for consideration of this Court in *Impression Prints* (supra), again strongly relied upon by learned counsel for the revenue. In that case the assessee was manufacturing printed bed sheets, bed covers and pillow covers, and for that purpose the colour was mixed with the help of colour mixing machine, which was operated with the aid of power. The question arose whether the said goods were manufactured with the aid of power. While holding that the activity of printing and colouring being integrally connected to the manufacture of printed bed sheets, bed covers etc., the manufacture of these goods was with the aid of power, the Court culled out the following parameters from the earlier pronouncements, which could be applied for determining the question whether a particular process carried on in respect of the final product amounts to manufacture of that product: (i) the term "manufacture" in Section 2(f) of the Act includes any process incidental or ancillary to the completion of a manufactured product; (ii) if power is used for any of the numerous processes that are required to turn the raw material into the finished articles then the "manufacture" will be with the use of power; (iii) if power is used at any stage then the argument that power is not used in the whole process of manufacture, using the word in its ordinary sense, will not be available; (iv) the expression "in the manufacture" would normally encompass the entire process carried on for converting raw material into goods; (v) if a process or activity is so integrally connected to the ultimate production of goods that but for that process, manufacture or processing of goods is impossible or commercially inexpedient then the goods required in that process would be covered by the expression "in the manufacture of"; (vi) it was not necessary that the word "manufacture" would only refer to the stage at which ingredients or commodities are used in the actual manufacture of the final product and (vii) the word "manufacture" does not refer only to

the using of ingredients which are directly and actually needed for making the goods.

17. Having considered the present case on the touchstone of the aforenoted parameters, we are of the opinion that the activity of the assessee in first lifting the water for filling up of the storage tank at the ground level and then lifting it further to the overhead water storage tanks with the aid of electric motors are so integrally connected to the ultimate manufacture of "Turpentine Oil" and "Rosin" that but for the said activity the processing of Oleo-pine Rosin for manufacture of Turpentine Oil and Rosin would not be possible. It is common ground that without sprinkling of water on the coils carrying the vapours of Turpentine Oil, condensation - a crucial component of distillation which brings about the change of the physical state of matter from gaseous phase into liquid phase, is not possible. In other words without the process of condensation, Turpentine Oil, the final product, cannot be obtained. Similarly, without lifting water from the storage tanks at the ground level with the aid of electric motor to a higher level, the water cannot fall on the cooling coils with its gravitational force. In this fact situation, we hold that the operation of lifting of the water from the well to the higher levels, is so integrally connected with the manufacture of "Turpentine Oil" and "Rosin", that without this activity it is impossible to manufacture the said goods and therefore, the processing of the said raw material in or in relation to manufacture of the said final goods is carried on with the aid of power.

18. We may now examine the ancillary question as to whether the Tribunal was correct in law in accepting the plea of the assessee that they could not be denied the benefit of the clarification issued by the Board vide their letter dated 10th/16th January, 1978, despite the decision of this Court in *Rajasthan State Chemical Works* (supra). We are of the view that the decisions of the Tribunal on this aspect are clearly fallacious for more than one reason. Firstly, the Tribunal has failed to notice and consider the effect and implication of Circular No. 38/38/

94-CX dated 27th May, 1994, issued by the Central Board of Excise and Customs, withdrawing all instructions/guidelines/ tariff advices issued in respect of the erstwhile First Schedule to the Central Excises and Salt Act, 1944, which, obviously included the 1978 clarification. Secondly, and more importantly, it has also erred in not appreciating the ratio decidendi of the decision in *Rajasthan State Chemical Works* (supra). It is well settled proposition of law that a decision is an authority for what it actually and explicitly decides and not for what logically flows from it, the precise exercise the Tribunal undertook in the instant case for distinguishing the said decision, by observing thus :

> "We observe that the Supreme Court in that case deals with the use of power while handling the raw material prior to the commencement of process of production. It is nobody's case in the present application that the water that is pumped to the overhead tank is a raw material used in the manufacture of "Rosin"."

In *Rajasthan State Chemical Works* (supra), the question of law for determination was as to what kind of "process" carried on in respect of particular goods constituted "process" in or in relation to "manufacture" for the purposes of and within the meaning of Section 2(f) of the Act. It was held that any activity or operation, which is an essential requirement and is so integrally connected with further operations for production of ultimate goods that but for that process the manufacture of the final product is impossible, would be a process in or in relation to manufacture. In fact, it is manifest from the afore-extracted paragraph of the judgment that the contention of the assessee that since the stage at which the power is used does not bring about any change in the raw material, it cannot be said that such process is carried on with the aid of power, was specifically rejected. Therefore, the observations of the Tribunal, extracted above, to the effect that since it is nobody's case that water that is pumped upto the overhead tank is a raw material used in the manufacture of "Rosin", are not only misplaced, in our opinion, these are irrelevant for deciding the issue at hand.

19. In that view of the matter, when the law on the question at issue before the Tribunal had already been declared by this Court, the Tribunal should not have based its decisions on the clarification issued by the Board, which otherwise stood rescinded, on the specious ground that the said clarification issued by the Board was binding on the Deputy Commissioner as also on the Commissioner (Appeals). It is well settled proposition of law that Circulars and instructions issued by the Central Board of Excise and Customs are no doubt binding in law on the authorities under the respective Statutes but when this Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Courts or the Tribunal, as the case may be, to direct that the Board's Circular should be given effect to and not the view expressed in a decision of this Court or a High Court. [(**See:** *Ratan Melting & Wire Industries* (supra)]**.**

20. In the final analysis, in light of the foregoing discussion, the decisions of the Tribunal, impugned in these appeals, cannot be sustained. Resultantly, all the appeals are allowed and the orders passed by the Tribunal are set aside, leaving the parties to bear their own costs.

R.P. Appeals allowed.

UNION OF INDIA

v.

M/S. KRAFTERS ENGINEERING & LEASING (P) LTD.

(Civil Appeal No. 2005 of 2007)

JULY 12, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Arbitration Act, 1940 – Jurisdiction of arbitrator to award interest when contract prohibits it – Held: In such a case, arbitrator cannot award interest for the amount payable to the contractor under the contract – However, where there is no prohibition as regards the grant of interest, arbitrator has the power to award interest pendente lite – On facts, the bar under clause 1.15 of the General Conditions of the Contract between the parties prohibiting payment of interest on amount payable to contractor under the contract, is absolute and interest cannot be awarded without rewriting the contract – Thus, the award of the arbitrator granting interest in respect of the amount payable to the contractor under the contract is set aside.

Respondent was awarded a works contract. Certain disputes arose between the parties. On an application by the respondent, an arbitrator was appointed but since the arbitrator could not deliberate the matter within the time limit, the respondent invoked the jurisdiction of Umpire. The Umpire gave award for certain claims and rejected certain claims. The appellant challenged the award given by the Umpire as regards the grant of interest. The High Court dismissed the arbitration petition as also the appeal.

The question which arose for consideration in the instant appeal was whether the arbitrator has jurisdiction to grant interest despite the agreement prohibiting the same.

Allowing the appeal, the Court

HELD: 1.1 Where the parties had agreed that no interest shall be payable, the arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest *pendente lite.* In such a case, it must be presumed that interest was an implied term of the agreement between the parties. However, this does not mean that in every case, the arbitrator should necessarily award interest *pendente lite*. In the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator is free to award interest. [Para 14] [210-G-H; 211-A-B]

1.2 In light of the above said principle and in view of Clause 1.15 of the General Conditions of the Contract between the parties whereby it prohibits payment of interest on the amount payable to the contractor under the contract, the arbitrator ceases to have the power to grant interest. It is clarified that the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest. However, in the Arbitration and Conciliation Act, 1996, there is a specific provision with regard to award of interest by the arbitrator. The bar under clause 1.15 is absolute and interest cannot be awarded without rewriting the contract. Thus, the award of the arbitrator granting interest in respect of the amount payable to the contractor under the contract as well as the order of the Single Judge and the Division Bench of the High Court confirming the same are set aside. [Paras 15 and 16] [211-C-E]

Secretary, Irrigation Department, Government of Orissa and Ors. vs. G.C. Roy **(1992) 1 SCC 508: 1991 (3) Suppl. SCR 417;** *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. vs. N.C. Budharaj (deceased) by LRs. and Ors.* **(2001) 2 SCC 721: 2001 (1) SCR 264;** *Sayeed Ahmed and Company vs. State of Uttar Pradesh and Ors.* **(2009) 12 SCC 26: 2009 (10) SCR 841;** *Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Ors.* **(2010) 8 SCC 767: 2010 (10) SCR 487 – relied on.**

Board of Trustees for the Port of Calcutta vs. Engineers-De-Space Age **(1996) 1 SCC 516: 1995 (6) Suppl. SCR 327;** *Madnani Construction Corporation Private Limited vs. Union of India and Ors.* **(2010) 1 SCC 549: 2009 (16) SCR 216;** *Union of India vs. Saraswat Trading Agency and Ors.* **(2009) 16 SCC 504: 2009 (10) SCR 1063 – referred to.**

Case Law Reference:

2009 (10) SCR 841	**Relied on.**	**Para 10**
1995 (6) Suppl. SCR 327	**Referred to.**	**Para 10, 14**
2009 (10) SCR 1063	**Referred to.**	**Para 11**
2010 (10) SCR 487	**Relied on.**	**Para 13**
2009 (16) SCR 216	**Referred to.**	**Para 14**
1991 (3) Suppl. SCR 417	**Relied on.**	**Para 14**
2001 (1) SCR 264	**Relied on.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2005 of 2007.

From the Judgment & Order dated 24.4.2006 of the High Court of Judicature at Bombay in Appeal No. 219 of 2006 in Arbiration Petition No. 274 of 2005.

A.S. Chandhiok, ASG, Sonia Mathur, Ritesh Kumar, Piyush Sanhi, D.S. Mahra for the Appellant.

Ramesh Babu, M.R. Arun Francis, G. Prakash, Amarjit Singh Bedi for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal by Union of India arises out of the final judgment and order dated 24.04.2006 passed by the High Court of Judicature at Bombay in Appeal No. 219 of 2006 in Arbitration Petition No. 274 of 2005 whereby the Division Bench of the High Court dismissed their appeal.

2. **Brief facts:**

(a) On 16.05.1988, the respondent was awarded with a contract for the work of Provision of Signaling Arrangements at "C" Class Stations on Igatpuri-Bhusawal Section and 2 "C" Stations on Bhusawal-Badnera Section of Bhusawal Division of Central Railway at the cost of Rs.18,10,400/-. On completion of the contract, the respondent raised certain disputes/claims by filing Suit No. 2822 of 1993 before the High Court and demanded for adjudication through arbitration. The High Court directed the General Manager of the Central Railway to appoint an arbitrator and refer the disputes for adjudication. Since the Arbitrator appointed could not deliberate the matter within the time limit, the respondent invoked the jurisdiction of the Umpire. The Umpire, by order dated 26.04.2005, gave award for Claim Nos. 1, 3, 6, 8, 9, 10, 11, 12 & 13 and rejected Claim Nos. 2, 5, 7 & 14 and mentioned that a bank guarantee towards security deposit against claim No. 4 is to be returned.

(b) Challenging the award given by the Umpire for Claim Nos. 11 & 13, the appellant herein filed Arbitration Petition No. 274 of 2005 before the High Court. The learned Single Judge of the High Court, vide order dated 06.12.2005 dismissed their petition.

(c) Aggrieved by the order passed by the learned single Judge, the appellant herein filed an appeal being Arbitration Appeal No. 219 of 2006 before the Division Bench of the High

Court. The Division Bench, by impugned order dated 24.04.2006, dismissed the appeal. Challenging the said order, the Union of India preferred this appeal by way of special leave before this Court.

3. Heard Mr. A. S. Chandhiok, learned Additional Solicitor General for the Union of India and Mr. Ramesh Babu M.R., learned counsel for the respondent.

4. Before the High Court as well as before us, the appellant projected their case only with regard to interest that was granted by the arbitrator and confirmed by the High Court. Therefore, the only point for consideration in this appeal is whether an arbitrator has jurisdiction to grant interest despite the agreement prohibiting the same?

5. Though the appellant has challenged the award of the Umpire in respect of Claim Nos. 11 and 13, they are mainly concerned about grant of interest; hence there is no need to traverse all the factual details except the required one which we have adverted to. According to Mr. A.S. Chandhiok, learned ASG, in view of clause 1.15 of the General Conditions of the Contract between the parties, the arbitrator does not have the power to award interest pendente lite. The said clause reads as under:

> "1.15 Interest on Amounts - No interest will be payable upon the Earnest Money or the Security Deposit or amounts payable to the Contractor under the Contract but Government Securities deposited in terms of clause 1.14.4 will be repayable with interest accrued thereon."

According to the learned ASG, in view of the above-mentioned clause, no interest is payable on the amount payable to the Contractor under the contract. On the other hand, Mr. Ramesh Babu M.R., learned counsel appearing for the respondent submitted that irrespective of the bar in the contract arbitrator has power to award interest for which he strongly relied on the decision of this Court in *Board of Trustees for the Port of*

Calcutta vs. Engineers-De-Space-Age, (1996) 1 SCC 516 and *Madnani Construction Corporation Private Limited vs. Union of India and Others,* (2010) 1 SCC 549.

6. We have already extracted the relevant clause wherein the words "amounts payable to the Contractor under the contract" are of paramount importance. If there is no prohibition in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amount due under the contract, the arbitrator is free to consider and award interest in respect of the period. If there is a prohibition in the agreement to pay the interest, in that event, the arbitrator cannot grant the interest. Clause 1.15 prohibits payment of interest on the amount payable to the contractor under the contract.

7. It is not in dispute that the provisions of the Arbitration Act, 1940 alone are applicable to the case on hand. Now, let us consider various decisions of this Court dealing with similar prohibition in the agreement for grant of interest. In *Secretary, Irrigation Department, Government of Orissa and Others vs. G.C. Roy,* (1992) 1 SCC 508, the Constitution Bench had considered Section 29 of the Arbitration Act, 1940 which deals with interest pendente lite. After analyzing the scheme of the Act and various earlier decisions, the Constitution Bench considered the very same issue, namely, whether an arbitrator has power to award interest pendente lite and, if so, on what principle. The relevant paragraphs are extracted hereunder:-

> **"43.** The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:
>
> (i) A person deprived of the use of money to which

> he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.
>
> (ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.
>
> (iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.
>
> (iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for

unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

8. In *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others vs. N.C Budharaj (deceased) by LRs and Others,* (2001) 2 SCC 721, another Constitution Bench considered payment of interest for pre-reference period in respect of cases arising when Interest Act, 1839 was in force.

The following conclusion in para 26 is relevant which reads thus:

"26. For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jena case taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs."

(Emphasis supplied).

9. In the earlier paras, we have referred to the stand taken by the learned counsel for the respondent and reliance based on the decision reported in *Board of Trustees for the Port of Calcutta* (supra). It is true that in that decision, this Court has held that arbitrator has jurisdiction to interpret the clauses of the contract and to decide whether interest pendente lite could be awarded by him. The short question that arose in that case was that the arbitrator had awarded interest pendente lite notwithstanding the prohibition contained in the contract against the payment of interest on delayed payments. Ultimately, the two-Judge Bench of this Court has concluded that irrespective of the terms of the contract, the arbitrator was well within his jurisdiction in awarding interest pendente lite. It is useful to point out that the ratio in that decision was considered by this Court in *Sayeed Ahmed and Company vs. State of Uttar Pradesh and Others,* (2009) 12 SCC 26. While considering the very same issue, particularly, specific clause in the agreement prohibiting interest pendente lite, this Court considered the very same decision i.e. *Board of Trustees for the Port of Calcutta* (supra). After adverting to the clause in the *Board of Trustees*

for the Port of Calcutta (supra) and the Constitution Bench in *G.C. Roy's* case (supra), this Court concluded as under:

> "23. The observation in Engineers-De-Space-Age that the term of the contract merely prohibits the department/ employer from paying interest to the contractor for delayed payment but once the matter goes to the arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting the arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.
>
> 24. The learned counsel for the appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period, that is, from 14-3-1997 to 31-7-2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered with by the High Court. In view of the Constitution Bench decisions in G.C. Roy and N.C. Budharaj rendered before and after the decision in Engineers-De-Space-Age, it is doubtful whether the observation in Engineers-De-Space-Age in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by the arbitrator."

10. Considering the specific prohibition in the agreement as discussed and interpreted by the Constitution Bench, we are in respectful agreement with the view expressed in *Sayeed Ahmed and Company* (supra) and we cannot possibly agree with the observation in *Board of Trustees for the Port of Calcutta* (supra) in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite ignoring the express bar in the contract.

11. In *Union of India vs. Saraswat Trading Agency and Others,* (2009) 16 SCC 504, though it was under the Arbitration and Conciliation Act, 1996, this Court has considered elaborately about the legal position in regard to interest after adverting to all the earlier decisions and basing reliance on clause 31 of the agreement held:

> **"33.** In the case in hand Clause 31 of the agreement is materially different. It bars payment of any interest or damage to the contractor for any reason whatsoever. We are, therefore, clearly of the view that no pre-reference or pendente lite interest was payable to the respondent on the amount under Item 3 and the arbitrator's award allowing pre-reference and pendente lite interest on that amount was plainly in breach of the express terms of the agreement. The order of the High Court insofar as pre-reference and pendente lite interest on the amount under Item 3 is concerned is, therefore, unsustainable."

12) At the end of the argument, learned counsel for the respondent heavily relied on the recent decision of this Court in *Madnani Construction Corporation Private Limited* (supra) which arose under the Arbitration Act, 1940. There also, Clause 30 of SCC and Clause 52 of GCC prohibits payment of interest. Though the Bench relied on all the earlier decisions and

considered the very same clause as to which we are now discussing, upheld the order awarding interest by the arbitrator de hors to specific bar in the agreement. It is relevant to point out that the decision of *Madnani Construction Corporation Private Limited* (supra) was cited before another Bench of this Court in *Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Others,* (2010) 8 SCC 767, wherein the decision in Madnani Construction Corporation Private Limited (supra) was very much discussed and considered. After adverting to all the earlier decisions including the Constitution Bench judgments, this Court has analyzed the effect of *Madnani Construction Corporation Private Limited* (supra). The following discussion and ultimate conclusion are relevant:

> "17. In Madnani the arbitrator had awarded interest pendente lite, that is, from the date of appointment of arbitrator to the date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This Court following the decision in Engineers-De-Space-Age reversed the said rejection and held as follows: (Madnani case, SCC pp. 560-61, para 39)
>
> "39. In the instant case also the relevant clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid clauses. We therefore, on a strict construction of those clauses and relying on the ratio in Engineers find that the said clauses do not impose any bar on the arbitrator in granting interest."
>
> 18. At the outset it should be noticed that Engineers-De-Space-Age and Madnani arose under the old Arbitration Act, 1940 which did not contain a provision similar to

> Section 31(7) of the new Act. This Court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed held that the decision in Engineers-De-Space-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed: (SCC p. 36, paras 23-24)
>
> "23. The observation in Engineers-De-Space-Age that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to the arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting the arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.
>
> 24. The learned counsel for the appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G 1.09 is held to bar

interest in the pre-reference period, it should be held not to apply to the pendente lite period, that is, from 14-3-1997 to 31-7-2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered with by the High Court. In view of the Constitution Bench decisions in G.C. Roy and N.C. Budharaj rendered before and after the decision in Engineers-De-Space-Age, it is doubtful whether the observation in Engineers-De-Space-Age in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by the arbitrator."

The same reasoning applies to the decision in Madnani *also as that also relates to a case under the old Act and did not independently consider the issue but merely relied upon the decision in* Engineers-De-Space-Age*.*

19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award.

20. We are of the view that the decisions in Engineers-De-Space-Age and Madnani are inapplicable for yet another reason. In Engineers-De-Space-Age and Madnani the arbitrator had awarded interest for the pendente lite period. This Court upheld the award of such interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded

or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in the instant case the Arbitral Tribunal has refused to award interest for the pendente lite period. Where the Arbitral Tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with. On this ground also the decisions in Engineers-De-Space-Age and Madnani are inapplicable…"

13. Inasmuch as we have already expressed similar view as mentioned above and conveyed our inability to apply the reasoning in *Madnani Construction Corporation Private Limited* (supra), we fully endorse the view expressed in *Sree Kamatchi Amman Constructions* (supra).

14. In the light of the above discussion, following conclusion emerge:

Reliance based on the ratio in Board of Trustees for the Port of Calcutta (supra) is unacceptable since the said view has been overruled in *Sayeed Ahmed and Company* (supra) and insofar as the ratio in *Madnani Construction Corporation Private Limited* (supra) which is also unacceptable for the reasons mentioned in the earlier paras, we reject the stand taken by the counsel for the respondent. On the other hand, we fully accept the stand of the Union of India as rightly projected by Mr. A.S. Chandhiok, learned ASG. We reiterate that where the parties had agreed that no interest shall be payable, the arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendent elite. As observed by the Constitution Bench in G.C. Roy's case (supra), in such a case, it must be presumed that interest was an

implied term of the agreement between the parties. However, this does not mean that in every case, the arbitrator should necessarily award interest pendente lite. In the subsequent decision of the Constitution Bench, i.e., *N.C. Budharaj's* case (supra), it has been reiterated that in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator is free to award interest.

15. In the light of the above principle and in view of the specific prohibition of contract contained in Clause 1.15, the arbitrator ceases to have the power to grant interest. We also clarify that the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest. However, in the Arbitration & Conciliation Act, 1996, there is a specific provision with regard to award of interest by the arbitrator. The bar under clause 1.15 is absolute and interest cannot be awarded without rewriting the contract.

16. For the aforesaid reasons, we set aside the award of the arbitrator granting interest in respect of the amount payable to the contractor under the contract as well as the order of the learned Single Judge and the Division Bench of the High Court confirming the same.

17. Consequently, the appeal is allowed to the extent pointed out above with no order as to costs.

N.J. Appeal allowed.

C.M. THRI VIKRAMA VARMA

v.

AVINASH MOHANTY AND ORS.

(Civil Appeal No. 2550 of 2010)

JULY 12, 2011

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

Indian Police Service (Cadre) Rules, 1954:

rr.3, 5 – Allocation of members of the IPS to home State cadre – Respondent challenged allocation of appellant, an OBC candidate to State cadre on the ground that it was arbitrary and in place of appellant, respondent should have been allocated to the State cadre – High Court quashing the allocation of appellant to State cadre with direction to Union of India to reconsider allocation of respondent and appellant in accordance with law – Correctness of – Held: Correct – Broad principles to be followed for allocation are indicated in Para 3 of the letter dated 31.05.1985 issued by the Secretary, Government of India, Ministry of Personnel and Training – A reading of Para 3 states that vacancies in every cadre are required to be earmarked for outsiders and insiders in the ratio of 2:1 – The purpose of the principles of allocation in the letter is not only to implement the policy having 2 outsiders and 1 insider in each cadre, but also to ensure that general and reserved candidates selected and appointed to the All India Service get a fair and just treatment in the matter of allocation to different cadres – This is clear from clause (2) and also clause (3) which states that the allocation of insiders, both men and women, has to be strictly according to their ranks, subject to their willingness to be allocated to their home States – Admittedly, respondent had secured a higher rank than the appellant in the Civil Services Examination, 2004 and both were insiders – Therefore, respondent was required to be considered for allocation to the State cadre if he had given

his willingness for being allocated to his home State, Andhra Pradesh, before the appellant could be considered for such allocation – If, however, the vacancy for which consideration was being made was a vacancy for an insider OBC candidate in the 30 point roster, the appellant would have preference over respondent.

Constitution of India, 1950:

Articles 14 and 16(1) – Held: A member appointed to the All India Service has no right to be allocated to a particular State cadre or Joint cadre, but he has a right to a fair and equitable treatment in the matter of allocation under Articles 14 and 16(1) of the Constitution.

Articles 14 and 16(1) – Held: Complexity of a decision making process cannot be a defence when a grievance is made before the Court by a citizen that his fundamental right to equality has been violated – When such a grievance is made before the Court, the authorities have to justify their decision by placing the relevant material before the Court – The constitutional principle of equality is inherent in the rule of law – However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application – The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction – The concept of equality allows differential treatment but it prevents distinctions that are not properly justified – Justification needs each case to be decided on case-to-case basis.

The Civil Services Examination, 2004 was conducted by the UPSC in which 'AM' and 'VV' amongst others were selected for appointment to the Indian Police Service (IPS). They were offered appointments to the IPS in 2005. 'VV' was an OBC candidate. By notification dated 19.1.2006 of the Government of India, the candidates selected and appointed to the IPS on the basis of the

results of the Civil Services Examination, 2004 were allocated to different State cadres. By this notification, 'AM' who had secured 45th rank in the Civil Services Examination, 2004 was allocated to the Chhattisgarh cadre whereas 'VV' who had secured 201st rank was allocated to the Andhra Pradesh cadre.

'AM' made representations to the authorities against his allotment to the Chhattisgarh cadre and claimed allocation to the Andhra Pradesh cadre. When he did not receive any response, he filed O.A. before CAT on the ground that the authorities ought to have followed the guidelines and norms in the letter dated 31.5.1985 while making the allocations and the allocation of 'VV' to the Andhra Pradesh cadre was arbitrary and in his place he should have been allocated to the Andhra Pradesh cadre. The Tribunal dismissed the O.A. Aggrieved, 'AM' filed writ petition before the High Court. The High Court allowed the writ petition and quashed the allocation of 'VV' to the Andhra Pradesh cadre and directed the Union of India to reconsider the allocation of 'AM' and 'VV'. The instant appeals were filed by 'VV' and the Union of India.

Dismissing the appeals, the Court

HELD: 1. In view of Rule 3 of the IPS (Cadre) Rules, 1954, each State and a group of States will have a State cadre or Joint cadre respectively of the IPS. Rule 5 provides that the Central Government in consultation with the State Government or State Governments concerned has the power to make allocation of IPS officers to various cadres. [Para 6] [224-F-G]

Union of India v. Rajiv Yadav, IAS and Others **(1994) 6 SCC 38: 1994(2) Suppl. SCR 30;** *Union of India v. Mhathung Kithan and Others*, etc. **(1996) 10 SCC 562: 1996 (6) Suppl. SCR 486;** *Srinivas Rao v. Union of India & Ors.* **2005 (2) ALT 728: 2005 (2) SCR 83 – referred to.**

2.1. The broad principles to be followed for allocation are indicated in Para 3 of the letter dated 31.05.1985. A reading of clause (1) of Para 3 stated that vacancies in every cadre are required to be earmarked for outsiders and insiders in the ratio of 2:1 and in order to avoid problems relating to fractions and to ensure that this ratio is maintained, over a period of time, if not during every allocation, the breakup of vacancies in a cadre between outsiders and insiders will have to be calculated following this cycle of 'outsider', 'insider', 'outsider'. Clause (2) provided that the vacancies for Scheduled Castes and Scheduled Tribes are to be reserved in the various cadres according to the prescribed percentage and for the purpose of this reservation, Scheduled Castes and Scheduled Tribes are to be grouped together and the percentage to be added and distribution of reserved vacancies in each cadre between outsiders and insiders are to be done in the ratio of 2:1 and this ratio is to be operationalised by following a cycle outsider, insider, outsider as is done in the cases of general candidates. [Paras 7, 8] [224-H; 227-F-H; 228-A-B]

2.2. The purpose of the principles of allocation indicated in different clauses in the letter dated 31.05.1985 is not only to implement the policy having 2 outsiders and 1 insider in each cadre, but also to ensure that general and reserved candidates selected and appointed to the All India Service get a fair and just treatment in the matter of allocation to different cadres. This is clear from clause (2) and also clause (3) which states that the allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. This is also clear from clause 4(vii) which explains how the candidates belonging to the reserved category and the general category will be dealt with. These principles were laid down in the letter dated 31.05.1985 because

while making allocations of different candidates appointed to the service to different State cadres or Joint cadres, the Central Government has also to discharge its constitutional obligations contained in the equality principles in Articles 14 and 16(1) of the Constitution. A member appointed to the All India Service has no right to be allocated to a particular State cadre or Joint cadre, but he has a right to a fair and equitable treatment in the matter of allocation under Articles 14 and 16(1) of the Constitution. [Para 10] [229-D-H; 230-A]

3. The High Court in the impugned judgment extracted the table of vacancies filled up from Civil Services Examination 1994-2003, as furnished in Para 28 of the counter affidavit dated 22.03.2007 filed by the Union of India before the High Court. After considering this table, the High Court held that even according to the Union of India, as against a total of 29 vacancies 9 OBC candidates (4 insiders + 5 outsiders) were allocated to the Andhra Pradesh cadre from amongst the successful candidates of Civil Services Examinations from 1994-2003 and if 'VV', an insider OBC candidate, was to be allocated to the Andhra Pradesh cadre from the selected candidates of the Civil Services Examination, 2004, a total of 10 OBC candidates would be allocated to the Andhra Pradesh cadre in the 30 point roster, making the percentage of OBC candidates to 33-1/3, which was a variation of 6% in excess and by any standard was not a marginal variation. The Union of India, in para 32 of its counter affidavit before the Tribunal has, however, stated that from the five Civil Services Examinations (1999-2003) a total of 8 candidates appointed to the IPS were allotted to the Andhra Pradesh cadre, out of which 2 were OBC candidates and 2 out of 8 does not exceed 27% and, therefore, there was neither any excess nor any shortfall of allocation of OBC candidates in the Andhra Pradesh IPS cadre. Such calculation of percentages on reserved

category candidates allotted to the Andhra Pradesh cadre worked out on the basis of number of candidates allotted to the Andhra Pradesh cadre from the five Civil Services Examinations, from 1999-2003 is not sensible, when in the very same counter affidavit of the Union of India filed before the Tribunal, it is clearly stated that a 30 point roster in respect of Andhra Pradesh was being maintained for allocation of insider and outsider, as well as, reserved and general candidates in accordance with clauses (1) and (2) of Para (3) of the letter dated 31.05.1985. It appeared that only with a view to somehow justify the allocation of 'VV', an OBC candidate to the Andhra Pradesh cadre from the Civil Services Examination, 2004, the Union of India took the figures of allocation of candidates selected for the IPS in the five Civil Services Examinations of 1999-2003 instead of taking the figures of appointments to the vacancies in the 30 point roster starting from the 1994 Civil Services Examination till 2003 Civil Services Examinations. [Paras 11,12] [230-B-C; 231-A-H; 232-A]

4. Admittedly, 'AM' had secured a higher rank than 'VV' in the Civil Services Examination, 2004 and both 'AM' and 'VV' are insiders. Clause (3) of Para 3 of the letter dated 31.05.1985 states that allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. Hence, 'AM' was required to be considered for allocation to the Andhra Pradesh cadre if he had given his willingness for being allocated to his home State, Andhra Pradesh, before 'VV' could be considered for such allocation. If, however, the vacancy for which consideration was being made was a vacancy for an insider OBC candidate in the 30 point roster, 'VV' would have preference over 'AM'. But the High Court has come to a finding that the number of vacancies in the 30 point roster filled up by OBC candidates from Civil Services

Examinations 1999-2003 were 9 and had exceeded the 27% reservation for OBC candidates and hence there could not be an insider OBC vacancy in which 'VV' could have been allocated. The High Court was, therefore, right in coming to the conclusion that allocation of 'VV' to the Andhra Pradesh cadre was in violation of the guidelines contained in the letter dated 31.05.1985 and was clearly arbitrary and not equitable. [Para 13] [232-B-F]

5. Complexity of a decision making process cannot be a defence when a grievance is made before the Court by a citizen that his fundamental right to equality has been violated. When such a grievance is made before the Court, the authorities have to justify their impugned decision by placing the relevant material before the Court. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis. [Para 14] [232-G-H; 233-A-C]

6. The impugned order of the High Court quashing the allocations of 'VV' and 'AM' and directing reconsideration of their allocation will not have cascading effects on the service because the High Court has only quashed the allocation of only two members of the IPS, namely, 'AM' and 'VV' and not of other members of the IPS and directed reconsideration of their allocation. [Para 14] [233-D-E]

M. Nagaraj v. Union of India **(2006) 8 SCC 212: 2006 (7) Suppl. SCR 336 – relied on.**

Case Law Reference:

1994 (2) Suppl. SCR 30	**referred to**	**Para 3,5,9**
1996 (6) Suppl. SCR 486	**referred to**	**Para 3, 9**
2005 (2) SCR 83	**referred to**	**Para 3**
2006 (7) Suppl. SCR 336	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2550 of 2010.

From the Judgment & Order dated 22.3.2007 of the Division Bench of the High Court of Andhra Pradesh at Hyderabad in W.P. No. 458 of 2007.

WITH

Civil Appeal No. 2551 of 2010.

Mohan Parasaran, ASG, Ranjit Kumar, Brijender Chahar, T.S. Doabia, I. Venkatanarayana, Neeraj Kumar Jain, R. Ayyam Perumal, K. Seshachary, Shomana Khanna, G. Ramakrishna Prasad, Mohd. Wasay Khan, Bharat J. Joshi, H. Rajgopal, Pranab Kumar Mullick, Soma Mullick, Rekha Pandey, Rohitash S. Nagar, S.N. Terdal, Sushma, Suri, V. Pattabhiram, G.N. Reddy, Manish Mohan, Bhaskar Poluri, Pratham Kant, Kaustubh N. Sinha, Ugra Shankar Prasad, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These two appeals by way of special leave under Article 136 of the Constitution are against the impugned judgment of the Division Bench of the Andhra Pradesh High Court dated 22.03.2007 in Writ Petition No. 458 of 2007.

2. The facts very briefly are that in the Civil Services Examination, 2004 conducted by the Union Public Service

Commission, Avinash Mohanty and Vikrama Varma amongst others were selected for appointment to the Indian Police Service (for short 'the IPS') and were offered appointments to the IPS in 2005. By notification dated 19.01.2006 of the Government of India, Ministry of Home Affairs, the candidates who had been selected and appointed to the IPS on the basis of the results of the Civil Services Examination, 2004 were allocated to different State cadres. By this notification, Avinash Mohanty, who had secured the 45th rank in the Civil Services Examination, 2004 was allocated to the Chhattisgarh cadre, whereas Vikrama Varma, who had secured 201st rank in the Civil Services Examination, 2004 was allocated to the Andhra Pradesh cadre. Avinash Mohanty made representations to the authorities against his allotment to the Chhattisgarh cadre and claimed that he should have been allocated to the Andhra Pradesh cadre. When his representations did not yield any results, Avinash Mohanty filed O.A. No. 286 of 2006 before the Central Administrative Tribunal, Hyderabad Bench (for short 'the Tribunal') on 03.05.2006 contending that the guidelines and norms in the letter dated 31.05.1985 of the Secretary, Government of India, Ministry of Personnel and Training (for short 'the letter dated 31.05.1985') have not been followed while making the allocations and the allocation of Vikrama Varma to the Andhra Pradesh cadre was arbitrary and in his place he should have been allocated to the Andhra Pradesh cadre. After considering the pleadings of the parties and hearing learned counsel for the parties, the Tribunal by its order dated 24.11.2006 dismissed the O.A. Aggrieved, Avinash Mohanty filed Writ Petition No. 458 of 2007 under Article 226 of the Constitution before the Andhra Pradesh High Court and by the impugned judgment, the High Court allowed the Writ Petition, quashed the allocation of the Vikrama Varma to the Andhra Pradesh cadre and directed the Union of India to reconsider the allocation of Avinash Mohanty and Vikrama Varma in accordance with law.

3. Mr. M.S. Ganesh, learned counsel for Vikrama Varma,

the appellant in C.A. No. 2550 of 2010, submitted that this Court in *Union of India* vs. *Rajiv Yadav, IAS and Others* [(1994) 6 SCC 38] while considering the allocation of officers appointed to the Indian Administrative Services (for short 'the IAS') has held that under Rule 5 of the Indian Administrative Service (Cadre) Rules, 1954, the Central Government is under no obligation to have options or preferences from the officers concerned and this Rule made the Central Government the sole authority to allocate the members of the service to various cadres and therefore a person appointed to an All India Service, having various State cadres, has no right to claim allocation to a State of his choice or to his home State. He submitted that this position of law has been reiterated by this Court in *Union of India* vs. *Mhathung Kithan and Others*, etc. [(1996) 10 SCC 562]. He also relied upon the judgment of the Division Bench of the Andhra Pradesh High Court in *G. Srinivas Rao* vs. *Union of India & Ors.* (2005 (2) ALT 728 (D.B.) which, while referring to the law laid down in *Rajiv Yadav's* case (supra), has further observed that the Union of India was required to operationalise a plurality of Government choices in the matter of allocation of officers to different State cadres and in the very nature of things, it is not always possible to fulfill all the policy objectives of Union of India in every factual circumstance and in every recruitment year. He also referred to the observations made in the Division Bench judgment of the Andhra Pradesh High Court in the case of *G. Srinivas* Rao (supra) that considering the complexities of accommodating the multitude of federal policy choices, allocation is a daunting task and there are no ready solutions which can perfectly be tailored to fit such complex problems. Considering all these multiple factors which have to be kept in mind while making the allocations of members of the IPS to different cadres, the High Court in the present case should not have quashed the allocation of Vikrama Varma to the Andhra Pradesh cadre. He submitted that the main reason given by the High Court in the impugned judgment is that in the current roster (3rd Cycle)

already nine OBC candidates had been allocated to the Andhra Pradesh cadre before the allocation of Vikrama Varma, who was an OBC candidate, and allocation of Vikrama Varma to the Andhra Pradesh cadre would make a total of ten OBC candidates in the 30 point roster which was 6% excess over the 27% reservation in favour of OBC candidates. He submitted that this Court has held in the case of *Rajiv Yadav* (supra) that allocation is not to be tested by the reservation provision under Article 16(4) of the Constituion and therefore 27% reservation in favour of OBC candidates was not relevant in the matter of allocation and the reasoning given by the High Court in the impugned judgment is erroneous.

4. Mr. Mohan Parasaran, learned Additional Solicitor General appearing for the Union of India, the appellant in C.A. No. 2551 of 2010, submitted that the direct recruitment in the IPS is done on an All India basis under the Indian Police Service (Recruitment) Rules, 1954 (for short 'the Recruitment Rules') and hence reservation in such direct recruitment is also on All India basis. He submitted that after direct recruitment is over and the selected general and reserved candidates are appointed to the IPS under Rule 5 of the Indian Police Service (Cadre) Rules, 1954, the Central Government makes allocation of cadres to the members of the IPS and Rule 5 does not provide for reservation. He submitted that this Court has, therefore, held in the case of *Rajiv Yadav* while interpreting Rule 5 of the Indian Police Service (Cadre) Rules, 1954, which is similarly worded, that the principles of allocation contained in the letter dated 31.05.1985 do not provide for reservation on appointments or posts and the question of testing the principles of allocation on the anvil of Article 16 (4) of the Constitution does not arise. Relying on Para 32 of the counter affidavit filed by the Union of India before the Tribunal in O.A. No. 286 of 2006, he submitted that at the time of allocation of cadres to the candidates for appointment to IPS on the basis of the Civil Services Examination 2004, a total of 8 candidates were allocated to the Andhra Pradesh cadre from the last five

Civil Services Examinations (1999-2003), out of which 2 (27%) were OBC and hence there was neither any excess nor any shortfall in respect of allocation of OBC candidates in the IPS cadre of Andhra Pradesh. He submitted that from Civil Services Examination 2004 a total number of 2 candidates were to be allocated to the Andhra Pradesh cadre and as per prescribed percentage, one vacancy each had to be filled up from General category and OBC category and as per 30 point roster prepared as per the letter dated 31.05.1985, the OBC vacancy was meant for an insider OBC candidate and thus the same has been filled up by allocating Vikrama Varma, an OBC candidate. He submitted that the High Court in the impugned judgment has not correctly appreciated the roster maintained by the Government and has instead observed that there was clear arbitrariness in the operation of the roster system. Mr. Parasaran finally submitted that the directions of the High Court in the impugned judgment for reconsideration of cadre allocation if followed will have a cascading effect on the service.

5. Mr. Sunil Kumar, appearing for Avinash Mohanty, the respondent no.1 in the two appeals, on the other hand, submitted that in *Rajiv Yadav's* case (supra) this Court has held that the roster system in the letter dated 31.05.1985 ensures equitable treatment to both the general candidates and the reserved candidates. He submitted that the table indicating the correct position of vacancies filled from Civil Services Examination 1994 to 2003 furnished in Para 28 of the counter affidavit dated 22.03.2007 of the Union of India filed in the High Court has been extracted in the impugned judgment of the High Court, which will go to show that four vacancies had been assigned to insider OBCs and five vacancies had been assigned to outsider OBCs and thus nine OBC candidates had already been allocated in a total of 29 vacancies in the Andhra Pradesh cadre and there was already an excess over 27% reserved in favour of the OBC candidates. He submitted that for this reason the High Court took the view that the 10th vacancy in the Andhra Pradesh cadre in the 30 point roster, if allocated

to an OBC candidate would be clearly a violation of the equitable principle of allocation contained in the letter dated 31.05.1985 and would be arbitrary. He submitted that the directions of the High Court for reconsideration of cadre allocation of Avinash Mohanty and Vikrama Varma are justified in the facts of the case and the directions are to be followed in their cases only and will not have any cascading effect on the service.

6. Rules 3 and 5 of the IPS (Cadre) Rules, 1954, are quoted herein below:

> **"3. Constitution of Cadres**- 3(1) There shall be constituted for each State or group of States an Indian Police Service Cadre.
>
> 3(2) The Cadres so constituted for a State or a group of States are hereinafter referred to as a 'State Cadre' and a 'Joint Cadre' respectively.
>
> **5. Allocation of members to various cadres**– 5(1) The allocation of cadre officers to the various cadres shall be made by the Central Government in consultation with the State Government or State Governments concerned.
>
> 5(2) The Central Government may, with the concurrence of the State Governments concerned, transfer a cadre officer from one cadre to another cadre."

It will be clear from Rule 3 that each State and a group of States will have a State cadre or Joint Cadre respectively of the IPS and it will be further clear from Rule 5 that the Central Government in consultation with the State Government or State Governments concerned has the power to make allocation of IPS officers to various cadres.

7. The broad principles, which are to be followed for allocation, have been indicated in Para 3 of the letter dated 31.05.1985 and are extracted herein below:

"(1) The vacancies in every cadre will be earmarked for 'outsiders' and 'insiders' in the ratio of 2:1. In order to avoid problems relating to fractions and to ensure that this ratio is maintained, over a period of time, if not during every allocation, the break-up of vacancies in a cadre between 'outsiders' and 'insiders' will be calculated following the cycle of 'outsider', 'insider', 'outsider'

(2) The vacancies for Scheduled Castes and Scheduled Tribes will be reserved in the various cadres according to the prescribed percentage. For purpose of this reservation, Scheduled Castes and Scheduled Tribes will be grouped together and the percentage will be added. Distribution of reserved vacancies in each cadre between 'outsiders' and 'insiders' will be done in the ratio 2:1. This ratio will be operationalised by following a cycle 'outsider, 'insider', 'outsider' as is done in the case of general candidates.

(3) Allocation of 'insiders', both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States

(4) Allocation of 'outsiders', whether they are general candidates or reserved candidates, whether they are men or women, will be according to the roster system after placing 'insiders' at their proper places on the chart as explained below:

(i) All the State Cadres/Joint Cadres should be arranged in alphabetical order and divided into groups which, on the basis of the average over a period of time, are taking roughly equal number of candidates each. On the basis of average intake during the last 4 years, the group could be as follows:

Group I : Andhra Pradesh, Assam-Meghalaya, Bihar

and Gujarat

Group II : Haryana, Himachal Pradesh, Jammu & Kashmir Karnataka, Kerala and Madhya Pradesh

Group III : Maharashtra, Manipur-Tripura, Nagaland, Orissa, Punjab, Rajasthan and Sikkim

Group IV : Tamil Nadu, Union Territories, Uttar Pradesh and West Bengal.

(ii) Since the number of Cadres/Joint Cadres is 21, the cycles will be 1-21, 22-42, 43-63 and so on.

(iii) The 'insider' quota should then be distributed among the States and assigned to different cycles of allotment. For example, if a State gets 4 'insider' candidates, they should go to the share of the State in their respective cycles and if there are 2 'insider' candidates from the same cycle, they should be treated as going to the State in two successive and so on.

(iv) The 'outsider' candidates should be arranged in order of merit and allotted to the State cadres in cycles as described in (v) below

(v) In the first cycle, State Cadre/Joint Cadre which have not received 'insider' candidates should be given one candidate each in order of merit of 'outsider' candidates. The process should be repeated in successive cycles, each successive cycle beginning with the next successive group of States, e.g., the second cycle should begin from Group II States, the third cycle with Group III States and the fourth cycle with Group IV States and the first cycle again with Group I States. Occasionally it may happen that a

candidate's turn may come in such a way that he may get allocated to his own home State. When that happens, the candidate next below him should be exchanged with him.

(vi) For the succeeding year, the State cadres should be arranged again in alphabetical order but with Group I of the previous year at the bottom, i.e., the arrangement will begin with Group II on top. In the third year, Group III will come on top and so on

(vii) In the case of candidates belonging to the reserved category, such of those candidates, whose position in the merit list is such that they could have been appointed to the service even in the absence of any reservation, will be treated on par with general candidates for purposes of allotment though they will be counted against reserved vacancies. In respect of other candidates belonging to the reserved category a procedure similar to the one adopted for general category candidates would be adopted. In other words, a separate chart should be prepared with similar grouping of States and similar operational details should be followed. If there is a shortfall in general 'insiders' quota it could however be made up by 'insider' reserved candidates."

8. It will be clear from a reading of clause (1) of the broad principles of allocation in the letter dated 31.05.1985 quoted above, that vacancies in every cadre are required to be earmarked for outsiders and insiders in the ratio of 2:1 and in order to avoid problems relating to fractions and to ensure that this ratio is maintained, over a period of time, if not during every allocation, the breakup of vacancies in a cadre between outsiders and insiders will have to be calculated following this cycle of 'outsider', 'insider', 'outsider'. Clause (2) of the broad principles of allocation in the letter dated 31.05.1985 further provides that the vacancies for Scheduled Castes and Scheduled Tribes are to be reserved in the various cadres according to the prescribed percentage and for the purpose

of this reservation, Scheduled Castes and Scheduled Tribes are to be grouped together and the percentage to be added and distribution of reserved vacancies in each cadre between outsiders and insiders are to be done in the ratio of 2:1 and this ratio is to be operationalised by following a cycle outsider, insider, outsider as is done in the cases of general candidates.

9. In *Rajiv Yadav's* case (supra), Rajiv Yadav appeared in the Civil Services Examination held in 1988 and he was selected for appointment to the IAS and he was placed at Serial No.16 in the order of merit. Though he belongs to the Union Territory of Delhi and he opted for the Union Territory's cadre, he was allocated to the Manipur-Tripura cadre. He challenged the order allocating him to the Manipur-Tripura cadre before the Central Administrative Tribunal, New Delhi, raising various contentions and the Tribunal held that the power conferred by Article 16(4) of the Constitution is only for making provision for reservation of appointment or posts in favour of any backward class of citizens not adequately represented in the services under the State and cannot be extended to allocation of members of the IAS to different cadres. The Tribunal further held that clause (2) of the principles of allocation gave an added benefit to IAS probationers belonging to Scheduled Castes and Scheduled Tribes and this was not permissible under Article 16(4) of the Constitution. This Court did not approve of this reasoning of the Tribunal and held that the principles of allocation as contained in clause (2) of the letter dated 31.05.1985 do not provide for reservation for appointments or posts and as such the question of testing the principles of allocation on the anvil of Article 16(4) of the Constitution does not arise. In Para 6 of the judgment in *Rajiv Yadav's* case, the Court explained that in compliance with the statutory requirements and in terms of Article 16(4) of the Constitution, 22½ % reserved category candidates are recruited to the IAS and having done so, both the categories are to be justly distributed amongst the States. The Court also held that when a person is appointed to the All India Service, having various

State cadres, he has no right to claim allocation to a State of his choice or to his home State and the Central Government is under no legal obligation to have options or even preferences from the officer concerned and Rule 5 of the Indian Administrative Service (Cadre) Rules, 1954, made the Central Government the sole authority to allocate the members of the service to various cadres. This position of law was reiterated in *Mhathung Kithan and Others* (supra). The Court, however, has not held in *Rajiv Yadav* or in *Mhathung Kithan and Others* that such authority of the Central Government can be exercised arbitrarily or in a manner which is not equitable to the general or reserved category candidates selected for appointment to an All India Service. On the contrary, the Court has held in *Rajiv Yadav* that the roster system as contained in the letter dated 31.05.1985 ensures equitable treatment to both the general candidates and the reserved candidates.

10. In fact, the object of the principles of allocation indicated in different clauses in the letter dated 31.05.1985 is not only to implement the policy having 2 outsiders and 1 insider in each cadre, but also to ensure that general and reserved candidates selected and appointed to the All India Service get a fair and just treatment in the matter of allocation to different cadres. This will be clear from clause (2) of the letter dated 31.05.1985 which states that the vacancies for Scheduled Castes and Scheduled Tribes in the various cadres should be according to the prescribed percentage and from clause (3) which states that the allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. This will also be clear from clause 4(vii) which explains how the candidates belonging to the reserved category and the general category will be dealt with. These principles have been laid down in the letter dated 31.05.1985 because while making allocations of different candidates appointed to the service to different State

cadres or Joint cadres, the Central Government has also to discharge its constitutional obligations contained in the equality principles in Articles 14 and 16(1) of the Constitution. A member appointed to the All India Service has no right to be allocated to a particular State cadre or Joint cadre, but he has a right to a fair and equitable treatment in the matter of allocation under Articles 14 and 16(1) of the Constitution.

11. Coming now to the facts of this case, we find that the High Court has in the impugned judgment extracted the table of vacancies filled up from Civil Services Examination 1994 – 2003, as furnished in Para 28 of the counter affidavit dated 22.03.2007 filed by the Union of India before the High Court, which is extracted hereunder :

S.No.	CSE	Total Vacancies	Insider			Outsider		
			GEN	OBC	SC/ST	GEN	OBC	SC/ST
1.	1994	7	-	1	1	3	1	1
2.	1995	5	1	1	-	1	1	1
3.	1996	6	2	-	-	1	2	1
4.	1997	2	-	-	-	2	-	-
5.	1998	1	-	1	-	-	-	-
6.	1999	1	-	-	-	1	-	-
7.	2000	1	-	-	-	1	-	-
8.	2001	1	-	-	1	-	-	-
9.	2002	1	-	-	-	-		1
10.	2003	4	-	1	-	2	-	1
Total		29	3	4	2	11	5	4

After considering this table, the High Court has held in the impugned judgment that even according to the Union of India, as against a total of 29 vacancies 9 OBC candidates (4 insiders + 5 outsiders) had been allocated to the Andhra Pradesh cadre from amongst the successful candidates of Civil Services Examinations from 1994-2003 and if Vikrama Varma, an insider OBC candidate, was to be allocated to the Andhra Pradesh cadre from the selected candidates of the Civil Services Examination, 2004, a total of 10 OBC candidates would be allocated to the Andhra Pradesh cadre in the 30 point roster, making the percentage of OBC candidates to 33 1/3, which was a variation of 6% in excess and by any standard was not a marginal variation.

12. The Union of India, in para 32 of its counter affidavit before the Tribunal in O.A.No.286 of 2006, has, however, stated that from the five Civil Services Examinations (1999-2003) a total of 8 candidates appointed to the IPS were allotted to the Andhra Pradesh cadre, out of which 2 were OBC candidates and 2 out of 8 does not exceed 27% and, therefore, there was neither any excess nor any shortfall of allocation of OBC candidates in the Andhra Pradesh IPS cadre. We fail to appreciate this calculation of percentages on reserved category candidates allotted to the Andhra Pradesh cadre worked out on the basis of number of candidates allotted to the Andhra Pradesh cadre from the five Civil Services Examinations, from 1999 – 2003, when in the very same counter affidavit of the Union of India filed before the Tribunal in O.A. No. 286 of 2006, in para 21, it is clearly stated that a 30 point roster in respect of Andhra Pradesh was being maintained for allocation of insider and outsider, as well as, reserved and general candidates in accordance with clauses (1) and (2) of Para (3) of the letter dated 31.05.1985. It appears to us that only with a view to somehow justify the allocation of Vikrama Varma, an OBC candidate, to the Andhra Pradesh cadre from the Civil Services Examination, 2004, the Union of India has taken the figures of allocation of candidates selected for the

IPS in the five Civil Services Examinations of 1999 to 2003 instead of taking the figures of appointments to the vacancies in the 30 point roster starting from the 1994 Civil Services Examination till 2003 Civil Services Examinations.

13. Admittedly, Avinash Mohanty had secured a higher rank than Vikrama Varma in the Civil Services Examination, 2004 and both Avinash Mohanty and Vikrama Varma are insiders. Clause (3) of Para 3 of the letter dated 31.05.1985 states that allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. Hence, Avinash Mohanty was required to be considered for allocation to the Andhra Pradesh cadre if he had given his willingness for being allocated to his home State, Andhra Pradesh, before Vikrama Varma could be considered for such allocation. If, however, the vacancy for which consideration was being made was a vacancy for an insider OBC candidate in the 30 point roster, Vikrama Varma would have preference over Avinash Mohanty. But the High Court has come to a finding that the number of vacancies in the 30 point roster filled up by OBC candidates from Civil Services Examinations 1999-2003 were 9 and had exceeded the 27% reservation for OBC candidates and hence there could not be an insider OBC vacancy in which Vikrama Varma could have been allocated. The High Court was, therefore, right in coming to the conclusion that allocation of Vikrama Varma to the Andhra Pradesh cadre was in violation of the guidelines contained in the letter dated 31.05.1985 and was clearly arbitrary and not equitable.

14. In our view, complexity of a decision making process cannot be a defence when a grievance is made before the Court by a citizen that his fundamental right to equality has been violated. When such a grievance is made before the Court, the authorities have to justify their impugned decision by placing the relevant material before the Court. As has been held by a

Constitution Bench of this Court in *M. Nagaraj* vs. *Union of India* [(2006) 8 SCC 212] at 277 in Para 118:

> "The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis."

We are also of the considered opinion that the impugned order of the High Court quashing the allocations of Vikrama Varma and Avinash Mohanty and directing reconsideration of their allocation will not have cascading effects on the service because the High Court has quashed the allocation of only two members of the IPS, namely, Avinash Mohanty and Vikrama Varma, and not of other members of the IPS and directed reconsideration of their allocation.

15. We, therefore, do not find any merit in these appeals and we dismiss the same and vacate the interim orders staying the operation of the impugned judgment. No order as to costs.

D.G. Appeals dismissed.

SAYAJI HANMANT BANKAR

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 457 of 2007)

JULY 13, 2011

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

Penal Code, 1860: s.304, (Part I), s.300, Exception 4; s.302 – Conviction on the basis of dying declaration – Allegation that accused-husband came home in drunken state and started abusing victim-wife and hit her on knee with brass pot and thereafter threw burning kerosene lamp on her – Victim was wearing a nylon sari which caught fire and she got engulfed in flames – In her dying declaration, she stated that accused had tried to douse the fire – Courts below convicted accused u/s.302 and awarded life imprisonment – On appeal, held: On facts and in view of evidence on record, Exception 4 to s.300 is attracted – There was sudden fight between accused and his wife and the act of throwing burning kerosene lamp was without premeditation – The evidence did not show the intention on part of accused to cause death or such bodily injury so as to result in the death of his wife – The burning seemed to be more out of the fact that at the time of incident, the victim was wearing nylon sari and had she not been wearing a nylon sari, she would not have been burnt to the extent of 70% – Conviction of accused altered from s.302 to s.304 Part I and sentence modified to period already undergone by him.

The prosecution case was that on the fateful night, the appellant-accused came home at 9 p.m. under the influence of liquor and started abusing his wife. There was petty quarrel between the accused and his wife and in that quarrel, the accused hit her left knee with a brass pot and thereafter threw a burning kerosene lamp on her.

The wife was wearing a nylon sari which immediately caught fire and she was engulfed in flames. She was taken to hospital. As per the medical report, the victim was burnt to the extent of 70%. In her dying declaration, she mentioned that the accused had tried to douse the fire. The accused had also received burn injuries to the extent of 18%.

The trial court as well as the High Court took the view on the basis of dying declaration that the act on the part of the accused showed his intention to commit the murder or such bodily injury as was likely to result in her death. The accused was convicted under Section 302 IPC and sentenced to life imprisonment. The instant appeal was filed against the order of conviction.

Partly allowing the appeal, the Court

HELD: Exception 4 to Section 300 IPC is attracted if the act is done without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and the offender does not take any undue advantage or act in a cruel or unusual manner. The evidence on record did not show that the intention on the part of the appellant-accused was to cause death or such bodily injury as would have resulted in the death of his wife. There would have to be much more activity on the part of the accused if his intention was to commit the murder of his wife. If there was any intention to commit her murder, as mentioned in Section 299 IPC, there would have been much other acts like pouring kerosene on the victim-deceased etc. A perusal of evidence showed that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw water pot and thereafter a kerosene lamp. The burning seemed to be more out of the fact that unfortunately at that time, the victim was wearing nylon sari. Had she not been wearing a nylon sari, she could not have been burnt to the extent of 70%. This was a case which clearly fell

under Exception 4 of Section 300 IPC since there was sudden fight. There was no premeditation either. Therefore the accused-appellant is liable to be convicted for the offence punishable under Section 304 Part-I. The conviction of the accused is altered from Section 302 IPC to Section 304 Part-I IPC and sentence is reduced to the period already undergone by him. [Paras 5, 7, 8, 9] [237-D-F; 238-B-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 457 of 2007.

From the Judgment & Order dated 11.8.2004 of the High Court of Judicature at Bombay in Criminal Appeal No. 319 of 2000.

Satyapal Khushal Chand Pasi, for the Appellant.

Shankar Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

V.S.SIRPURKAR, J. 1. Challenge in this appeal is to the judgment dated 11.8.2004 in Criminal Appeal No. 319 of 2000 passed by the High Court of Bombay affirming the judgment and order dated 6.3.2000 passed by the trial court by which the appellant was convicted for the offence under Section 302 IPC and sentenced to imprisonment for life and to pay a fine of Rs. 2000/- in default to undergo further rigorous imprisonment for one year.

2. The brief facts leading to case are as under:

On 18.5.1998 at about 9 p.m., appellant-accused Sayaji Hanmat Bankar came home under the influence of liquor and abused his wife deceased-Suman. There was petty quarrel between the appellant and the deceased Suman and in that quarrel the appellant hit her left knee with a water pot made of brass and thereafter threw a burning kerosene lamp upon her. At that time, she was wearing nylon sari which immediately caught fire and she was engulfed by flames. The deceased was

immediately taken to the hospital by her parents where her dying declaration was recorded. The medical report of the doctor showed that the deceased was burnt to the extent of 70%. A dying declaration was recorded. During investigation the deceased gave the above version. In her dying declaration, it has also been mentioned that the accused-appellant also tried to douse the fire. It is established that he had received burn injuries to the extent of 18%.

3. The trial court as well as the High Court have taken the view on the basis of dying declaration that the act on the part of the accused showed his intention to commit the murder or such bodily injury as was likely to result in her death.

4. We have heard Mr. S.K.C. Pasi, learned counsel appearing on behalf of the appellant and Mr. Shankar Chillarge, learned counsel appearing on behalf of the State and also gone through the record.

5. In our view, from the evidence on record, it does not appear that the intention on the part of the accused was to cause death or such bodily injury as would have resulted in the death of his wife. There would be much more activity on the part of the accused if his intention was to commit the murder of his wife. It seems that there was a fight as soon as he came to the house under the drunken state and in the fight, he first hit her left knee with a water pot and thereafter, threw kerosene lamp on her. It is obvious from the evidence that this was done suddenly in the heat of passion. If there was any intention to commit her murder, as mentioned in Section 299 IPC, there would have been much other acts like pouring kerosene on the deceased etc. on the part of the accused.

6. The High Court rejected the contention of learned counsel for the appellant that this case would fall under Exception 4 to Section 300 IPC. It was held by the High Court that this is certainly not a case to which exception 4 to Section 300 would get attracted but would fall under clause "fourth" of 300 IPC. Exception 4 to Section 300 IPC reads as under:

Exception 4- Culpable homicide is not murder if it is

committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner"

7. It is clear from the reading of aforesaid Exception 4 that if the act is done without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and if the offender does not take any undue advantage or act in a cruel or unusual manner, then Exception 4 will be attracted.

8. We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw water pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly fall under Exception 4 of Section 300 IPC since there was sudden fight. There was no premeditation either. Therefore the accused-appellant is liable to be convicted for the offence punishable under Section 304 Part-I.

9. We, accordingly, alter the conviction of the accused from Section 302 IPC to Section 304 Part-I IPC and sentence him to the period already undergone by him. The sentence of fine remains the same.

10. It is submitted by the learned counsel for the appellant that the appellant was taken into custody on 29.5.1998 and was never granted bail by the High Court and he has already undergone 13 years of sentence.

11. In that view of the matter, the accused-appellant is directed to be released from the jail forthwith unless he is required in any other case.

12. The appeal is allowed partly to the extent indicated above.

D.G. Appeal partly allowed.

CHHOTELAL

v.

STATE OF M.P.

(Criminal Appeal No. 664 of 2006)

JULY 14, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 376 (2) and 302 – Rape and murder of a young girl aged ten years – Trial court convicted appellant-accused u/ss. 376(2) and 302 and sentenced him to imprisonment for life with further clarification that the sentence would continue for the remaining period of his entire life – Order upheld by the High Court – Interference with – Held: Not called for since the evidence against the appellant appears to be fully credible – However, direction issued that the appellant would serve out the sentence of imprisonment upto the end of his life subject to any remissions which the Government may choose to give to the appellant – Sentence/ Sentencing.

Mulla v State of U.P. **(2010) 3 SCC 508: 2010 (2) SCR 633 – relied on.**

Case Law Reference:

2010 (2) SCR 633 Relied on. Para 3

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 664 of 2006.

From the Judgment & Order dated 10.7.2003 of the High Court of Madhya Pradesh at Jabalpur in CRLA No. 136 of 1992.

Aishwarya Bhati, Harbans Lal Bajaj for the Appellant.

Praveena Gautam, C.D. Singh, Vibha Datta Makhija for the Respondent.

The following Order of the Court was delivered

O R D E R

1. The appellant Chhote Lal stands convicted under Section 376(2) and 302 of the Indian Penal Code for having committed rape and murder of a young girl 10 years of age and has been sentenced by the trial court to imprisonment for life under both the provisions by the Sessions Court and it was further clarified that the sentence would continue for the remaining period of the entire life of the accused. An appeal was thereafter taken to the High Court of Madhya Pradesh which has confirmed the order of the Sessions Judge. This appeal has been filed in this Court as a jail petition.

2. Mr. Harbans Lal Bajaj, the learned Amicus appointed earlier did not put in appearance on the last several dates and even yesterday when the matter was called out. We had, accordingly, requested Ms. Aishwarya Bhati, learned counsel who was present in the Court to assist us in the matter and appointed her as an Amicus in place of Mr. Harbans Lal Bajaj. We have, accordingly, heard her as well as the State Counsel on the merits of the case.

3. We have gone through the evidence with the assistance of the learned counsel and find no cause for interference on the facts of the case as the evidence against the appellant appears to be fully credible. We, however, feel that in the light of the judgment of this Court in *Mulla v. State of U.P.* (2010) 3 SCC 508, some modification has to be made in the sentencing part of the impugned judgments. In the cited case, it has been observed that though it was open to the courts to award a sentence prescribing the length of incarceration but the power to commute the sentence or to grant remissions which rested with the Government had to be respected. Paragraphs 85 and 86 of the judgment read as under:-

"85. We are in complete agreement with the above

dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.

86. Here we would like to note that the punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons."

4. We, accordingly, dismiss the appeal but direct (in the light of the aforesaid observations) that the appellant would serve out the sentence of imprisonment upto the end of his life but this direction would be subject to any remissions which the Government may choose to give under the circumstances to the appellant. In this background, we issue a further direction to the State Government that (as the appellant has been in custody since the 10th January, 1989) to take a decision on the appellant's continued detention or release in accordance with law within a period of six months from today.

5. Fee of the Amicus is fixed at Rs. 7,000/-.

N.J. Appeal dismissed.

UNION OF INDIA & ANR.

v.

RAM SINGH THAKUR & ORS.

(Civil appeal No. 200 of 2007)

JULY 14, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Service Law:

Employees of Railway Employees Cosumer Co-operative Society Ltd. – Central Administrative Tribunal directing induction of claimants and employees of other co-operative societies in regular group 'D' posts and alternatively also as casual group 'D' employees in Railways – Direction upheld by High Court – HELD: A direction regarding regularisation in service is a purely executive function and such a direction cannot validly be given by the judiciary – There is broad separation of powers in the Constitution of India – It is not proper for the judiciary to encroach into the domain of the Legislature or the Executive – The framing of a scheme such as the one done by the Tribunal and approved by the High Court was a purely executive function – The direction to frame a scheme for appointment can only be given by the Executive (and that too according to Article 16 and other provisions of the Constitution) – Moreover, the employees of a co-operative society are not employees of the Government – The impugned judgment of the High Court as well as the order of the Tribunal set aside – Constitution of India, 1950 – Article 16 – Constitutional law – Separation of powers.

Co-operative Societies:

Employees of co-operative societies – HELD: Are not Government employees.

Divisional Manager, Aravali Goft Club & Anr. Vs. Chander Hass & Anr. **2007 (12) SCR 1084 = (2008) 1 SCC 683; and** *Union of India (Railway Board) & Ors. vs. J.V. Subhiah & Ors.* **1995 (6) Suppl. SCR 812 = (1996) 2 SCC 258 – relied on.**

Case Law Reference:

2007 (12) SCR 1084	**relied on**	**para 6**
1995 (6) Suppl. SCR 812	**relied on**	**para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 200 of 2007.

From the Judgment & Order dated 15.9.2003 in WP No. 6661, 6662, 6663 & 6664 of 2002 and dated 21.11.2003 M.C.C. No. 3440 of 2003 in WPC No. 6661 of 2002, M.C.C. No. 3368 of 2003 in WP No. 6663 of 2002 and MCC No. 3439 of 2003 in WP No. 6664 of 2002 of the High Court of Judicature at Jabalpur.

WITH

C.A. No. 1197 of 2007.

Harin P. Raval, ASG, Wasim Quadri, Anando Mukherjee, Harsh N. Parekh, Anirudh Sharma, Arvind Kr. Sharma, Mukesh Verma, Shweta Verma, Zaid Ali, Shreekant N. Terdal, B. Krishna Prasad for the Appellants.

Akshat Shrivastava, P.P. Singh, Inderjeet Yadav, Parthapratim Chaudhuri, Aditya Sharma, K.S. Rana for the Respondents.

The following Order of the Court was delivered

O R D E R

Civil Appeal No. 200 of 2007

Heard learned counsel for the appearing parties.

This Appeal has been filed against the impugned judgments dated 15.09.2003 and dated 21.11.2003 passed by the High Court of Madhya Pradesh.

The facts have been set out in the impugned judgment dated 15.09.2003 as well as in the order of the Central Administrative Tribunal dated 30.05.2001 and hence we are not repeating the same here.

The respondents were employees of a co-operative society of Railway Employees Consumer Co-operative Society Ltd. By its order dated 30.05.2001, the Central Administrative Tribunal (for short 'the Tribunal) has directed the Chairman, Railway Board to formulate a suitable scheme for induction of the respondents and similarly placed employees of other co-operative societies in regular Group 'D' posts and alternatively also as Casual Group 'D' employees in the railways. This direction has been upheld by the High Court in the impugned judgments.

In our opinion, the order of the Tribunal as well as the impugned judgments of the High Court were totally unwarranted and illegal. There is broad separation of power in the Indian Constitution. As held by this Court in *Divisional Manager, Aravali Golf Club & Anr Vs. Chander Hass & Anr.,* (2008) 1 SCC 683, it is not proper for the Judiciary to encroach into the domain of the Legislature or the Executive. The framing of a scheme such as the one done by the Tribunal and approved by the High Court was a purely executive function, and could not validly be done by the judiciary.

Moreover, in view of the judgment of this Court in *Union of India [Railway Board] & Ors. Vs. J.V. Subhaiah & Ors.* (1996) 2 SCC 258, the employees of a co-operative society are not employees of the Government.

In our opinion, the direction to frame a scheme for appointment can only be given by the Executive (and that too according to Article 16 and other provisions of the Constitution).

For the reasons stated above, the Appeal stands allowed and the impugned judgments of the High Court as well as the order of the Tribunal are set aside. No costs.

Civil Appeal No. 1197 of 2007

Heard learned counsel for the appearing parties.

This Appeal has been filed against the impugned judgment dated 23.08.2005 passed by the High Court of Gujarat in Special Civil Application No. 8536 of 2003.

The facts have been set out in the impugned judgment and in the judgment of the Central Administrative Tribunal dated 28.03.2002 and hence we are not repeating the same here.

It appears that the respondents were working in a Mess run by the trainee officers in the Railway Staff College. That Mess was not run by the railways but was run by the trainee officers themselves so that they could get proper meals. It is evident that the respondents were not railway employees, but a direction has been given that they be regularised in railway service.

In our opinion, a direction regarding regularisation in service is a purely executive function and such a direction cannot validly be given by the judiciary.

Consequently, this Appeal stands allowed. The impugned judgment as well as the judgment of the Tribunal are set aside. No costs.

R.P. Appeal allowed.

JAGDISH PARWANI
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 5481 of 2011)

JULY 15, 2011

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

Service Law:

Pay protection – Entitlement of – Employee of State Electricity Board recruited by selection to Central Government on 23.02.1990 – Pay protection claimed by employee by virtue of Notification dated 07.08.1989 – Subsequent Notification dated 28.02.1992 issued extending grant of pay protection to the employees of State Government Undertakings joining service in Central Government on and after 01.02.1990 – High Court holding that the employee not entitled to pay protection – On appeal, held: The issue for getting pay protection arises as soon as an employee joins his new post, where he gets his new pay scale by whatever Notifications, memorandums which are available and applicable at that stage laying down such rules regarding pay protection – Notification dated 28.02.1992 clearly states that the employees of the State Government Undertakings selected for posts in Central Government on direct recruitment basis on and after 01.02.1992 were also extended the benefit of pay protection, as was provided in the case of the employees of Central Government Public Undertakings as per Notification dated 07.08.1989 – On facts, said employee was selected and appointed to the post in Central Government on 23.03.1990 after working as an employee of the State Government Undertaking-State Electricity board, thus, the

Notification was not applicable and could not have claimed for any pay protection – Also the employee accepted the appointment without any demur or protest on the issue of pay – Thus, order passed by the High Court was justified – Memorandum "DoPT OM NO.12/1/88-Estt (Pay-I) dated 28.2.1992.

Appellant was an employee of the State Government Undertaking, the Uttar Pradesh State Electricity Board (UPSEB). He was selected and appointed to the post in the Central Government on 23.02.1990. The respondent-Union of India fixed his pay scale at the minimum of pay scale of Rs. 2200/-. The appellant continued to receive the said pay for more than one and a half years. Thereafter, the appellant submitted representations claiming pay protection on the basis of a Notification issued by the Ministry of Personnel, Public Grievances and Pensions [Department of Personnel & Training] dated 07.08.1989. The appellant claimed that when he was released from the service of the UPSEB on 19.02.1999, he was drawing the basic pay of Rs. 2750 per month and as such he was entitled to receive a salary of Rs. 3000/- per month, w.e.f., 23.2.1990 and not Rs. 2200/-. Meanwhile, another Notification dated 28.02.1992 was issued extending the grant of pay protection to the employees of State Government Undertakings joining service in Central Government on and after 01.02.1990. The representations of the appellant were rejected. Thereafter, the appellant filed an application before the Tribunal seeking an order giving him the pay protection which was last paid to him by the UPSEB. The application was allowed. The respondents-Union of India filed a writ petition. The High Court allowed the writ petition holding that the appellant was not entitled to pay protection. Aggrieved, the appellant filed a Review Petition and the same was dismissed. Therefore, the appellant filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. A bare perusal of the Memorandum "DoPT OM NO.12/1/88-Estt (Pay-I) dated 28.2.1992 would make it crystal clear that the employees of the State Government Undertakings selected for posts in Central Government on direct recruitment basis on and after 01.02.1992 were also extended the benefit of pay protection, as was provided in the case of the employees of Central Government Public Undertakings as per notification dated 07.08.1989. In the said Notification, it was clearly stipulated that the said benefit of pay protection is effective only from the first day of the month in which the OM is issued, i.e., from 01.02.1992, which means that the said OM was given prospective effect only. Therefore, the said OM could even be said to be a clarification on the issue. In the said Notification the employees like the appellant would be entitled to get such pay protection, as employees of the State Government Undertakings on their appointment in Central Government service only from the effective date of 01.02.1992. If the appellant would have been appointed for a post in Central Government on direct recruitment basis after 01.02.1992 such benefit of pay protection could have been made available to him. But since the appellant was selected and appointed to a post in Central Government on 23.02.1990 after working as an employee of the State Government Undertaking, viz., UPSEB, the Notification dated 07.08.1989 was not applicable to him and, therefore, he could not have legally claimed for any pay protection. [Paras 14 and 15] [255-D-H; 256-A-B]

1.2. Being fully aware of the said position the appellant accepted the appointment without any demur or protest on the issue of pay being given to him under the appointment order issued to him by the Military Engineering Service, Ministry of Defence, fixing his pay

scale at the minimum of the pay scale of Rs. 2200. He accepted the said pay scale without raising any grievance and continued to receive the same till 11.09.1991, when for the first time he submitted his first representation for pay protection as per Notification dated 07.08.1989. [Para 16] [256-C-D]

1.3. So far getting pay protection is concerned, the said issue arises as soon as an employee joins his new post, where he gets his new pay scale and if he is entitled to any pay protection that is the stage and date when it is granted by whatever Notifications, memorandums which are available and applicable at that stage laying down such rules regarding pay protection. At that stage what was operating in the field was the Notification issued on 07.08.1989 which was not applicable to the appellant. The appellant also clearly understood the position and therefore, based his entire claim and right on the subsequent Notification dated 28.02.1992, although appointed to the post of Central Government on 23.02.1990. [Para 18] [257-B-D]

1.4. In the instant case, it cannot be said that a Notification issued after two years of the appointment of the appellant which is also specifically stated to have been issued with prospective effect is applicable in his case. The High Court was justified in setting aside the order of the Tribunal as the Tribunal has misread and misinterpreted the facts as also the legal principles in law. [Paras 19 and 20] [257-E-G]

T.S. Thiruvengadam v. Secretary to Government of India, Ministry of Finance, Deptt. of Expenditure, New Delhi **(1993) 2 SCC 174 – distinguished.**

Case Law Reference:

(1993) 2 SCC 174 distinguished. Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5481 of 2011.

From the Judgment & Order dated 11.9.2009 of the High Court of Madhya Pradesh Bench Gwalior, in Review Petition No. 185 of 2009.

WITH

C.A. No. 5482 of 2011.

Arijit Bhattacharjee, A.K. Aggarwal, Sarbani Kar, Ambreesh Kumar Aggarwal for the Appellant.

Mohan Jain, ASG, Prabhant Kumar, Deepak Jain, Arti Singh, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

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

2. The appeals are directed against the judgment and order dated 11.09.2009 passed by the High Court of Madhya Pradesh Bench at Gwalior in Review Petition No. 185 of 2009. The said review petition was filed by the appellant herein against the order dated 16.04.2009 passed by the High Court of Madhya Pradesh, Gwalior Bench, in Writ Petition (s) No. 882 of 2003. Appellant has also preferred a separate appeal [arising out of SLP(C) No. 8404 of 2010] against the said decision of the High Court of Madhya Pradesh in the Writ Petition No. 882 of 2003. By this order we propose to dispose of both the appeals filed by the appellant.

3. The facts leading to filing of the aforesaid appeals are that the appellant being a graduate engineer appeared for Indian Engineering Services examination which was held pursuant to an advertisement issued by the Union Public Service Commission in the year 1987 for filling up the post of

Assistant Executive Engineer [Buildings and Roads] in Military Engineering Service, Ministry of Defence. The appellant was working as an Assistant Engineer in Uttar Pradesh State Electricity Board [for short "UPSEB"], w.e.f., 1st January, 1988. He having qualified in the aforesaid competitive examination, the appellant was offered an appointment as Assistant Executive Engineer [Buildings and Roads] in the Military Engineering Services by an appointment letter issued by the Ministry of Defence dated 06.09.1989. Consequently, he resigned from the UPSEB and as per his last pay certificate from UPSEB, he was drawing a basic pay of Rs. 2750/-. His resignation was accepted and he was released from the service of UPSEB on 19.02.1990.

4. Pursuant to the aforesaid letter of appointment issued by the Ministry of Defence the appellant joined the Military Engineering Service Department on 23.02.1990 in the pay scale of Rs. 2200-4000. In the appointment letter issued on 06.09.1989 the appellant was also informed that his pay would be fixed at the minimum of the pay scale, viz., Rs. 2200. The aforesaid appointment of the appellant was against a temporary post but the same was likely to continue indefinitely. The appellant was also placed on probation for a period of two years from the date of his appointment with a clear stipulation that his appointment could be terminated at any time on one month's notice given on either side without assigning any reason. The appellant continued to receive the aforesaid pay as fixed by the respondents till the month of September, 1991, i.e., for a period of more than one and a half years and thereafter he submitted three representations on 11.09.1991, 12.02.1992 and 14.12.1992 respectively claiming pay protection on the basis of a notification issued by the Ministry of Personnel, Public Grievances and Pensions [Department of Personnel & Training] dated 07.08.1989. In the said representations the appellant claimed that he was entitled to receive a salary of Rs. 3000/- per month, w.e.f., 23.2.1990 and not Rs. 2200/-.

5. While the aforesaid representations of the appellant were being considered by the respondents, another notification came to be issued on 28.02.1992 by the Department of Personnel & Training extending grant of pay protection to the employees of State Government Undertakings joining service in Central Government on and after 01.02.1990.

6. By a Communication dated 14.02.1995 the appellant was informed by the respondents that he is not entitled to such pay protection as claimed by him in the representations submitted by him.

7. Being aggrieved by the aforesaid communication dated 14.02.1995 communicating the rejection of the representations of the appellant for pay protection, the appellant filed an Original Application before the Central Administrative Tribunal [Jabalpur Bench], Jabalpur [for short "Tribunal"] claiming and seeking an order for giving him the pay protection which was last paid to him by the UPSEB. The Tribunal issued an order on 01.10.2002 directing the respondents to fix pay of the appellant by giving him pay protection within six months and also to pay him the arrears of pay and allowances.

8. Aggrieved by the said order of the Tribunal the respondents-Union of India filed a Writ Petition which was registered as WP(S) No. 882 of 2003 before the Madhya Pradesh High Court, Gwalior Bench. The High Court after considering the facts of the case passed judgment and order dated 16.04.2009 holding that the appellant is not entitled to pay protection and, therefore, his claim was rejected. It was further held by the High Court that the Tribunal committed grave error in granting pay protection to the appellant. The appellant aggrieved by the aforesaid order of the High Court, preferred a Review Petition before the Madhya Pradesh High Court which was dismissed by order dated 11.09.2009 holding that there is no mistake apparent on the face of the records in the order impugned in the review petition. The aforesaid orders are challenged in the present appeals on which we heard the

learned counsel appearing for the parties and also perused the records.

9. The facts, which are stated hereinbefore, leading to filing of the present appeals are not disputed. The appellant joined the UP State Electricity Board on 01.01.1988 and while working with the Board he resigned from the service and at that time he was drawing the basic pay of Rs. 2750/- per month. Thereafter his resignation was accepted and he was released from the service of the UPSEB on 19.02.1990. The appellant was given the appointment to the post of Assistant Executive Engineer [Buildings and Roads] in Military Engineering Service [for short "MES"], Ministry of Defence and he joined the said post on 23.02.1990 and at the time of appointment his terms and conditions of appointment were clearly set out in the order of appointment whereby his pay was fixed in the pay sale of Rs. 2200-4000 with a stipulation that he would be paid basic salary of Rs. 2200 plus dearness allowance.

10. Reliance was placed by the appellant on the contents of the Memorandum dated 06.09.1989 which was in the nature of guidelines issued by the Ministry of Defence fixing the pay. A copy of the said memorandum is annexed to the memorandum of appeal as Annexure-P1.

11. Paragraph 1 of the said guidelines provided that as per the extant rules/orders, on fixation of pay, pay protection is granted to candidates who were appointed by the method of recruitment by selection through the Union Public Service Commission if such candidates are in Government service. It was also stipulated in the said paragraph 1 of the memorandum that no such pay protection would be granted to candidates working in public sector undertakings, universities, semi-Government institutions or autonomous bodies, when they are so appointed in Government.

12. Paragraph 2 thereof on which reliance was placed by the counsel appearing for the appellant provided that the

question as to how pay protection can be given in the case of candidates recruited from the public sector undertakings, etc., has been engaging the attention of the Government for sometime and that after careful consideration of the same the President was pleased to decide that in respect of candidates working in public sector undertakings, universities, semi-Government institutions, autonomous bodies, who were appointed as direct recruits on selection through a properly constituted agency including departmental authorities making recruitment directly their initial pay could be fixed at a stage in the scale of pay attached to the post so that the pay and DA already being drawn by them in their parent organisation may be protected. It was also stipulated therein that in the event of such a stage not being available in the post to which they have been recruited, their pay may be fixed at a stage just below in the scale of the post to which they have been recruited, so as to ensure a minimum loss to the candidates.

13. It is evident from the aforesaid stipulation in the relevant clause that such pay scale received is protected in the case of only Central Government Public Sector Undertakings, etc., inasmuch as the decision to grant such benefit was restricted specifically to Central Government employees and also employees of central government public sector undertakings. This position got fortified and clearly explained by the issuance of the subsequent notification dated 28.2.1992, to which reference is made immediately hereafter.

14. Reliance was placed by the counsel appearing for the appellant on the subsequent OM issued by the Department of Personnel and Training issued on 28.02.1992. The contents of the said notification/memorandum is extracted hereinbelow for easy reference and for better understanding: -

"DoPT OM NO.12/1/88-Estt (Pay-I) dated 28.2.1992.

"PAY PROTECTION ALSO TO CANDIDATES FROM STATE PSUs RECRUITED BY PROPER SELECTION TO

CENTRAL GOVERNMENT"

The Undersigned is directed to say that question of inclusion of employees of State Government undertakings within the purview of this Department's OM No. 12/1/88-Estt (Pay-I), dated 7.8.1989 has been engaging the attention of the Government for some time. The matter has been carefully considered and the president is pleased to decide that provisions of this Department's OM of even number dated 7.8.1989, may be extended to the employees of State Government Undertakings selected for posts in Central Government on direct recruitment basis as in case of Central Public Undertakings.

These orders take effect from the first of the month in which this OM is issued."

A bare perusal of the Memorandum would make it crystal clear that the employees of the State Government Undertakings selected for posts in Central Government on direct recruitment basis on and after 01.02.1992 were also extended the benefit of pay protection, as was provided in the case of the employees of Central Government Public Undertakings as per notification dated 07.08.1989.

15. In the aforesaid notification, it was clearly stipulated that the said benefit of pay protection is effective only from the first of the month in which the OM is issued, i.e., from 01.02.1992, which means that the said OM was given prospective effect only. Therefore, the said OM could even be said to be a clarification on the issue which is sought to be raised in the present case. It was clearly pointed out in the said notification that employees like the appellant would be entitled to get such pay protection, as employees of the State Government Undertakings on their appointment in Central Government service only from the effective date of 01.02.1992. If the appellant would have been appointed for a post in Central Government on direct recruitment basis after 01.02.1992 such

benefit of pay protection could have been made available to him. But since the appellant was selected and appointed to a post in Central Government on 23.02.1990 after working as an employee of the State Government Undertaking, viz., UPSEB, the notification dated 07.08.1989 was not applicable to him and, therefore, he could not have legally claimed for any pay protection.

16. Being fully aware of the aforesaid position the appellant accepted the appointment without any demur or protest on the issue of pay being given to him under the appointment order issued to him by the Military Engineering Service, Ministry of Defence, fixing his pay scale at the minimum of the pay scale of Rs. 2200. He accepted the said pay scale without raising any grievance and continued to receive the same till 11.09.1991, when for the first time he submitted his first representation for pay protection as per notification dated 07.08.1989.

17. The position with regard to the entitlement or otherwise of the appellant for getting pay protection was made clear by issuing the notification dated 28.02.1992 clearly stipulating therein that an employee of the State Government Undertaking selected for post in Central Government on direct recruitment basis would be entitled to pay protection upon appointment in Central Government only effective from 01.02.1992. The appellant having joined the MES, Ministry of Defence prior to the aforesaid date was not entitled to the benefit of the aforesaid notification which was issued much after his joining date and, therefore, the benefit of the aforesaid notification is not available to the appellant.

18. Counsel appearing for the appellant however sought to submit that to deny the benefit of the notification dated 28.02.1992 to the appellant was discriminatory in nature and in support of the said contention the counsel relied on the decision of this Court in the case of *T.S. Thiruvengadam v.*

Secretary to Government of India, Ministry of Finance, Deptt. of Expenditure, New Delhi reported in (1993) 2 SCC 174. In our considered opinion the ratio of the aforesaid decision was rendered in respect of case of pension which is a continuing cause of action. Facts of the said case are clearly distinguishable from the facts of the present case and, therefore, the ratio of the said decision is not applicable to the case in hand. There is an inherent clear distinction between the two concepts of pay protection and pension. So far getting pay protection is concerned, the said issue arises as soon as an employee joins his new post, where he gets his new pay scale and if he is entitled to any pay protection that is the stage and date when it is granted by whatever notifications, memorandums which are available and applicable at that stage laying down such rules regarding pay protection. At that stage what was operating in the field was the notification issued on 07.08.1989 which was not applicable to the appellant. The appellant also clearly understood the position and therefore based his entire claim and right on the subsequent notification dated 28.02.1992, although appointed to the post of Central Government on 23.02.1990.

19. In the present case it cannot be said that a notification issued after two years of the appointment of the appellant which is also specifically stated to have been issued with prospective effect is applicable in his case.

20. Consequently, we hold that the High Court was justified in setting aside the order of the Tribunal as the Tribunal has misread and misinterpreted the facts as also the legal principles in law.

21. We, therefore, find no merit in these appeals, which are dismissed, but, leaving the parties to bear their own costs.

N.J. Appeals dismissed.

UNION OF INDIA & ORS.
v.
JUJHAR SINGH
(Civil Appeal No. 4281 of 2006)

JULY 15, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Service Law:

Armed Forces – Army – Disability pension – Army personnel while on annual leave, suffered injuries in a road accident – Medical Board assessed his disability as 60% for two years – After superannuation with normal pension he claimed disability pension – HELD: The Medical Board clearly opined that the injury was neither attributable to nor connected with service – The injury which had no connection with military service cannot be termed as attributable to or aggravated by military service – The claim was rightly rejected by the authorities – Pension Regulations of the Army (Part-I), 1961 – Regulation 179 – Entitlement Rules, 1982 – Para 12(d) – Government of India Letter N0. 1(1)/81/(PEN)C/ Vol. II dated 27.10.1998.

Armed Forces – Claim for disability pension – Opinion of Medical Board – HELD: In the instant case, medical authorities have recorded a specific finding to the effect that disability is neither attributable to nor aggravated by the military service – The High Court has failed to appreciate that the Medical Board is a Specialized Authority composed of expert medical doctors and it is the final authority to give information regarding attributability and aggravation of the disability to the military service and the condition of service resulting in the disablement of the individual.

The respondent was enrolled in the Army on

27.06.1978. On 26.03.1987, when he was at his native place on annual leave, he met with an accident and sustained severe injuries and was hospitalized. After he joined the duty, he was kept under observation by the Medical Board and his disability was assessed as 60% for two years. The Medical Board also opined that the disability was neither attributable to nor aggravated by the military service. The respondent was superannuated from service w.e.f. 01.07.1998 and he was granted normal service pension. He made a representation claiming disability pension on the ground that he was having disability on the date of retirement. The representation was rejected. The respondent preferred a writ petition, which was allowed by the Single Judge of the High Court holding that the respondent was entitled to disability pension under Regulation 179 of the Pension Regulations for the Army, 1961. The Letters Patent appeal filed by the employers was dismissed by the Division Bench of the High Court. Aggrieved, the employers filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. It is not in dispute that the respondent was on annual leave when he met with a scooter accident as a pillion rider and sustained injuries on 26.03.1987 at his native place. He was not on military duty at the time of the accident in terms of Para 12 (d) of Entitlement Rules, 1982 as clarified by Government of India letter No.1(1)/81(PEN)C/Vol.II dated 27.10.1998. In view of the same, the injuries sustained cannot be held to be attributable to the military service. [para 8] [265-E-F]

1.2. The opinion of the Medical Board makes it clear that the injury is not attributable to service and it is not connected with service. The proceedings of the Court of Inquiry show that the injury of severe nature sustained by the respondent during his Annual Leave was not attributable to Military Service. Thus, the injury which had

no connection with the military service even though suffered during annual leave cannot be termed as attributable to or aggravated by military service. [paras 13,14 and 17] [270-A-B-G; 272-B-C]

Regional Director, E.S.I. Corporation and Another vs. Francis De Costa and Another, **1996 (5) Suppl. SCR 797 = (1996) 6 SCC 1 – relied on**

Ex. N.K. Dilbag vs. Union of India and Others, **2008 (106) Delhi Reported Judgment 865 – approved**

Union of India and Another vs. Baljit Singh **1996 (7) Suppl. SCR 626 =(1996) 11 SCC 315; and** *Secretary, Ministry of Defence and Others vs. A.V. Damodaran (dead) through LRs. and Others,* **2009 (13) SCR 416 = (2009) 9 SCC 140 – referred to.**

1.3. The Single Judge of the High Court failed to appreciate that under Regulation 179 of the Pension Regulations of the Army (Part-I), 1961, a personnel can be granted disability pension only if he is found suffering from disability which is attributable to or aggravated by military service and recorded by Service Medical Authorities. In the case on hand, medical authorities have recorded a specific finding to the effect that disability is neither attributable to nor aggravated by the military service. This fact has not been appreciated either by the Single Judge or by the Division Bench of the High Court, which without assigning any reason, by way of a cryptic order, confirmed the order of the Single Judge. The High Court has also failed to appreciate that the Medical Board is a Specialized Authority composed of expert medical doctors and it is the final authority to give information regarding attributability and aggravation of the disability to the military service and the condition of service resulting in the disablement of the individual. [para 16] [271-E-H]

1.4. The High Court failed to appreciate that even though the respondent sustained injuries while he was on annual leave in 1987, he was kept in service till superannuation and he was superannuated from service w.e.f. 01.07.1998. It is relevant to point out that he was also granted full normal pension as admissible under the Regulations. [para 17] [272-B-C]

1.5. The judgments of the Single Judge as well as the Division Bench of the High Court are set aside. It is made clear that the respondent is entitled to "full normal pension" which he is already getting as per the Regulations, but not entitled to "disability pension". [para 18] [272-F-G]

Case Law Reference:

1996 (5) Suppl. SCR 797	**relied on**	**para 9**
1996 (7) Suppl. SCR 626	**referred to**	**para 10**
2009 (13) SCR 416	**referred to**	**para 11**
2008 (106) Delhi Reported Judgment 865	**approved**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4281 of 2006.

From the Judgment & Order dated 4.1.2002 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 5 of 2002.

R. Balasubramaniam, Purnima Bhat Kak, Anil Katiyar, B.V. Balaram Das for the Appellants.

Respondent, In-Person.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal by Union of India is directed against the final judgment and order dated 04.01.2002 passed by the High Court of Punjab and Haryana at Chandigarh in L.P.A. No. 5 of 2002 whereby the Division Bench of the High Court dismissed their appeal in limine.

2. **Brief facts:**

(a) The respondent was enrolled in the Army on 27.06.1978. In the year 1987, when he was on annual leave to his native place, he met with an accident on 26.03.1987 and sustained severe injuries and was admitted in the hospital from 26.03.1987 to 20.01.1989. Subsequently, he was admitted in Military Hospital, Dehradun and after treatment was placed in medical category BEE (Permanent) and percentage of disability was ascertained as 20%. After he joined the duty, he was kept under observation by the Medical Board and his disability was assessed as 60% for two years. The Medical Board also opined that the disability was neither attributable to nor aggravated by the military service.

(b) The respondent was superannuated from service w.e.f. 01.07.1998 and he was granted normal service pension. He made a representation before the authorities claiming disability pension on the ground that he was having disability on the date of retirement. The representation was rejected by the authorities.

(c) Against the rejection of disability pension claim, the respondent preferred a writ petition being C.W.P. No. 14290 of 1999 before the High Court of Punjab and Haryana. Learned Single Judge of the High Court, by order dated 20.07.2001, allowed the writ petition by holding that the respondent herein is entitled for disability pension under Regulation 179 of the Pension Regulations for the Army, 1961 (hereinafter referred to as "the Regulations").

(d) Challenging the said order, the appellants herein

preferred L.P.A. No. 5 of 2002 before the Division Bench of the High Court. The Division Bench, by impugned judgment dated 04.01.2002, dismissed the appeal in limine. Aggrieved by the said judgment, the appellants preferred this appeal by way of special leave petition before this Court.

3. Heard Mr. R. Balasubramaniam, learned counsel for the appellant-Union of India and Mr. Jujhar Singh respondent, who appeared in person.

4. The questions that arise for consideration in this appeal are:

(a) Whether the case of the respondent for disability is covered under Regulation 179 of the Pension Regulations for the Army (Part I) 1961?

(b) Whether the disability in an accident suffered by the respondent during his annual leave while doing his personal work would amount to the disability attributable to or aggravated by military service?

5. **Discussion**:

We have already narrated the required factual details. It is seen that when the respondent was on annual leave, he met with a road accident at his native place and sustained grievous injuries resulting in permanent disability. It is further seen that after treatment and returning from his leave, he continued in military service and w.e.f. 01.07.1998, the respondent was superannuated from service and he was granted normal service pension. According to the respondent, since on the date of retirement, he was permanently disabled, he is entitled for disability pension for which he made a representation which was rejected by the authorities.

6. It was contended by the respondent before the learned Single Judge that at the relevant time when he had gone on leave he remained in military service and while attending to his

normal duties at home he suffered disability and later superannuated with the said disability, hence eligible for disability pension. The learned Single Judge arrived at a conclusion that the writ petitioner- respondent herein is entitled to disability pension as envisaged under Regulation 179 of the Regulations since he retired in normal course and he was not invalidated from military service on account of his disability but the fact is that he was suffering from disability on the date of retirement which is above the degree of 20%. He also concluded that as per Defence Service Regulations, when a defence personnel goes on leave, he is counted on duty unless the leave is determined as unauthorized leave. In this way, relying on Regulation 179, the learned Single Judge allowed the writ petition and directed the authorities to process the case of the writ petitioner (respondent herein) for granting disability pension in accordance with law. When this order was challenged by the Union of India before the Division Bench of the High Court, the Division Bench, by impugned order dated 04.01.2002, dismissed their appeal without assigning any reason.

7. In order to answer the above referred questions, it is useful to refer Regulation 179 which reads thus:

"Disability at the time of retirement/discharge

179. An individual retired/discharged on completion of tenure or on completion of service limits or on completion of terms of engagement or attaining the age of 50 years (irrespective of their period of engagement), if found suffering from a disability attributable to or aggravated by military service and recorded by Service Medical Authorities, shall be deemed to have been invalidated out of service and shall be granted disability pension from the date of retirement, if the accepted degree of disability is less than 20 per cent or more, and service element if the degree of disability is less than 20 per cent. The service pension/service gratuity, if already sanctioned and paid,

shall be adjusted against the disability pension/service element, as the case may be.

(2) the disability element referred to in clause (1) above shall be assessed on the accepted degree of disablement at the time of retirement/discharge on the basis of the rank held on the date on which the wound/injury was sustained or in the case of disease on the date of first removal from duty on account of that disease."

8. It is clear that if a person concerned found suffering from disability attributable to or aggravated by military service, he shall be granted disability pension. The other condition is that the disability is to be examined/assessed by Service Medical Authorities and based upon their opinion a decision has to be taken by the authority concerned. The respondent should satisfy the conditions specified in the Regulation. In this case, it is the definite stand of the authorities that disability has neither occurred in the course of employment nor attributable to or aggravated by military service. We have already pointed out and it is not in dispute that the respondent was on annual leave when he met with a scooter accident as a pillion rider and sustained injuries on 26.03.1987 at his native place. He was not on military duty at the time of the accident in terms of Para 12 (d) of Entitlement Rules, 1982 as clarified vide Government of India, Ministry referred letter No.1(1)/81(PEN)C/Vol.II dated 27.10.1998. In view of the same, the injuries sustained cannot be held to be attributable to the military service.

9. In this background, it is useful to refer decision of this Court in *Regional Director, E.S.I. Corporation and Another vs. Francis De Costa and Another,* (1996) 6 SCC 1. Though this decision arose under the Employees' State Insurance Act, 1948, we are of the view that since there is a similar provision in the Employees' State Insurance Act, namely, that the accident should have its origin in the employment and the same should have arisen out of and in the course of employment, the same is applicable to the case on hand. In that case, the respondent

employee while going to his place of employment (a factory), met with an accident at a place which was about only one kilometer away from the factory. The accident occurred at 4.15 p.m. while his duty-shift was to commence at 4.30 p.m. As a result of the accident, the respondent's collar bone was fractured. The question before this Court was whether the said injury amounted to "employment injury" within the meaning of Section 2(8) of the Employees' State Insurance Act, 1948 entitling the respondent to claim disablement benefit. Answering in the negative, this Court held "a road accident may happen anywhere at any time. But such accident cannot be said to have arisen out of employment, unless it can be shown that the employee was doing something incidental to his employment."

10. In *Union of India and Another vs. Baljit Singh* (1996) 11 SCC 315, the respondent therein was enrolled in the Army as an Apprentice on 30.03.1975 and was appointed in the service on regular basis w.e.f. 27.03.1977 in the EME 177 Battalion. While he was in service he had sustained moderately severe injury. On the basis of the opinion of the Medical Board, he was discharged from service as an invalidated man on 31.05.1981. In the writ petition filed by him, the High Court of Himachal Pradesh directed the authorities to pay him disability pension. This was challenged by the Union of India before this Court by way of appeal by special leave. From the materials placed, this Court concluded that it cannot be said that the sustenance of injury per se is on account of military service. The report of the Medical Board of doctors shows that it is not due to military service. Finally, it was held by this Court as under:

"In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service. Accordingly, we are of the view that the High Court was not totally correct in reaching that conclusion".

11. In *Secretary, Ministry of Defence and Others vs. A.V. Damodaran (dead) through LRs. and Others,* (2009) 9 SCC 140, the opinion of the Medical Board and acceptability or otherwise for awarding disability pension was considered. The short question that was considered in that case was whether the High Court was justified in ignoring the report of the Medical Board in which it was clearly mentioned that disability of A.V. Damodaran was neither attributable to nor aggravated by military service. On examination, the Medical Board had opined that the disability of A.V. Damodaran was not attributable to the military service nor has it been aggravated thereby and it is not connected with the service as schizophrenia is a constitutional disease. The legal representatives of A.V. Damodaran filed original writ petition before the High Court praying for grant of disability pension. By order dated 20.12.2000, the learned Single Judge allowed the original petition and declared that the individual was eligible to get disability pension under the provisions contained in the Pension Regulations for the Army, 1961 and such other enabling provisions. The Department filed a writ appeal before the High Court. The Division Bench dismissed the said appeal finding no reason to interfere with the discretion exercised by the learned Single Judge. After considering Regulation 173 which speaks about primary conditions for the grant of disability pension and various other earlier decisions, this Court concluded that the Medical Board is an expert body and its opinion is entitled to be given due weight, value and credence. In that case, the Medical Board has clearly opined that the disability of late A.V. Damodaran was neither attributable nor aggravated by military service. In this way, this Court concluded that the legal representatives of A.V. Damodaran are not entitled to disability pension. However, in the facts and circumstances of that case, this Court directed that the amounts which have already been paid to the LRs of deceased A.V. Damodaran towards disability pension may not be recovered from them.

12. In *Ex. N.K. Dilbag vs. Union of India and Others,* 2008

(106) Delhi Reported Judgment 865, a Full Bench of the Delhi High Court had an occasion to consider the similar issue and eligibility of disability pension by Armed Forces Personnel. After adverting to various decisions of this Court as well as of the High Courts, it concluded thus:

> "24. To sum up our analysis, the foremost feature, consistently highlighted by the Hon'ble Supreme Court, is that it requires to be established that the injury or fatality suffered by the concerned military personnel bears a causal connection with military service. Secondly, if this obligation exists so far as discharge from the Armed Forces on the opinion of a Medical Board the obligation and responsibility a fortiori exists so far as injuries and fatalities suffered during casual leave are concerned. Thirdly, as a natural corollary it is irrelevant whether the concerned personnel was on casual or annual leave at the time or at the place when and where the incident transpired. This is so because it is the causal connection which alone is relevant. Fourthly, since travel to and fro the place of posting may not appear to everyone as an incident of military service, a specific provision has been incorporated in the Pension Regulations to bring such travel within the entitlement for Disability Pension if an injury is sustained in this duration. Fifthly, the Hon'ble Supreme Court has simply given effect to this Rule and has not laid down in any decision that each and every injury sustained while availing of casual leave would entitle the victim to claim Disability Pension. Sixthly, provisions treating casual leave as on duty would be relevant for deciding questions pertaining to pay or to the right of the Authorities to curtail or cancel the leave. Such like provisions have been adverted to by the Supreme Court only to buttress their conclusion that travel to and fro the place of posting is an incident of military service. Lastly, injury or death resulting from an activity not connected with military service would not justify and sustain a claim for Disability Pension. This

is so regardless of whether the injury or death has occurred at the place of posting or during working hours. This is because attributability to military service is a factor which is required to be established."

In the light of our discussion, we fully endorse the views expressed by the Full Bench.

13. Mr. R. Balasubramaniam, learned counsel appearing for the Union of India has pressed into service the opinion of the Medical Board which reads as under:

"1. Did the disability/ies exist before entering service?

No.

2. (a) In respect of each disability the Medical Board on the evidence before it will express its views as to whether?

(i) It is attributable to service during peace or under field service condition; or

(ii) It has been aggravated thereby and remains so; or

(iii) It is not connected with service.

The Board should state fully the reasons in regard to each disability on which its opinion is based.

Disability	A	B	C
1. FRACTURE SHAFT OF TIBIA FEBULA (Lt) LOWER 1/3 2. SUPRA CONDYLAR FRACTURE FEMUR (Lt)"	No	No	Yes

It is pointed out that A, B and C refers (i), (ii) and (iii) which is not in dispute. The above opinion makes it clear that the injury, particularly, the fracture is not attributable to service and it is

not connected with service.

14. The proceedings of the Court of Inquiry are as under:

"Proceedings of a Court of Inquiry
Assembled at 19 GUARDS (ATGM) C/o 56 APO
On the day of 10 Jul 90
IN the order of Commanding Officer 19 Guards (ATGM)
For the purpose of Enquiring into the circumstances Under which No. 1367100 H NK Jujhar Singh met with an accident on 26 Mar 87 during his Annual leave.
(Vide BROS No. 160 dt. 06 May 89) PRESIDING OFFICER 10-4743
Lt. KK Singh
Members 1. JC-115678A Sub P.C. Sharma
2. JC-166001 XNb.Sub Diwani Chand

The Court having assembled pursuant to order proceed to examine the witnesses.

OPINION OF THE COURT

The opinion of the court is as under:-

(a) Inquiry of severe nature sustained by No.13677100 H. NK Jujhar Singh during his Annual Leave is not attributable to the Military Service.

(b) No. 1367100 H NK Jujhar Singh is not be blamed for the injury sustained to him during accident.

Presiding Officer Sd xxx

IC47438 F Lt. KK Singh

Member Sd xx

JC-115678A Sub PC Sharma

Sd xx

JC 16600 I X Nb Sub Diwani Chand."

15. The above factual details and materials show that first of all, the respondent herein sustained injuries in a road accident at his home town during his annual leave which was not attributable to the military service. It was strengthened from the opinion of the Medical Board that the injuries were not attributable to the service and it was also not connected with the service. In *A.V. Damodaran's* case (supra), this Court has emphasized the importance of the opinion of the Medical Board which is an expert body and its opinion is entitled to be given due weight, value and credence.

16. We are of the view that the learned Single Judge failed to appreciate that under Regulation 179 a personnel can be granted disability pension only if he is found suffering from disability which is attributable to or aggravated by military service and recorded by Service Medical Authorities. In the case on hand, medical authorities have recorded a specific finding to the effect that disability is neither attributable to nor aggravated by the military service. This fact has not been appreciated either by the learned Single Judge or by the Division Bench of the High Court. The High Court has also failed to appreciate that the Medical Board is a Specialized Authority composed of expert medical doctors and it is the final authority to give information regarding attributability and aggravation of the disability to the military service and the condition of service resulting in the disablement of the individual. These relevant facts have not been considered by the learned Single Judge and the Division Bench of the High Court.

17. As rightly pointed by the counsel for the Union of India, the High Court failed to appreciate that even though the respondent sustained injuries while he was on annual leave in 1987, he was kept in service till superannuation and he was superannuated from service w.e.f. 01.07.1998. It is relevant to point out that he was also granted full normal pension as admissible under the Regulations. In the case on hand, inasmuch as the injury which had no connection with the military service even though suffered during annual leave cannot be termed as attributable to or aggravated by military service. The member of the Armed Forces who is claiming disability pension must be able to show a normal nexus between the act, omission or commission resulting in an injury to the person and the normal expected standard of duties and way of life expected from member of such forces. Inasmuch as the respondent sustained disability when he was on annual leave that too at his home town in a road accident, the conclusion of the learned Single Judge that he is entitled to disability pension under Regulation 179 is not based on any material whatsoever. Unfortunately, the Division Bench, without assigning any reason, by way of a cryptic order, confirmed the order of the learned Single Judge.

18. In view of our discussion, the judgments of the learned Single Judge as well as the Division Bench are set aside. We make it clear that the respondent is entitled to "full normal pension" which he is already getting as per the Regulations, but not entitled to "disability pension". The appeal is allowed. No costs.

R.P. Appeal allowed.

##NEXT FILE

INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION
v.
UNION OF INDIA & OTHERS
IA NO.36 AND IA NO.44
IN
WRIT PETITION (C) No.967 OF 1989

JULY 18, 2011

[DALVEER BHANDARI AND H.L. DATTU, JJ.]

ADMINISTRATION OF JUSTICE:

Abuse of process of law – Chemical industries causing damage to the ecology by throwing untreated toxic sludge in the open – Toxic substances percolated deep into the bowels of earth polluting the acquifers and the sub-terrain supply of water as also rendering the soil unfit for cultivation – Supreme Court by its judgment dated 13.2.1996 directing to close down the industrial units and attachment of their plants, machinery and all other immovable assets as also directing remediation at the cost of the polluters industrial units – By order dated 4.11.1997, the cost of remediation assessed to Rs.37.385 crores – Review and curative petitions dismissed – Several interim applications filed by the industrial units also dismissed – Again two I As filed by the industrial units– HELD: This is a classic example of abuse of the process of law and is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex Court in particular – All the issues raised in the instant applications had already been argued and determined by an authoritative judgment of the Court – The applications have been filed to avoid liability to pay the amount for remediation and costs imposed by the Court on the 'polluter pays' principle – Permitting the parties to reopen the concluded judgment of the Court by filing repeated interlocutory applications is clearly

an abuse of the process of law and would have far reaching adverse impact on the administration of justice – The applicants had adequate opportunity and were heard by the Court on a number of occasions – The applications being devoid of any merit are dismissed with costs of Rs. 10 lakhs which would be utilised for carrying out remedial measures in the affected area – Environmental Law – 'Polluter pays' principle – Costs.

Finality of judgment – Chemical industrial units causing damage to ecology – Judgment by Supreme Court directing closure of industrial units and remediation at their cost – Review and curative petitions dismissed – Industrial units keeping on filing interim applications – Judgment of the Court not complied with – HELD: It should be presumed that every proceeding has gone through infiltration several times before the decision of the apex Court – The controversy between the parties must come to an end at some stage and the judgment of the apex Court must be permitted to acquire finality – Various cases of different jurisdictions discussed and exceptions indicated – A final judgment of this Court cannot be reopened by merely filing interlocutory applications where all possible legal remedies have been fully exhausted – In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of the Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice – The principles laid down in judgments of various cosurts summed up – Maxim, 'interest republicae ut sit finis litium' – Explained – Environmental law.

UNJUST ENRICHMENT:

Unjust enrichment –Concept of – Discussed – Held: Unjust enrichment of a person occurs when he has and

retains money or benefits which in justice and equity belong to another – In the instant case, by the judgment dated 13.2.1996 Supreme Court fixed the liability of the polluter industries – It was on the lines of a preliminary decree – By order dated 4.11.1997 the Court accepting the ascertainment, fixed the amount at Rs. 37.385 crores – The liability to pay arose on 4.11.1997 – This was in the lines of a final decree pursuant to a preliminary decree – Thus, the position of the polluter industrial units was of a 'judgment-debtor' – The industrial units did not pay the amount but sought to postpone the payment and in the meantime utilised the said amount and thereby got themselves benefited – As a consequence, State authorities were deprived of the use of that amount for taking remedial measures – It is settled principle that no one can take advantage of his own wrong – Whatever benefits a person has had or could have had by not complying with the judgment must be disgorged and paid to the judgment-creditor and not allowed to be retained by the judgment-debtor – This is the bounden duty and obligation of the court – Environmental Law.

RESTITUTION:

'Unjust enrichment' and 'restitution' – Explained – Held: The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders – Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money – It is not only disgorging all the benefits but making the creditor whole, i.e., ordering restitution in full, and not dependent on what he might have made or benefited is what justice requires – The need for restitution in relation to court proceedings gives full jurisdiction to the court to pass appropriate orders that levelises – The court has only to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether – Environmental law.

COMPOUND INTEREST:

Compound interest, keeping in view unjust enrichment and restitution – Discussed – Chemical industries causing damage to ecology – Supreme Court directing remediation at the cost of polluter industries – On 4.11.1997 industries directed to pay Rs.37.385 crores as remediation cost – Non-compliance of the order – Held: To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment, or to simply levelise, interest has to be calculated on compound basis as it also takes into account the inflationary trends – Some of the statute law provide only for simple interest and not compound interest – It is a matter of law reform which the Law Commission must take note of – Law Commission is suggested to consider and recommend necessary amendments in relevant laws – However, the power of the court to order compound interest by way of restitution is not fettered in any way – the applicants are directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid/recovered – Environmental law — Restitution – Unjust enrichment – Legislation – Code of Civil Procedure, 1908 – s.34.

COSTS:

Imposition of realistic costs and punitive costs – Held: In consonance with the principle of equity, justice and good conscience, courts should ensure that legal process is not abused by litigants in any manner – It is the bounden duty of courts to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and courts must ensure that there is no wrongful, unauthorised or unjust gain for anyone by the abuse of the process of court – Besides the realistic costs, courts would be fully justified even imposing punitive costs where legal process has been abused.

Writ Petition No.967 of 1989 was filed before the Supreme Court, stating that the chemical industries, namely, respondents no. 4 to 8 which were controlled by the same group, namely, Hindustan Agro Chemicals Limited (respondent no. 4) set up in village Bichhri, of district Udaipur in Rajashtan, had caused damage to the ecology of the village and the surrounding area inasmuch as the untreated toxic sludge had been thrown in the open in and around the complex by the said industrial units, and the toxic substances had percolated deep into the bowels of the earth polluting the aquifers and the sub-terrain supply of water rendering the water in the wells and the streams unfit for human consumption. It had even become unfit for cattle to drink and for irrigating the land. The soil had become polluted and unfit for cultivation, which was the main source of livelihood for the villagers. The Court by its judgment dated 13.2.1996, directed closure of all the plants and factories of respondents no. 4 to 8 located in the village, and attachment of their factories, plant, machinery and all other immovable assets; and applying the 'polluter pays' principle, directed that the whole of the contaminated area be developed as a green belt at the expense of respondents no. 4 to 8. On the basis of the report of the NEERI, the extent of contamination done by the plants of respondents 4 to 8 was evaluated; and, by order dated 4.11.1997 the industrial units were asked to pay Rs. 37.385 crores towards the costs of remediation to the government. The review the curative petitions were dismissed. However, the orders of the Court could not be implemented till date because respondent nos. 4 to 8 kept on filing interlocutory applications.

Respondent no. 4 (HACL) filed the instant I.A. 36 stating that as on date there was no pollution existing in the area, no remediation was required to be done in the area and, therefore, there was no necessity for the Court

to sell its assets in order to carry out any remediation in the area. The applicant, in support of its case sought to introduce before the Court the opinions of various experts engaged by it for the purpose. It was prayed that the Court may pass the consequential order directing forclosing the proceedings and to lift the attachment order dated 13.2.1996. By I.A. No. 44 respondent no. 4, prayed to seek an investigation into the reports of April, 1994 prepared by the NEERI, which was employed by the R.S.P.C.B. to evaluate the extent of contamination done by the applicant's plants in the village concerned.

Dismissing the I. As., the Court

HELD: 1.1. This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this Court delivered on 13.2.1996, the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex Court in particular. [para 1]

IAs 36 and 44

1.2. The applications are a serious attempt to discredit the NEERI report of 1996 once again. The sole object of filing of the application is to introduce before this Court recent reports prepared by experts at the behest of the applicant to demonstrate to the Court that before embarking upon remediation measures and for the said purposes putting the properties of the applicant to sale,

the status and conditions of water, soil and environment in the area be reviewed with a view to realistically ascertain whether any measures for remediation are called for at all in the area and if yes, then the nature and the current cost of the same may be ascertained. According to the applicant, the report of NEERI relied upon by this Court was not the authentic report which was officially prepared. There is a serious attempt to reopen the entire case which stands fully concluded by the judgment of this Court delivered on 13.2.1996. It may be pertinent to mention that even the review and curative petitions have also been dismissed but the applicant did not comply with the orders passed by this Court. The report had been considered by this Court at length on its own merits and the observations of the Court on the report are contained in the judgment pronounced by it on 13.2.1996. [para 29-31, 42, 49 and 64]

1.3. All issues raised in the applications have been argued and determined by an authoritative judgment of this Court in its judgment dated 13.2.1996. The applications have been filed to avoid liability to pay the amount for remediation and costs imposed by the Court on the settled legal principle, i.e. "polluter pays" principle. The applicant is making an effort to avoid compliance of the order/judgment of this Court delivered fifteen years ago. The tendency must be effectively curbed. The applicant cannot be permitted to avoid compliance of the final order of this Court by abusing the legal process and keep the litigation alive. The Court must discourage such tactics and ensure effective compliance of the Court's order. It is also the obligation and bounden duty of the court to pass such order where litigants are prevented from abusing the system. [para 47-48]

1.4. In its order dated 4.11.1997, this Court held that the remedial measures taken on the basis of the NEERI

report shall be treated as final; and *accepted the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National Productivity Council as the Project Management Consultant and held that the Ministry of Environment and Forests, Government of India has rightly made a demand for Rs.37.385 crores.* **The applicants had adequate opportunity and were heard by the court at length on number of occasions and only thereafter the writ petition was disposed of. The applicants now want to reopen the case by filing these interlocutory applications. [para 84 and 156]**

1.5. The applicants certainly cannot be provided an entry by back door method nor can the unsuccessful litigants to be permitted to re-agitate and reargue their cases. The applicants have filed these applications merely to avoid compliance of the order of the court. The applicants have been successful in their endeavour and have not permitted the judgment delivered on 3.2.1996 to acquire finality till date. It is strange that other respondents did not implement the final order of this Court without there being any order or direction of this Court. These applications being devoid of any merit deserve to be dismissed with heavy costs. [para 157]

M.C. Mehta and Another v. Union of India and Others (Oleum Gas Leak Case) **1987 (1) SCR 819 = (1987) 1 SCC 395;** *Rupa Ashok Hurra v. Ashok Hurra & Another* **2002 (2) SCR 1006 = (2002) 4 SCC 388;** *Indian Council for Enviro-Legal Action and others v. Union of India* and *Others* **1996 (2) SCR 503 = (1996) 3 SCC 212;** *M.C. Mehta v. Kamal Nath and others* **2000 (1) Suppl. SCR 389 = (2000) 6 SCC 213 – referred to.**

Minister for the environment and Heritage v. Greentree ***(No.3) [2004] FCA 1317*****,** *United States v. Hooker Chems and Plastics Corp.,* **722 F. Supp 960 (W.D.N.Y. 1989) – referred to.**

Public Liability Insurance Act, ***1991*** **111– referred to.**

FINALITY OF JUDGMENT

2.1. The maxim '*interest republicae ut sit finis litium*' says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage, it is necessary to put a quietus. It is not rare that in an adversarial system, despite the judges of the highest Court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door for a further appeal could be opening a flood gate which will cause more wrongs in the society at large at the cost of rights. It should be presumed that every proceeding has gone through infiltration several times before the decision of the apex Court. [para 114-115]

2.2. Departure from the normal principle that the court's judgment is final would be justified only when compelling and substantial circumstances make it necessary to do so. Such circumstances may be that a material statutory provision was not drawn to the court's attention at the original hearing or a manifest wrong has been done. Reviewing of various cases of different jurisdictions lead to irresistible conclusion that though the judgments of the apex Court can also be reviewed or recalled but it must be done in extremely exceptional circumstances where there is gross violation of principles of natural justice. It is reiterated that the finality of the judgment of the apex Court has great sanctity and unless there are extremely compelling or exceptional circumstances, the judgments of the apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed. [para 118, 153 and 219]

Union of India & Another v. Raghubir Singh (Dead) by L.Rs. **1989 (3) SCR 316 = (1989) 2 SCC 754;** *Mohd. Aslam*

v. Union of India & Others **1996 (3) SCR 782 = (1996) 2 SCC 749;** *Khoday Distilleries Ltd. and Another v. Registrar General, Supreme Court of India* **1995 (6) Suppl. SCR 190 = (1996) 3 SCC 114;** *Gurbachan Singh & Another v. Union of India & Another* **1996 (2) SCR 400 = (1996) 3 SCC 117;** *Babu Singh Bains and others v. Union of India and Others* **1996 (6) Suppl. SCR 120 = (1996) 6 SCC 565;** *P. Ashokan v. Union of India & Another* **1998 (1) SCR 717 = (1998) 3 SCC 56;** *Ajit Kumar Barat v. Secretary, Indian Tea Association & Others* **(2001) 5 SCC 42;** *Naresh Shridhar Mirajkar v. State of Maharashtra and another* **1966 SCR 744 = AIR 1967 SC 1;** *Mr. "X" v. Hospital "Z"* **(2000)9 SCC 439;** *Triveniben v. State of Gujarat* **1989 (1) SCR 509 = (1989) 1 SCC 678;** *Sumer v. State of U.P.* **2005 (7) SCC 220 (2005) 7 SCC 220;** *Sita Ram Bhandar Society, New Delhi v. Lieutenant Governor, Government of NCT, Delhi & Others* **2009 (14) SCR 507 = (2009) 10 SCC 501;** *M. Nagabhushana v. State of Karnataka and others* **2011 (2) SCR 435 = (2011) 3 SCC 408 – relied on.**

Regina v. Gough, **[1993] 1 A.C. 646;** *Dimes v. Proprietors of Grand Junction Canal,* **(1852) 3 H.L. Cases 759;** *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* **(No 2) (1999) 2 W.L.R. 272;** *Regina (Edwards) v Environment Agency and others* **[2010] UKSC 57,** *The (U.K.) Supreme Court Rules, 2009*, **2009 No. 1603 (L. 17);** *Wewaykum Indian Band v. Canada* **[2003] 2 SCR 259;** *Taylor Ventures Ltd. (Trustee of)* v. *Taylor* **2005 BCCA 350;** *State Rail Authority of New South Wales v. Codelfa Constructions Propriety Limited* **(1982) 150 CLR 29;** *Bailey v. Marinoff* **(1971) 125 CLR 529;** *DJL v. Central Authority* **(2000) 170 ALR 659;** *Lexcray Pty. Ltd. v. Northern Territory of Australia* **2003 NTCA 11;** *United States of America v. Ohio Power Company* **353 US 98 (1957), 149;** *Raymond G. Cahill v. The New York, New Haven and Hartford Railroad Company* **351 US 183;** *Re Transferred Civil Servants (Ireland) Compensation* **(1929) AC 242, 248-52; and** *State Rail*

Authority NSW v Codelfa Construction Pty Ltd **(1982) HCA 51 : (1982) 150 CLR 29,** *Smith v NSW Bar Association* **(1992) 176 CLR 252; and** *Autodesk Inc v Dyason* **(No 2) (1993) HCA 6 : (1993) 176 CLR 300 – referred to.**

2.3. However, a case stands on different footing where the aggrieved party filing a review or curative petition was not a party to the lis but the judgment adversely affected his interest or he was party to the lis was not served with notice of the proceedings and the matter proceeded as if he had notice. [para 153]

State of M.P. v. *Sugar Singh & Others* **2010 (3) SCR 159 - relied on**

2.4. This Court has consistently taken the view that the judgments delivered by this Court while exercising its jurisdiction under Article 136 of the Constitution cannot be reopened in a writ petition filed under Article 32 of the Constitution. In view of this legal position, a final judgment of this Court cannot be reopened by merely filing interlocutory applications where all possible legal remedies have been fully exhausted. In the facts of the instant case, it becomes abundantly clear that this Court delivered final judgment in this case way back in 1996. The said judgment has not been permitted to acquire finality because the respondent Nos. 4 to 8 had filed multiple interlocutory applications and has ensured non-compliance of the judgment of this Court. It may be pertinent to mention that even after dismissal of review and the curative petition on 18.7.2002, the applicants (respondent Nos. 4 to 8) have been repeatedly filing one petition or the other in order to keep the litigation alive. It is indeed astonishing that the orders of this Court have not been implemented till date. The applicants have made all possible efforts to avoid compliance of the judgment of this Court. This is a clear case of abuse of process of

the court. [para 220]

2.5. The controversy between the parties must come to an end at some stage and the judgment of this Court must be permitted to acquire finality. It would hardly be proper to permit the parties to file application after application endlessly. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice. [para 115]

Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur **1976 (3) SCR 99 = (1976) 4 SCC 124;** *Green View Tea & Industries* v. *Collector, Golaghat and Another* **(2002) 1 SCC 109;** *M/s Northern India Caterers (India) Ltd*. v. *Lt. Governor of Delhi* **1980 (2) SCR 650 = (1980) 2 SCC 167 – relied on**

2.6. The principles laid down in the judgments of various courts, can be enumerated as follows:

(i) The judgment of the apex Court has great sanctity and unless there are extremely compelling, overriding and exceptional circumstances, the judgment of the apex Court should not be disturbed, particularly, in a case where review and curative petitions have already been dismissed

(ii) The exception to this general rule is where in the proceedings the judge concerned failed to disclose the connection with the subject matter or the parties giving scope of an apprehension of bias and the judgment adversely affected the petitioner.

(iii) The other exception to the rule is that the circumstances incorporated in the review or curative petition are such that they must inevitably shake public confidence in the integrity of the administration of justice if the judgment or order is allowed to stand. [para 221]

These categories are illustrative and not exhaustive but only in such extremely exceptional circumstances the order can be recalled in order to avoid irremedial injustice. [para 222]

UNJUST ENRICHMENT

3.1. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice, equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. [para 171]

Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573;_"Justice, Courts and Delays" **by Dr. Arun Mohan – referred to.**

3.2. By the judgment dated 13.02.1996 this court fixed the liability but did not fix any specific amount, which was ordered to be ascertained. It was on the lines of a preliminary decree in a suit which determines the liability, but leaves the precise amount to be ascertained in further proceedings and upon the process of ascertainment being completed, a final decree for payment of the precise amount is passed. By judgment dated 4.11.1997 this Court, accepting the ascertainment, fixed the amount i.e. Rs.37.385 crores. The exact liability

was quantified which the applicant- HACL was under an obligation to pay. The liability to pay arose on that particular date i.e. 4.11.1997. This was in the lines of a final decree pursuant to a preliminary decree. On that judgment being passed, the position of the applicant in I.A. No.44 was that of 'judgment-debtor' and the applicant became liable to pay forthwith. [para 159-162]

3.3. Admittedly, the amount has not been paid. Instead, the applicants sought to postpone the payment by raising various challenges in this Court and in the meantime 'utilised' that money, i.e., benefited. As a consequence, the non-applicants (respondents-states herein) were 'deprived' of the use of that money for taking remedial measures. The challenge has now – nearly 14 years later – been finally decided against them. It is settled principle of law that no one can take advantage of his own wrong. [para 163 and 165]

3.4. Unless courts disgorge all benefits that a party availed by obstruction or delays or non-compliance, there will always be incentive for non compliance. Whatever benefits a person has had or could have had by not complying with the judgment must be disgorged and paid to the judgment creditor and not allowed to be retained by the judgment-debtor. This is the bounden duty and obligation of the court. In fact, it has to be looked from the position of the creditor. Unless the deprivation by reason of delay is fully restituted, the creditor as a beneficiary remains a loser to the extent of the un-restituted amount. [para 167-168]

Schock v. *Nash*, **732 A.2d 217, 232-33 (Delaware. 1999). USA);** *Fibrosa v. Fairbairn*, **[1942] 2 All ER 122;** *Nelson v. Larholt* **[1947] 2 All ER 751 – referred to.**

3.5. In order to neutralize any unjust enrichment and undeserved gain made by the litigants, while adjudicating,

the courts must keep the following principles in view:

(i) It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

(ii) When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

(iii) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

(iv) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

(v) No litigant can derive benefit from the mere pendency of a case in a court of law.

(vi) A party cannot be allowed to take any benefit of his own wrongs.

(vii) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

(viii) The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts. [para 223]

RESTITUTION

4.1. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. The terms 'unjust enrichment' and 'restitution' are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. The terms 'unjust enrichment' and 'restitution' are like the two shades of green – one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders. [para 179 and 182]

South-Eastern Coalfields **2003 (4) Suppl. SCR 651 = 2003 (8) SCC 648;** *Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs* **2005 (2) SCR 606 = (2005) 3 SCC 738 – relied on**

American Jurisprudence **2d. Volume 66 Am Jur 2d – referred to.**

4.2. Restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the

court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the court's own process, along with time delay, to do injustice. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether. [para 183-184]

Bank of America Canada vs Mutual Trust Co. **[2002] 2 SCR 601 = 2002 SCC 43 – referred to.**

Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another **[2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294 – referred to.**

4.3. The liability may also be understood in the form of recovery of a bank loan. If payment of an amount equivalent of what the ledger account in the bank on a clean loan would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. This is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefitted is what justice requires. [para 188-190]

Grindlays Bank Limited vs Income Tax Officer, Calcutta **(1980) 2 SCC 191;** *Ram Krishna Verma and Others vs State of U.P. and Others* **1992 (2) SCR 378 = (1992) 2 SCC** *Kavita Trehan vs Balsara Hygiene Products* **1994 (1) Suppl. SCR 340 = (1994) 5 SCC 380 ;** *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another* **1999 (1) SCR 311 = (1999) 2 SCC 325 - relied on**

Padmawati vs Harijan Sewak Sangh **- CM (Main) No.449 of 2002 decided by the Delhi high Court on 6.11.2008, approved .**

Compound Interest

4.4. 'Compound interest' is 'interest paid on both the principal and the previously accumulated interest.' It is a method of arriving at a figure which nears the 'Time Value of Money'. Compound interest is a norm for all commercial transactions. [para 205-206]

Alok Shanker Pandey vs Union of India & Others **2007 (2) SCR 737 = (2007) 3 SCC 545 – relied on.**

Black's Law Dictionary, **Eighth Edition (Bryan A. Garner) page 830;and** *'The Principles of the Law of Restitution*" **(at pp26-27) by Graham Virgo – referred to.**

4.5. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment– or to simply levelise – a convenient approach is calculating interest. But here interest has to be calculated on compound basis – and not simple – for the latter leaves much uncalled for benefits in the hands of the wrongdoer. [para 202]

4.6. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors, i.e., use of the money and the inflationary trends, as the market forces and predictions work out.

[para 203]

Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another **1999 (1) SCR 311 = (1999) 2 SCC 325;** *Ouseph Mathai and others v. M. Abdul Khadir* **2001 (5) Suppl. SCR 118 = (2002) 1 SCC 319;** *South Eastern Coalfields Limited v. State of M.P. and others* **2003 (4) Suppl. SCR 651 = (2003) 8 SCC 648;** *Amarjeet Singh and others v. Devi Ratan and others* **2009 (15) SCR 1010 = (2010) 1 SCC 417;** *Kalabharati Advertising v. Hemant Vimalnath Narichania and others* **2010 (10) SCR 971 = (2010) 9 SCC 437 – relied on.**

LEGAL POSITION UNDER THE CODE OF CIVIL PROCEDURE

4.7. One reason the law has not developed on this is because of the wording of s. 34 of the Code of Civil Procedure, 1908 which still proceeds on the basis of simple interest. In fact, it is this difference which prompts much of our commercial litigation because the debtor feels – calculates and assesses – that to cause litigation and then to contest with obstructions and delays will be beneficial because the court is empowered to allow only simple interest. A case for law reform on this is a separate issue. [para 191]

4.8. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on administration of justice. The Law Commission is requested to consider and recommend necessary amendments in relevant laws. However, the power of the court to order compound interest by way of restitution is not fettered in any way. [para 204]

4.9. In the point under consideration, which does not arise from a suit for recovery under the Code of Civil Procedure, the inherent powers of the Court and the principles of justice and equity are each sufficient to enable an order directing payment of compound interest. The power to order compound interest as part of restitution cannot be disputed, otherwise there can never be restitution. [para 192]

4.10. The Court in its order dated 04.11.1997 while accepting the report of the MOEF directed the applicant – M/s Hindustan Agro Chemical Ltd. to pay a sum of Rs.37.385 crores towards the costs of remediation. The amount which ought to have been deposited way back in 1997 has yet not been deposited by keeping the litigation alive. This Court is clearly of the opinion that the applicant-industry concerned must deposit the amount as directed by this Court by order dated 4.11.1997 with compound interest. The applicant-industry has deliberately not complied with the orders of this court since 4.11.1997. Thousands of villagers have been adversely affected because no effective remedial steps have been taken so far. The applicant-industry has succeeded in their design in not complying with the court's order by keeping the litigation alive. Consequently, the applicant-industry is directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid or recovered. [para 226- 227]

Costs:

5.1. In consonance with the principle of equity, justice and good conscience judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to

abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.[para 216]

5.2. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases. [para 217]

Ramrameshwari Devi and Others v. Nirmala Devi and Others **2011(6) Scale 677 – relied on.**

5.3. Even after final judgment of this Court, the litigation has been kept alive for almost 15 years. The respondents have been compelled to defend this litigation for all these years. Enormous court's time has been wasted for all these years. On consideration of the totality of the facts and circumstances of this case, the applicant-industry is directed to pay costs of Rs.10 lakhs in both the Interlocutory Applications. The amount of costs would also be utilized for carrying out remedial measure in village Bichhri and surrounding areas in Udaipur District of Rajasthan on the direction of the authorities concerned. [para 228-229]

Case Law Reference:

1987 (1) SCR 819	referred to	para 21
2002 (2) SCR 1006	referred to	para 66
1996 (2) SCR 503	referred to	para 75
2000 (1) Suppl. SCR 389	referred to	para 102
[2004] FCA 1317	referred to	para 104
722 F. Supp 960 (W.D.N.Y. 1989)	referred to	para 106
1976 (3) SCR 99	relied on	para 116
2002 (1) SCC 109	relied on	para 117
1980 (2) SCR 650	relied on	para 118
1989 (3) SCR 316	relied on	para 119
1996 (3) SCR 782	relied on	para 120
1995 (6) Suppl. SCR 190	relied on	para 121
1996 (2) SCR 400	relied on	para 122
1996 (6) Suppl. SCR 120	relied on	para 123
1998 (1) SCR 717	relied on	para 124
2001 (5) SCC 42	relied on	Para 125
1966 SCR 744	relied on	para 125
(2000)9 SCC 439	relied on	para 127

1989 (1) SCR 509 relied on para 128

2005 (7) SCC 220 relied on para 130

2009 (14) SCR 507 relied on para 131

2011 (2) SCR 435 relied on para 132

[1993] 1 A.C. 646 referred to para 136

(1852) 3 H.L. Cases 759 referred to para 136

(No 2) (1999) 2 W.L.R. 272 referred to para 137

2010] UKSC 57 referred to para 139

2009 No. 1603 (L. 17) referred to para 139

[2003] 2 SCR 259 referred to para 141

2005 BCCA 350 referred to para 141

(1982) 150 CLR 29 referred to para 144

(1971) 125 CLR 529 referred to para 145

(2000) 170 ALR 659 referred to para 146

2003 NTCA 11 referred to para 147

353 US 98 (1957) referred to para 148

351 US 183 referred to para 149

(1929) AC 242, 248-52 referred to para 151

(1982) HCA 51 referred to para 151

(1992) 176 CLR 252 referred to para 151

(No 2) (1993) HCA 6 :

(1993) 176 CLR 300 referred to para 152

2010 (3) SCR 159 relied on para 155

732 A.2d 217, 232-33

(Delaware. 1999). USA referred to para 172

1942] 2 All ER 122 referred to para 174

[1947] 2 All ER 751 referred to para 175

2003 (4) Suppl. SCR 651 relied on para 180

2005 (2) SCR 606 relied on para 180

2007] UKHL 34 = [2007] 3 WLR 354= [2008] 1 AC 561 =

[2007] All ER (D) 294 referred to para 184

[2002] 2 SCR 601 referred to para 186

1980 (2) SCR 765 relied on para 193

1992 (2) SCR 378 relied on para 194

1994 (1) Suppl. SCR 340 relied on para 195

1999 (1) SCR 311 relied on para 196

CM (Main) No.449 of 2002 decided

by the Delhi High Court

on 6.11.2008, approved para 197

2007 (2) SCR 737 relied on para 201

1999 (1) SCR 311 relied on para 208

2001 (5) Suppl. SCR 118 relied on para 209

2003 (4) Suppl. SCR 651 relied on para 210

2009 (15) SCR 1010	**relied on**	**para 213**
2010 (10) SCR 971	**relied on**	**para 214**
2011(6) Scale 677	**relied on**	**para 217**

CIVIL ORIGINAL JURISDICTION : I.A. No. 36 & 44.

In

Writ Petition (Civil) No. 967 of 1989.

Under Article 32 of the Constitution of India.

Gopal Subramanium, SG, Dr, Manish Singhvi, AAG, Shanti Bhushan, Vikas Singh, Dr. Rajeev Dhawan, M.C. Mehta, K.R. Rajasekaran Pillai, Prashant Bhushan, Rohit Kumar Singh, Amrita Narayan, Udita Singh, Satyakam, B.V. Balram Das, K.B. Rohtagi, Manoj Aggarwal, Aparna Rohatgi Jain, Mahesh Kasana, Devander Kr. Devesh, R. Gopalakrishnan, S.K. Dhingra, Milind Kumar (for Aruneshwar Gupta), T. Raja Shail Kumar Dwivedi, B. Vijayalkshmi Menon, Dinesh Mathur, Saurabh Jain, Rameshwar Prasad Goyal, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this court (date of judgment 13th February, 1996) the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex court in particular.

2. An environmentalist organisation brought to light the sufferings and woes of people living in the vicinity of chemical industrial plants in India. This petition relates to the suffering of people of village Bichhri in Udaipur District of Rajasthan. In the Writ Petition No.967 of 1989, it was demonstrated how the conditions of a peaceful, nice and small village of Rajasthan were dramatically changed after respondent no. 4 Hindustan Agro Chemicals Limited started producing certain chemicals like Oleum (concentrated form of sulphuric acid) and Single Super Phosphate. Respondent numbers 4 to 8 are controlled by the same group and they were known as chemical industries. The entire chemical industrial complex is located within the limits of Bichhri village, Udaipur, Rajasthan. Pursuit of profit of entrepreneurs has absolutely drained them of any feeling for fellow human beings living in that village.

3. The basic facts of this case are taken from the judgment delivered in the Writ Petition No.967 of 1989. In the beginning of the judgment of this court delivered on February 13, 1996, it is observed as under:

> "It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialisation and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them -particularly, if they are men with means. Strong words indeed - but nothing less would reflect the deep sense of hurt, the hearing of this case has instilled in us."

4. It seems that the court was prophetic when it made

observation that at times men with means are successful in avoiding compliance of the orders of this court. This case is a classic illustration where even after decade and a half of the pronouncement of the judgment by this court based on the principle of 'polluter pays', till date the polluters (concerned industries in this case) have taken no steps to ecologically restore the entire village and its surrounding areas or complied with the directions of this court at all. The orders of this court were not implemented by keeping the litigation alive by filing interlocutory and interim applications even after dismissal of the writ petition, the review petition and the curative petition by this court.

5. In the impugned judgment, it is mentioned that because of the pernicious wastes emerging from the production of 'H' acid, its manufacture is stated to have been banned in the western countries. But the need of 'H' acid continues in the West and that need is catered to by the industries like the Silver Chemicals and Jyoti Chemicals in this part of the world.

6. In the impugned judgment, it is also mentioned that since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic sludge was thrown in the open in and around the complex, the toxic substances have percolated deep into the bowels of the earth polluting the aquifers and the sub-terrain supply of water. The water in the wells and the streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating the land. The soil has become polluted rendering it unfit for cultivation, which is the main source of livelihood for the villagers. The resulting misery to the villagers needs no emphasis. It spreads disease, death and disaster in the village and the surrounding areas. This sudden degradation of earth and water had an echo in Parliament too and the concerned Minister said that action was being taken, but nothing meaningful was done on the spot. The villagers then rose in virtual revolt leading to the imposition of Section 144 of the Criminal Procedure Code by the District Magistrate in the area and the closure of Silver Chemicals in January, 1989. It is averred by the respondents that both the units, Silver Chemicals and Jyoti Chemicals have stopped manufacturing 'H' acid since January, 1989 and are closed. We may assume it to be so, yet the consequences of their action remain - the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy.

7. The Rajasthan State Pollution Control Board (for short "R.S.P.C.B.") in pursuance of the show cause notice filed a counter affidavit and stated the following averments:

(a) Re.: Hindustan Agro Chemicals Limited (respondent for short) [R-4]: The unit obtained 'No-Objection Certificate' from the R.S.P.C.B. for manufacturing sulphuric acid and Aluminum sulphate. The Board granted clearance subject to certain conditions. Later 'No-Objection Certificate' was granted under the Water [Prevention and Control of Pollution] Act, 1974 [Water Act] and Air (Prevention and Control of Pollution) Act, 1981 [Air Act], again subject to certain conditions. However, this unit changed its product without clearance from the Board. Instead of sulphuric acid, it started manufacturing Oleum and Single Super Phosphate [S.S.P.]. Accordingly, consent was refused to the unit on February 16, 1987. Directions were also issued to close down the unit.

(b) Re.: Silver Chemicals [R-5]: This unit was promoted by the fourth respondent without obtaining 'No-Objection Certificate' from the Board for the manufacture of 'H' acid. The waste water generated from the manufacture of 'H' acid is highly acidic and contains very high concentration of dissolved solids along with several dangerous pollutants. This unit was commissioned in February, 1988 without

obtaining the prior consent of the Board and accordingly, notice of closure was served on April 30, 1988. On May 12, 1988, the unit applied for consent under Water and Air Acts which was refused. The Government was requested to issue directions for cutting off the electricity and water to this unit but no action was taken by the Government. The unit was found closed on the date of inspection, viz., October 2, 1989.

(c) Re.: Rajasthan Multi Fertilizers [R-6]: This unit was installed without obtaining prior 'No-Objection Certificate' from the Board and without even applying for consent under Water and Air Acts. Notice was served on this unit on February 20, 1989. In reply thereto, the Board was informed that the unit was closed since last three years and that electricity has also been cut off since February 12, 1988.

(d) Re.: Phosphates India [R-7]: This unit was also established without obtaining prior 'No-Objection Certificate' from the Board nor did it apply for consent under the Water and Air Acts. When notice dated February 20, 1989 was served upon this unit, the Management replied that this unit was closed for a long time.

(e) Re.: Jyoti Chemicals [R-8]: This unit applied for 'No-Objection Certificate' for producing ferric alum. 'No-Objection Certificate' was issued imposing various conditions on April 8, 1988. The 'No-Objection Certificate' was withdrawn on May 30, 1988 on account of non-compliance with its conditions. The consent applied for under Water and Air Acts by this unit was also refused. Subsequently, on February 9, 1989, the unit applied for fresh consent for manufacturing 'H' acid. The consent was refused on May 30, 1989. The Board has been keeping an eye upon this unit to ensure that it does not start the manufacture of 'H' acid. On October 2, 1989, when the unit was inspected, it was found closed.

8. The Government of Rajasthan filed counter-affidavit on January 20, 1990. The Para 3 of the affidavit reads as under:-

> "That the State Government is now aware of the pollution of under-ground water being caused by liquid effluents from the firms arrayed as Respondent Nos. 4 to 8 in the writ petition. Therefore, the State Government has initiated action through the Pollution Control Board to check further spread of pollution."

9. The State Government stated that the water in certain wells in Bichhri village and some other surrounding villages has become unfit for drinking for human beings and cattle, though in some other wells, the water remains unaffected.

10. The Ministry of Environment and Forests, Government of India (for short 'MOEF') in its counter affidavit filed on February 8, 1990 stated that M/s. Silver Chemicals was merely granted a Letter of Intent but it never applied for conversion of the Letter of Intent into industrial licence. Commencing production before obtaining industrial licence is an offence under Industries [Development and Regulation] Act, 1951. So far as M/s. Jyoti Chemicals is concerned, it is stated that it has not approached the Government at any time even for a Letter of Intent. The Government of India stated that in June, 1989, a study of the situation in Bichhri village and some other surrounding villages was conducted by the Centre for Science and Environment. A copy of their report was enclosed with the counter affidavit. The report states the consequences emanating from the production of 'H' acid and the manner in

which the resulting wastes were dealt with by Respondents Nos. 4 to 8 thus:

> "The effluents are very difficult to treat as many of the pollutants present are refractory in nature. Setting up such highly polluting industry in a critical ground water area was essentially ill-conceived. The effluents seriously polluted the nearby drain and overflowed into Udaisagar main canal, severely corroding its cement-concrete lined bed and banks. The polluted waters also seriously degraded some agricultural land and damaged standing crops. On being ordered to contain the effluents, the industry installed an unlined holding pond within its premises and resorted to spraying the effluent on the nearby hill-slope. This only resulted in extensive seepage and percolation of the effluents into ground water and their spread down the aquifers. Currently about 60 wells appear to have been significantly polluted but every week a few new wells, down the aquifers start showing signs of pollution. This has created serious problems for water supply for domestic purposes, cattle-watering crop irrigation and other beneficial uses, and it has also caused human illness and even death, degradation of land and damage to fruit, trees and other vegetation. There are serious apprehensions that the pollution and its harmful effects will spread further after the onset of the monsoon as the water percolating from the higher parts of the basin moves down carrying the pollutants lying on the slopes - in the holding pond and those already underground."

11. This court passed number of orders during the period 1989-1992.

12. On February 17, 1992, this Court passed a fairly elaborate order observing that respondent nos. 5 to 8 are responsible for discharging the hazardous industrial wastes; that the manufacture of 'H' acid has given rise to huge quantities of iron sludge and gypsum sludge - approximately 2268 MT of gypsum-based sludge and about 189 mt. of iron-based sludge; that while the other respondents blamed respondent no.9 as the main culprit but respondent no. 9 denied any responsibility, therefore, according to the Courts, the immediate concern was the appropriate remedial action. The report of the R.S.P.C.B. presented a disturbing picture. It stated that the respondents have deliberately spread the hazardous material/sludge all over the place which has only heightened the problem of its removal and that they have failed to carry out the orders of this Court dated April 4, 1990. Accordingly, this Court directed the MOEF to depute its experts immediately to inspect the area to ascertain the existence and extent of gypsum-based and iron-based sludge, to suggest the handling and disposal procedures and to prescribe a package for its transportation and safe storage. The cost of such storage and transportation was to be recovered from the concerned respondents.

13. Pursuant to the above order, a team of experts visited the area and submitted a report along with an affidavit dated March 30, 1992. The report presented a highly disturbing picture. It stated that the sludge was found inside a shed and also at four places outside the shed but within the premises of the complex belonging to the respondents. It further stated that the sludge has been mixed with soil and at many places it is covered with earth. A good amount of sludge was said to be lying exposed to sun and rain.

14. The report stated: "Above all, the extent of pollution in the ground water seems to the very great and the entire aquifer may be affected due to the pollution caused by the industry. The organic content of the sludge needs to be analysed to assess the percolation property of the contents from the sludge. It is also possible that the iron content in the sludge may be very high which may cause the reddish colouration. As the mother liquor produced during the process (with pH-1) was highly

acidic in nature and was indiscriminately discharged on land by the unit, it is possible that this might have eroded soil and caused the extensive damage. It is also possible that the organic contents of the mother liquor would have gone into soil with water together with the reddish colour." The report also suggested the mode of disposal of sludge and measures for re-conditioning the soil.

15. In view of the above report, the Court made an order on April 6, 1992 for entombing the sludge under the supervision of the officers of the MOEF. Regarding revamping of the soil, the Court observed that for this purpose, it might become necessary to stop or suspend the operation of all the units of the respondent but that, the Court said, requires to be examined further.

16. The work of entombment of sludge again faced several difficulties. While the respondents blamed the Government officers for the delay, the Government officials blamed the said respondents of non-cooperation. Several Orders were passed by this Court in that behalf and ultimately, the work commenced.

Orders passed in 1993, filing of Writ Petition (C) No. 76 of 1994 by Respondent No. 4 and the orders passed therein:

17. With a view to find out the connection between the wastes and sludge resulting from the production of 'H' acid and the pollution in the underground water, the Court directed on 20th August, 1993 that samples should be taken of the entombed sludge and also of the water from the affected wells and sent for analysis. Environment experts of the MOEF were asked to find out whether the pollution in the well water was on account of the said sludge or not. Accordingly, analysis was conducted and the experts submitted the Report on November 1, 1993. Under the heading "Conclusion", the report stated:

5.0 Conclusion

5.1 On the basis of the observations and analysis results, it is concluded beyond doubt that the sludge inside the emoted pit is the contaminated one as evident from the number of parameters analysed.

5.2 The ground water is also contaminated due to discharge of H- acid plant effluent as well as H-acid sludge/ contaminated soil leachiest as shown in the photographs and also supported by the results. The analysis result revealed good correlation between the colour of well water and H-acid content in it. The analysis results show high degree of impurities in sludge/soil and also in well water which is a clear indication of contamination of soil and ground water due to disposal of H-acid waste.

The report which is based upon their inspection of the area in September, 1993 revealed many other alarming features. It represents a commentary on the attitude and actions of the respondents. In Para-2, under the heading "Site Observations & Collection of Sludge/Contaminated Soil Samples", the following facts are stated:

2.1. The Central team, during inspection of the premises of M/s. HACL, observed that H-acid sludge (iron gypsum) and contaminated soil are still lying at different places, as shown in Figure 1, within the industrial premises(Photograph 1) which are the left overs. The area, where the solar evaporation pond was existing with H-acid sludge dumped here and there, was observed to have been leveled with borrowed soil (Photograph 2). It was difficult to ascertain whether the sludge had been removed before filling. However, there are visual evidences of contaminated soil in the area.

2.2 As reported by the R.S.P.C.B. representatives, about 720 tonnes out of the total contaminated soil and sludge scraped from the sludge dump sites is disposed of in six lined entombed pits covered by lime/flash mix, brick soling

and concrete (Photographs were placed on record). The remaining scraped sludge and contaminated soil was lying near the entombed pits for want of additional disposal facility. However, during the visit, the left over sludge and contaminated soil could not be traced at site. Inspection of the surrounding area revealed that a huge heap of foreign soil of 5 metre height heap of foreign soil of 5 metre height (Photograph was placed on record) covering a large area, as also indicated in Fig. I, was raised on the sloppy ground at the foot hill within the industry premises. The storm water run-off pathway over the area showed indication of H-acid sludge leachate coming out of the heap. Soil in the area was sampled for analysis.

2.3 M/s. HACL has a number of other industrial units which are operating within the same premises without valid consents from the R.S.P.C.B. These plants are sulphuric acid (H2SO4), fertilizer (SSP) and vegetable oil extraction. The effluents of these units are not properly treated and the untreated effluent particularly from the acid plant is passing through the sludge dump area playing havoc (Photograph was placed on record). The final effluent was collected at the outlet of the factory premises during operation of these units, at the time of groundwater monitoring in September 1993, by the RSPCB. Its quality was observed to be highly acidic (pH : 1.08, Conductivity : 37,100 mg/1, SO4 : 21,000 mg/1, Fe : 392 mg/1, COD : 167 mg/1) which was also revealed in the earlier visits of the Central teams. However, these units were not in operation during the present visit.

Under Para 4.2.1, the report stated inter alia:

The sludge samples from the surroundings of the (presently nonexistent) solar evaporation and the contaminated soil due to seepage from the newly raised dump site also exhibited very high values of the above mentioned parameters. This revealed that the contaminated soil is buried under the new dump found by the team.

25. So much for the waste disposal by the respondents and their continuing good conduct. To the same effect is the Report of the R.S.P.C.B. which is dated October 30, 1993.

26. In view of the aforesaid Reports, all of which unanimously point out the consequences of the 'H' acid production, the manner in which the highly corrosive waste water (mother liquor) and the sludge resulting from the production of 'H' acid was disposed of and the continuing discharge of highly toxic effluents by the remaining units even in the year 1993, the authorities [R.S.P.C.B.] passed orders closing down, in exercise of their powers Under Section 33A of the Water Act, the operation of the Sulphuric Acid Plant and the solvent extraction plant including oil refinery of the fourth respondent with immediate effect. Orders were also passed directing disconnection of electricity supply to the said plants.

The fourth respondent filed Writ Petition (C) No. 76 of 1994 in this Court, under Article 32 of the Constitution, questioning the said Orders in January, 1994. The main grievance in this writ petition was that without even waiting for the petitioner's [Hindustan Agro Chemicals Limited] reply to the show-cause notices, orders of closure and disconnection of electricity supply were passed and that this was done by the R.S.P.C.B. with a malafide intent to cause loss to the industry. It was also submitted that sudden closure of its plants is likely to result in disaster and, may be, an explosion and that this consideration was not taken into account while ordering the closure. In its Order dated March 7, 1994, this Court found some justification in the contention of the industry that the various counter-affidavits filed by the R.S.P.C.B. are self-contradictory. The Board was directed to adopt a

constructive attitude in the matter. By another Order dated March 18, 1994, the R.S.P.C.B. was directed to examine the issue of grant of permission to re-start the industry or to permit any interim arrangement in that behalf. On April 8, 1994, a 'consent' order was passed whereunder the industry was directed to deposit a sum of Rupees sixty thousand with R.S.P.C.B. before April 11, 1994 and the R.S.P.C.B. was directed to carry on the construction work of storage tank for storing and retaining ten days effluents from the Sulphuric Acid Plant. The construction of temporary tank was supposed to be an interim measure pending the construction of an E.T.P. on permanent basis. The Order dated April 28, 1994 noted the Report of the R.S.P.C.B. stating that the construction of temporary tank was completed on April 26, 1994 under its supervision. The industry was directed to comply with such other requirements as may be pointed out by R.S.P.C.B. for prevention and control of pollution and undertake any works required in that behalf forthwith. Thereafter, the matter went into a slumber until October 13, 1995.

NEERI REPORT:

27. At this juncture, it would be appropriate to refer to the Report submitted by NEERI on the subject of "Restoration of Environmental Quality of the affected area surrounding Village Bichhri due to past Waste Disposal Activities". This Report was submitted in April, 1994 and it states that it is based upon the study conducted by it during the period November, 1992 to February, 1994. Having regard to its technical competence and reputation as an expert body on the subject, we may be permitted to refer to its Report at some length:

18. The judgment also dealt with damaging of crops and fields. The finding of the Court was that the entire contaminated area comprising of 350 hectares of contaminated land and six abandoned dump sites outside the industrial premises has been found to be ecologically fragile due to reckless past disposal activities practised by M/s. Silver Chemicals Ltd. and M/s. Jyoti Chemicals Ltd. Accordingly, it is suggested that the whole of the contaminated area be developed as a green belt at the expense of M/s. Hindustan Agrochemicals Ltd. during the monsoon of 1994.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the respondents-industries made the following submissions:

(1) The respondents are private corporate bodies. They are not 'State' within the meaning of Article 12 of the Constitution. A writ petition under Article 32 of the Constitution, therefore, does not lie against them.

(2) The RSPCB has been adopting a hostile attitude towards these respondents from the very beginning. The Reports submitted by it or obtained by it are, therefore, suspect. The respondents had no opportunity to test the veracity of the said Reports. If the matter had been fought out in a properly constituted suit, the respondents would have had an opportunity to cross-examine the experts to establish that their Reports are defective and cannot be relied upon.;

(3) Long before the respondents came into existence, Hindustan Zinc Limited was already in existence close to Bichhri village and has been discharging toxic untreated effluents in an unregulated manner. This had affected the water in the wells, streams and aquifers. This is borne out by the several Reports made long prior to 1987. Blaming the respondents for the said pollution is incorrect as a fact and unjustified.

(4) The respondents have been cooperating with this Court in all matters and carrying out its directions faithfully. The Report of the R.S.P.C.B. dated November 13, 1992 shows that the work of entombment of the sludge was almost over. The Report states that the entire sludge would be stored in the prescribed manner within the next two days. In view of this report, the subsequent Report of the Central team, R.S.P.C.B. and NEERI cannot be accepted or relied upon. There are about 70 industries in India manufacturing 'H' acid. Only the units of the respondents have been picked upon by the Central and Sate authorities while taking no action against the other units. Even in the matter of disposal of sludge, the directions given for its disposal in the case of other units are not as stringent as have been prescribed in the case of respondents. The decision of the Gujarat High Court in Pravinbhai Jashbhai Patel case shows that the method of disposal prescribed there is different and less elaborate than the one prescribed in this case.

(5) The Reports submitted by the various so-called expert committees that sludge is still lying around within and outside the respondents' complex and/ or that the toxic wastes from the Sulphuric Acid Plant are flowing through and leaching the sludge and creating a highly dangerous situation is untrue and incorrect. The R.S.P.C.B. itself had constructed a temporary E.T.P. for the Sulphuric Acid Plant pursuant to the Orders of this Court made in Writ Petition (C) No. 76 of 1994. Subsequently, a permanent E.T.P. has also been constructed. There is no question of untreated toxic discharges from this plant leaching with sludge. There is no sludge and there is no toxic discharge from the Sulphuric Acid Plant.

(6) The case put forward by the R.S.P.C.B. that the respondents' units do not have the requisite permits/ consents required by the Water Act, Air Act and the Environment [Protection] Act is again unsustainable in law and incorrect as a fact. The respondents' units were established before the amendment of Section 25 of the Water Act and, therefore did not require any prior consent for their establishment.

(7) The proper solution to the present problem lies in ordering a comprehensive judicial enquiry by a sitting Judge of the High court to find out the causes of pollution in this village and also to recommend remedial measures and to estimate the loss suffered by the public as well as by the respondents. While the respondents are prepared to bear the cost of repairing the damage, if any, caused by them, the R.S.P.C.B. and other authorities should be made to compensate for the huge losses suffered by the respondents on account of their illegal and obstructionist policy adopted towards them.

(8) The decision in Oleum Gas Leak. Case has been explained in the opinion of Justice Ranganath Misra, CJ., in the decision in *Union Carbide Corporation etc. etc. v. Union of India etc. etc.* AIR 1992 SC 248. The law laid down in Oleum Gas leak Case is at variance with the established legal position in other Commonwealth countries.

20. The Court dealt with the submissions of the respondents in great detail and did not find any merit in the same.

21. In the impugned judgment, the Court heavily relied on the observations of the Constitution Bench judgment in *M.C. Mehta and Another v. Union of India and Others* (1987) 1 SCC 395 popularly known as *Oleum Gas Leak* Case, wherein it was held thus:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently. dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not….We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in *Ryland v. Fletcher* (1868) LR 3 HL 330.
>
> We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be corelated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."

22. This court in *M.C. Mehta's case (supra)* further observed as under:

> 31. We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in *Rylands v. Fletcher* apply or is there any other principle on which the liability can be determined? The rule in *Rylands v. Fletcher* was evolved in the year 1866 and it provides that

a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out part of the developmental programme, this rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous activities or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and exceptions. We in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England.

23. This Court applied the principle of Polluter pays and observed thus:

> "The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution.

Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The 'polluter pays' principle was promoted by the Organisation for Economic Co-operation and Development [OECD] during the 1970s when there was great public interest in environmental issues. During this time there were demands on government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialised society. Since then there has been considerable discussion of the nature of the polluter pays principle, but the precise scope of the principle and its implications for those involved in past, or potentially polluting activities have never been satisfactory agreed."

24. After hearing the learned counsel for the parties at length, this Court gave the following directions:

"1. The Central Government shall determine the amount required for carrying out the remedial measures including the removal of sludge lying in and around the complex of Respondents 4 to 8, in the area affected in village Bichhri and other adjacent villages, on account of the production of 'H' acid and the discharges from the Sulphuric Acid Plant of Respondents 4 to 8. Chapters-VI and VII in NEERI Report [submitted in 1994] shall be deemed to be the show-cause notice issued by the Central Government proposing the determination of the said amount. Within six weeks from this day, Respondents 4 to 8 shall submit their explanation, along with such material as they think appropriate in support of their case, to the Secretary, Ministry of Environment and Forests, Government of India