CHANDRAN @ MANICHAN @ MANIYAN
v.
STATE OF KERALA
(Criminal Appeal No. 1528 of 2005)

APRIL 4, 2011

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Abkari Act – s.57A – Spurious liquor trade – Improper mixing of noxious substance (methyl alchohol) with liquor led to death of 31 persons and blindness and grievous injuries to several persons – Allegation that the accused were engaged in the business of manufacture, storing, sale and supply of illicit liquor which resulted in the said liquor tragedy – Conviction of A-7 and his two brothers A-8 and A-4 u/s.57A(1)(ii), and A-25 and A-30 u/s.57A(2) – All accused sentenced to life imprisonment – On appeal, held: Methyl alcohol was used in mixing the liquor which was under the control of A-7 who was being helped by his brothers, servants and relatives – In order to be convicted u/s.57A, the prosecution is not required to prove that A-7 physically mixed the methyl alcohol or the injurious substance with the spirit – If A-7 directed his servants to mix methanol that would also be covered within the scope of the words 'mixes or permits to be mixed' in the Section – The knowledge of A-7 that methanol was being mixed, the fact that he was running the business along with his hirelings and the further fact that he used to be present at the time of the mixing are properly proved by the prosecution – A-8 is the real brother of A-7 and there are number of other circumstances to suggest that A-8 was actively engaged in the business – A-8 was an active member in carrying the said spurious liquor and the fact that a vehicle under his possession found from his premises had the trace of methanol is sufficient to hold that he had the necessary knowledge that methanol played a major part in the

business – The frequent calls of A-8 to his brother also show that he was actively involved in the business – It is not necessary that A-8 had to mix or permit to be mixed the noxious substance himself – A-4 was also thoroughly in the business like his brothers A-7 and A-8 – Conviction of A-8, A-7 and A-4 u/s.57A(1)(ii) and sentence of life imprisonment imposed thereunder accordingly maintained – As regards A-25, it is established that he used to take the liquor manufactured by A-7 and the same used to be supplied to him by A-4 and the same was distributed by him further – A-25 does not seem to have taken care that it was not mixed with methyl alcohol – Once this fact regarding the possession of methyl alcohol is proved, A-25 cannot argue that the possession of methyl alcohol was only incidental – The words "omits to take reasonable precaution" would cast a duty on him to see that the liquor that he sells is not mixed with poisonous substance – Again, under sub-section (5) of s.57A, he was bound to prove that he had taken reasonable precaution, as contemplated in sub-section (2) – No evidence that the accused discharged his burden in any manner – Therefore, his conviction for offence punishable u/s.57A(2) is justified – However, he should not be punished with life imprisonment – This accused has already undergone more than 10 years of imprisonment – Sentence brought down to the period already undergone by him – The case of A-30 more or less is identical with A-25 – There is enough evidence to show that A-30 was involved in the procurement of liquor from A-4 – He then packed it in the covers and supplied it – A-30 was also behind the bars for more than 10 years – His life imprisonment is also set aside and brought down to that already undergone by him.

Abkari Act – s.57A – Illicit liquor trade – Burden of proof – On whom – Held: The prosecution has the initial burden to suggest that the accused person was involved in the business of illicit liquor and that he knew the nature thereof – It is only then that the burden would shift to the accused to prove that

he had no means to know about the nature of the business or the fact that the liquor was being mixed with noxious substance like methanol – On facts, the prosecution had discharged its primary burden – The accused persons, more particularly, A-7, A-4 and A-8, did not offer any evidence so as to discharge the burden put against them..

Abkari Act – s.57A – Mixing of noxious substance with liquor – Liability under s.57A – Held: S.57-A is extremely general – Held: Offence under the Section is not limited to licence holders, but refers to anybody who mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life with any liquor – In addition to the mixing or permitting to be mixed, sub-section (2) of s.57A brings in the dragnet of the offence, a person who omits to take reasonable precaution to prevent the mixing of any noxious substance – For being convicted u/s.57A, it is not necessary that the person concerned must himself do the mixing.

Penal Code, 1860 – s.120B – Spurious liquor trade involving mixing of noxious substance (methyl alchohol) with liquor – Leading to death of 31 persons and blindness and grievous injuries to several persons – Allegations of conspiracy against accused-appellants – Held: On facts, it may not have been a conspiracy to mix the noxious substance but the fact of the matter is that in order to succeed in the business which itself was a conspiracy the accused mixed or allowed to be mixed methanol and used it so freely that ultimately 31 persons lost their lives – The prosecution clearly proved that there was a noxious substance which was likely to endanger the human life – Secondly, they proved that the substance was mixed, permitted to be mixed and was being regularly mixed with liquor – They thirdly proved that the persons mixing had the knowledge that methanol was a dangerous substance that aspect would be clear from the fact that after the tragedy A-7 went and punished his servants and

remonstrated them for 'not properly' mixing methanol with ethyl alcohol – Lastly, it is proved that as a result of mixing of methanol with the liquor and as a result of consuming such liquor as many as 31 persons lost their lives and number of others suffered grievous injuries.

Criminal Trial – Evidence of accomplice – Admissibility – Held: The evidence of an accomplice is admissible subject to the usual caution – On facts, even if the prosecution did not prosecute PW53 - a close relative of the accused, and used his evidence only as an accomplice, it was perfectly legal – The evidence of PW-53 was most natural and was not shaken in any manner in his cross-examination – He gave complete graphic description of the incident in question.

Spurious liquor trade – Role of the State – State Government to take definite steps for overhauling the system, by weeding out the corrupt by punishing them.

According to the prosecution, the accused-appellants were engaged in the illegal trade of spurious liquor adulterated with methyl alcohol which led to a tragedy in which 31 persons died, 6 persons lost their eyesight and 500 persons suffered serious injuries due to consumption of spurious liquor.

The appellants (A-7, his two brothers- A-4 and A-8, A-25, A-30 and one other accused, A-1, who died subsequently) were convicted by the Sessions Judge for offences punishable under Sections 120B, 302, 307, 326, 328 and 201 read with Section 34 of IPC as also under Sections 55(a) (g) (h) (i), 57A and 58 of the Abkari Act (a State Act for the State of Kerala) and sentenced to rigorous imprisonment for life. On appeal, the High Court set aside the conviction of the appellants under Sections 302 and Section 307, IPC, however, maintained their convictions under Section 57A(1)(ii) under the Abkari Act

along with convictions under Sections 324, 326, 328 and 201, IPC as also Section 55 (h) and (i) and 58 of the Abkari Act.

In the present appeals, the appellants challenged their conviction contending that the Courts below had mis-interpreted the provisions of Abkari Act, more particularly, Section 57A(1)(i) and (ii) as also Section 57A(2)(ii) and that the Courts below erred in convicting A-7 and his two brothers A-8 and A-4 u/s.57A(1)(ii), and in convicting A-25 and A-30 u/s.57A(2).

Disposing of the appeals, the Court

HELD:1.1. The original Section 57 of the Abkari Act provided the punishment for adulteration by the licenced vendor or manufacturer. Section 57A was added in the Act by Amendment Act No.21 of 1984. A plain reading of the Section would mean that now the offence is not limited to the licence holders, but refers to anybody who mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life with any liquor. The Section, therefore, is extremely general. In addition to the mixing or permitting to be mixed, sub-section (2) of Section 57A brings in the dragnet of the offence, a person who omits to take reasonable precaution to prevent the mixing of any noxious substance. Significantly if, as a result of such act of mixing of the liquor with noxious or dangerous substance death is caused, the extreme penalty of death also is provided. Imprisonment provided is for a term not less than three years but which may extend to imprisonment for life as also with a fine of Rs.50,000/-. Sub-section 3 is the punishment for possession of any liquor or intoxicating drug which is mixed with noxious substance or dangerous drug knowing it to be so. Sub-section (4) prohibits the bail and the conditions for grant

thereof. Sub-section (5) puts the burden of proving that the accused has not mixed or permitted to be mixed or has not omitted to take reasonable precautions to prevent the mixing, on the accused himself. Similarly, the burden would be on the accused to prove that while he was in possession of such liquor mixed with noxious or dangerous substance, he did not know that such substance was mixed with such liquor. Section 58 speaks for the possession of illicit liquor. [Paras 18, 19] [306-D; 308-H; 309-A-E]

1.2. Since the burden to prove the offence which normally lies on the prosecution under the criminal jurisprudence was shifted to the accused, it was but natural that the constitutional validity of Section 57A came to be challenged. However, in *P.N. Krishna Lal***, this Court proceeded to uphold the same. It held that the provisions did not violate Article 20 (3) of the Constitution and thus Section 57A was held to be valid. In this *locus classicus* this Court has described complete scope of section 57A as a whole with special reference to Section 57A (5). It is in this backdrop of this exposition of law that the Courts below were expected to decide upon the criminality of the accused involved. It is seen that in the instant case, the parameters fixed by this Court in the aforementioned judgment were scrupulously followed by the Courts below. [Paras 20, 22, 23] [309-F-G; 316-C-E]**

P.N. Krishna Lal & Ors. v. Govt. of Kerala & Anr. **1995 Suppl. (2) SCC 187: 1994(5) Suppl. SCR 526 – relied on.**

R.C. Cooper v. Union of India ***1970 (1) SCC 248: 1970 (3) SCR 530;*** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *Shambu Nath Mehra v. State of Ajmer* **[1956] SCR 199;** *C.S.D. Swamy v. The State*, **[1960] 1 SCR 461 – referred to.**

Salabiaku v. Grance **1988 13 EHRR 379;** *Woolmington*

v. Director of Public Prosecutions, **(1935) A.C. 462;** *Mancini v. Director of Public Prosecutions,* **(1942) A.C. 1;** *Reg. v. Edwards* **[1975] Q.B. 27;** *Ong Ah Chuan v. Public Prosecutor,* **(1981) A.C. 648;** *Queen v. Oakes*, **26 D.L.R, (4th) 200;** *Ed Tumey v. State of Ohio*, **(71) L.Ed. 749;** *Morrison v. California*, **78 Law. Ed. 664;** *United States v. Gainey*, **13, Law. Ed. 2nd. p. 658;** *Barnes v. United States*, **412 US 837;** *In County Court of Ulster, New York v. Samuel Allen*, **442 US 140;** *Herman Solem v. Jerry Buckley Helm*, **463 US 277;** *Timothy F. Leary v. U.S.*, **395 US 6 – referred to.**

2.1. A-7 appears to be the boss who was running this illegal business of liquor along with his family members including A-4 and A-8 and even their wives were not left behind which is clear from the fact that they were arrayed as accused along with others but could not be brought to book as they were absconding and hence their cases were separated. It appears to be an admitted position that 26 shops meant for selling toddy were being managed by this accused. He had the licence for running those toddy shops. He had obtained them in the auction using his own money. From the statements of the accused and from the documents, it is clear that a full-fledged business in illicit liquor was going on. The High Court referred to the oral evidence and also referred to number of documents to show that several buildings were owned, possessed and controlled by A-7 and his wife wherefrom A-7 conducted his liquor business. The High Court also made reference to other properties which were used by A-7 for the purpose of illicit business, which properties belonged to the mother-in-law of A-7. The High Court rightly came to the conclusion that it was A-7 who was controlling the whole affair. It is clear that methyl alcohol which was the main culprit, was not only a dangerously poisonous substance but was also used in mixing the liquor which was under the control of A-7 who was being helped by his brothers, servants and relatives. A-7 was

the captain of the whole team. [Paras 24, 25, 27, 28] [316-F-H; 318-F-G; 319-G-H; 320-G]

2.2. The reason why accused No.7 had to mix the methyl alcohol and/or methynol is not far to see. It is clarified from the evidence of PW-96 that A-7 had put the bid of Rs. 4 crores for the 26 toddy shops and even if all the toddy shops had worked in their full capacity he could not have recovered even half the amount and it was, therefore, that this idea of bringing ethyl alcohol, mixing it with methyl alcohol and creating various drinks like *Kalapani* etc. was mooted. The result thereof was for all to see which resulted in death of 31 persons. The High Court correctly observed that the basic reason for bidding for 26 shops for toddy was to get the legitimate godown for toddy. It is proved that those godowns, instead, were used not for storing toddy but for storing ethyl alcohol and mixing it with methyl alcohol for making enormous profits. It is not as if A-7 was selling only toddy. In addition to that he was creating various drinks preferably by mixing ethyl alcohol with methyl alcohol. Thus, there was a full liquor industry going on under his captainship. [Para 30] [321-C-F]

2.3. The last nail in the coffin is the evidence of PW-53, a close relative of A-7. He was supplying spirit to A-7 from various places. He has graphically described in his evidence as to how the spirit business was being done inasmuch as he deposed that the spirit used to be brought from the tankers and used to be collected in the syntex tanks and was filled in 35 litres cans. This spirit was used for making a drink called *Kalapani* by **mixing with essence and some toddy. It was then filled in the cans and dispatched in the vehicles. The evidence of this witness further goes on to show the position of godown which was used for the storage of ethyl alcohol and methyl alcohol. He referred to methyl alcohol as**

'essence'. He described that the spirit was brought from Karnataka and essence used to come on Thursdays in a white Fiat car. The Fiat car had a secret chamber. That car was identified as M.O.-24. The tank and the platform were built in the back seat and the front seat of the car. There were three valves attached to the same and 35 litres of methyl alcohol i.e. the essence could be carried in the said car. He gave a graphic description of mixture with spirit which ultimately was sold. He specifically named A-20, A-22, A-23 and A-21 who were supervising the mixing. In his evidence he has also specifically referred that he had seen M.O.-24, the car, importing the essence i.e. the methyl alcohol precisely two days prior to the liquor tragedy. He has also named A-16 and another boy who were the occupants of the said car. He also suggested that he and the other employees were filling up the essence in 10 cans. The High Court has referred to the further evidence on the part of this witness that in the night at about 10.30 p.m. the tanker lorry came with spirit and the said spirit was filled in the syntex tank and cans. Those half filled cans were then filled with the methyl alcohol meaning thereby it was mixed. He then went on to depose that the employees of A-4, namely, A-5, A-6, A-9 and A-10 came there with three vehicles and essence and they mixed up the essence with the spirit. He claimed that in all 60 cans were filled up and were dispatched in three cars for transporting to various places for sale. According to him after the tragedy, on the instructions of A-7, what was left in the syntex tank was poured in the river, un-used cans were removed and plastic covers were disposed of by setting fire and that A-7 had also taken adequate care to send away the employees for sometime and it was through him that the witness came to know that people had died by drinking the spirit supplied by A-4 and his employees due to a mistake in mixing by A-20 and A-22. [Para 31] [321-G-H; 322-A-H; 323-A-B]

2.4. For being convicted under Section 57A, it is not necessary that the person concerned must himself do the mixing. It is obvious that A-7 was the boss. In fact PW-53 describes him as the boss. It is, therefore, obvious that everything was done as per his command and if it was so, then in order to be convicted under Section 57A, the prosecution is not required to prove that A-7 physically mixed the methyl alcohol or the injurious substance with the spirit. Even if A-7 commanded his servants to mix up, he is equally guilty under the Section. In fact illegally importing ethyl alcohol and mixing the same with methanol was a regular trading activity on the part of A-7. The licences for running the toddy shops was merely a facade. He had undoubtedly put a very tall bid for those licences and could not have afforded to continue merely on the basis of those 26 toddy shops. Therefore, he gave his business a complete new turn, that is, instead of selling toddy through those outlets he started selling alcoholic drink prepared from ethyl alcohol and methanol and that illegally imported both and all this was going on with the corrupt cooperation of those who could have checked it. Therefore, it is a proved position from the evidence of PW-53 that A-7 was the boss of the illegal trade. He got the methanol imported and used his godown which he rightfully possessed on account of his licences for 26 shops. Therefore, his knowledge that methanol was being mixed, the fact that he was running the business along with his hirelings and the further fact that he used to be present at the time of the mixing are properly proved by the prosecution with the aid of testimony of PW-53 and are enough for a finding about Section 57A(1)(ii). It was not necessary that A-7 had physically mixed the methyl alcohol for his being convicted. It was actually done on his command and within his knowlege. His offence could also come within the definition on account of the other words of the Section '*or permits to be mixed*'. **While interpreting these**

words, namely, *'whoever mixes or permits to be mixed'* the real import of the words would have to be taken into consideration and thereby if A-7 directed his servants to mix methanol with methyl alcohol that would also be covered within the scope of the words '*mixes or permits to be mixed*' in the Section. It has already come in the evidence that all this mixing was done at the instance of, with the direction of and to the knowledge of the accused No.7. He was the king pin or the main actor on whom the huge business of liquor trade rested. It cannot, therefore, be said that the conviction under section 57A (1) (ii) was in any manner incorrect. [Paras 32, 34] [323-D-H; 324-A-B-G-H; 325-A-C]

2.5. There is no reason to discard the testimony of PW-53. The evidence was most natural and was not shaken in any manner in his cross-examination. He has given a complete graphic description of what happened. He has also spoken as to what happened when A-15 and A-7 came and A-7 gave a beating to A-20 asking him as to how mixing was not properly done. He then directed the whole remaining material to be poured into the river and to destroy the cans. Accordingly, as per the direction, the concoction in the Syntex tank was poured in the river and the cans and the covers were burnt and buried under the sand. He pointed out that the essence mixed spirit was taken to the shed belonging to A-7. He spoke about the electronic machine, hand machine and the process of filling the concoction in the plastic cans. He pointed out that on that day all the plastic covers were burnt by them. A-7 had also directed the witness and the other servants to remain absconding. In his cross-examination, he not only identified A-7 but called him Boss and Annan, elder brother. Some irrelevant questions were put to him which he answered suggesting that the property belonged to A-7 and the godown also belonged to him and the mixing used to be done there

only. Though he was subjected to lengthy cross-examination, the main story about the mixing has not suffered any dent. On the other hand, the operation of mixing was explained again in the cross-examination. He owned up that he himself carried Kalapani on number of occasions to the various shops of A-7. The evidence given by this witness sounds truthful because he has not tried to justify himself nor has he made any efforts to save himself. Considering the whole evidence, this witness is creditworthy. [Paras 35, 36] [326-C-H; 327-A-C]

2.6. The evidence of PW-60 provides complete corroboration to the evidence of PW-53. This is apart from the fact that there is another piece of evidence which corroborates the evidence of PW-53 which is to be found in the evidence of the Investigating Officer, PW-270. The description given by PW-270 on his searches of the places and, more particularly, of the places as described by PW-53 completely tallies. These are also material particulars which would lend support to the testimony of PW-53. On the whole there are number of other corroborations to the evidence of PW-53. [Para 41] [331-C-E]

2.7. It cannot be said that the evidence of PW-53 could not be taken into consideration because this witness, though an accomplice, was neither granted pardon under Section 306 Cr.P.C. nor was he prosecuted. Even if the prosecution did not prosecute PW-53 and used his evidence only as an accomplice, it was perfectly legal. The evidence of such witness subject to the usual caution was admissible evidence. [Para 42] [332-E-G]

2.8. The Trial Court and the appellate Court were right in convicting A-7. The High Court rightly confirmed the same. [Para 46] [339-G-H]

Laxmipat Choraria & Ors. v. State of Maharashtra **AIR 1968 SC 938: 1968 SCR 624 – relied on.**

Shankar @ Gauri Shankar v. State of Tamil Nadu **1994 (4) SCC 478;** *Rampal Pithwa Rahidas v.State of Maharashtra* **(1994) Suppl. (2) SCC 73: 1994 (2) SCR 179;** *Rattan Singh v. State of Himachal Pradesh* **1997 (4) SCC 161: 1996 (9) Suppl. SCR 938;** *Smt. Laxmi v. Om Prakash* **AIR 2001 SC 2383: 2001 (3) SCR 777 – referred to.**

3. The prosecution has the initial burden to suggest that the accused person was involved in the business of illicit liquor and that he knew the nature thereof. It is only then that the burden would shift to the accused to prove that he had no means to know about the nature of the business or the fact that the liquor was being mixed with noxious substance like methanol. In the present case, A-8 is the real brother of A-7 and there are number of other circumstances to suggest that A-8 was actively engaged in the business. It is clear from the evidence of discovery regarding the fake car number plates that A-8 was neck deep into the business of spurious liquor. He was an active member in carrying the said spurious liquor and the fact that a vehicle under his possession found from his premises had the trace of methanol is sufficient to hold that he had the necessary knowledge that methanol played a major part in the business which was headed by his real brother A-7 and in which he was an active partner. The contentions raised that he may at the most be booked for transporting the spurious liquor is also not acceptable because if that is established then his active participation in the business also comes to the forefront. Thereby his knowledge that the liquor was being mixed with methanol has also to be presumed. There was no necessity for keeping the fake unattached number plates in his premises and the whole objective is clear of shielding the cars by attaching fake number plates to them. The High Court thoroughly discussed about the

vehicle which was sold by PW-68 and was found in the possession of this accused. The High Court also discussed about the transaction of his house, which was in front of the half built house where obnoxious liquor trade was going on. A-8 had taken a house right in front of the aforementioned half built house and it was at his instance that the real number plates of the car which had the traces of methanol were found. Therefore, no reason is found to discard the evidence of this discovery. It is obvious that A-8 was engaged in the business of manufacture, storing, sale and supply of illicit liquor along with A-7 which resulted in liquor tragedy. A-8 was well aware of the nature of the business as he was thoroughly into it. Therefore, the offence under section 57A (1) (i) and (ii) as also the other offences under Sections 324, 326 and 328 read with Section 34, IPC have been rightly held proved against him. It cannot be said that the discovery was unnatural and was farcical since both the Courts have held the said discovery to have been proved. Again his frequent calls to his brother would cut both ways and would also show that he was actively involved in the business. It is not necessary that the accused had to mix or permit to be mixed the noxious substance himself. He could be booked on the same basis as A-7 has been booked on the same logic. It cannot be accepted that A-8 had no idea that methanol is a noxious substance. If a huge business was going on and methanol was being imported along with ethyl alcohol in huge quantity and if the car which brought the methanol was in his possession and further if the methanol is established to be a noxious substance, it would be a travesty to hold that A-8 did not know that methanol was obnoxious substance. It is also well established that this accused could be convicted with the aid of Section 120B, IPC and also independently of the offence under Section 57 A (1) (ii) as he was not only the part of the business but had actively taken part in it. That

by itself is sufficient to hold that he had the knowledge about the mixing of the ethyl alcohol with the noxious substance like methanol and in spite of it,continued. His offence would be covered fully in the phraseology '*or permits to be mixed*' **and accordingly, his conviction is confirmed. The Trial Court and the appellate Court did not commit any illegality in booking him under section 57A(1)(ii) also. Considering the number of deaths caused on account of the business in which this accused was neck deep, no leniency can be shown. The appeal of A-8 is accordingly dismissed. [Para 49, 50 and 52] [343-F-H; 344-A-F; 345-B-H; 346-A-D]**

4.1. A-4 is another brother of A-7 and A-8. The part played by A-4, is not less than the part played by A-8, if not more. It is clear that this witness was thoroughly in the business like his brothers A-7 and A-8. It is, therefore, clear that this was nothing but a conspiracy to run a patently illegal business along with his two brothers and others. A-5 and A-11 along with A-6 and A-10 are proved to have physically transported the mixed substance to various places. However, they are not the persons who took active part in the business as its proprietors as A-4 did. In fact A-4 was at the helm of the affairs unlike those accused who merely transported the liquor. The case of A-4, therefore, is quite different. It was argued that he himself had not transported the noxious substance which was done by A-15. That may not be so, but he was practically managing the whole show. It has rightly been held by the Trial Court and the appellate court that A-5 was a worker of A-4 and took active part in the transportation of methanol. His involvement in the business is so deep that it was clear that he was a conspirator and it was in pursuance of conspiracy that the whole liquor business which essentially involved the mixing of methanol with the ethyl alcohol was being conducted. [Para 53] [346-E; 348-C-H]

4.2. The language of Section 57A(1) of the Abkari Act is wide enough and A-4 will fit in the broad language. Reading the language of Section 57 A (1) as it is, it is more than proved that all these accused persons entered into a conspiracy to do the illegal liquor business and in order to succeed in their business, took recourse to mixing methanol with ethyl alcohol and brought out a new type of spurious liquor. In order to increase the potency of the drink and in order to probably give taste, they mixed the methanol. Once ethyl alcohol is proved to be a noxious drug, if they are found to be mixing or permitting mixing methanol with ethyl alcohol then the offence would be complete whether they had the knowledge regarding the qualities of methanol or not. That is apart from the fact that in this case itself to say that the accused did not know about the properties of methanol would be wrong. If that had been so they would not have been running between Hosur and Kerala to bring methanol in the cars which had fake registration numbers and secrete chambers. [Para 54] [349-C-G]

4.3. There can be no question about the absence of conspiracy. The whole business itself was a conspiracy. It may not be the conspiracy to mix the noxious substance but the fact of the matter is that in order to succeed in the business which itself was a conspiracy they mixed or allowed to be mixed methanol and used it so freely that ultimately 31 persons lost their lives. The prosecution has discharged its primary burden. The accused persons, more particularly, these three brothers have not offered any evidence so as to discharge the burden put against them under section 57A(1)(v). In this case the prosecution has clearly proved that there was a noxious substance which was likely to endanger the human life. Secondly, they have proved that substance was mixed, permitted to be mixed and was being regularly mixed with liquor. They have thirdly proved that

the persons mixing had the knowledge that methanol was a dangerous substance that aspect would be clear from the fact that after the tragedy A-7 went and punished his servants and remonstrated them for '*not properly*' mixing methanol with ethyl alcohol. Lastly, it is proved that as a result of mixing of methanol with the liquor and as a result of consuming such liquor as many as 31 persons lost their lives and number of others suffered grievous injuries. The appeal filed by A-4 is dismissed. [Para 55] [350-E-H; 351-A-D]

5. It is well proved by the prosecution that A-25 was a major link used to purchase liquor from A-4 and he was the one to distribute the same. A-25 was selling liquor in retail through A-32, A-35 etc. A-25 and A-10 were the employees of A-4 who were supplying the liquor. It is established that A-25 used to take the liquor manufactured by A-7 and the same used to be supplied to him by A-4 and the same was distributed by him further. The sale on the part of A-25 and his active participation in the business run by A-4 and A-7 was clearly brought out. He was convicted for the offence under Sections 57A(2)(i) and was heavily fined for Rs.50,000/-, Rs.25,000/- and Rs.2 lakhs on different counts including Section 55(a)(i) as also under Section 58 of the Abkari Act. He was, thus, in a position for distributors and it has come out in the evidence that the liquor sold by sub-distributors killed number of persons. The sub-distributors were none, but A-37, A-35 and A-41. It was the chain of distribution of liquor mixed with methyl alcohol. It is obvious that he was in possession of the poisoned liquor and does not seem to have taken care that it was not mixed with methyl alcohol. There is no doubt that A-25 was acquitted of the offence under Section 120B, IPC by the Trial Court and there is no appeal against it. The conviction of this accused is for offence punishable under Section 57A(2) and on that

account, he has been awarded life imprisonment. There can be no dispute that this witness had no control over the business run by A-7 and, therefore, he was rightly acquitted for the offence under Section 120B, IPC i.e. conspiracy. However, it cannot be said that his conviction under Section 57A(2) is incorrect on that count. From the evidence of PW-252, it is found that there was a search in the house of this accused on 23.10.2010 and a bottle was seized which was mixed with ethyl and methyl. This was substantiated by Chemical Analysis Report (Exhibit P-784). He was also in possession of pure methyl alcohol, which is substantiated by Exhibit P-417, a disclosure made by him to PW-269 as per Exhibit P-1019. Even this was found to be methyl alcohol. Once this fact regarding the possession of methyl alcohol is proved, A-25 cannot argue that the possession of methyl alcohol was only incidental. There is no reason for keeping methyl alcohol with him. After all, he was not going to use it as a deodorant or perfume. This may suggest that he had a hand in mixing the alcohol with methyl alcohol, but there is no evidence for that and he has not been convicted for the offence under Section 57A(1). The words "omits to take reasonable precaution" would cast a duty on him to see that the liquor that he sells is not mixed with poisonous substance. Again, under sub-Section (5) of Section 57A, he was bound to prove that he had taken reasonable precaution, as contemplated in sub-Section (2). There is no evidence to the contrary nor has the accused discharged his burden in any manner. Therefore, his conviction for offence punishable under Section 57A(2) is justified. However, he should not be punished with life imprisonment. This accused is convicted for offence punishable under Section 55 as also under Section 58, the maximum punishment for which Section is 10 years and he has already undergone more than 10 years of imprisonment. This Court,

therefore, deems it fit while confirming his conviction for the other offences and the sentences therefor to bring down the sentence from life imprisonment to what is undergone by him. [Para 56] [353-A-H; 354-A-G]

6. The case of A-30 more or the less is identical with A-25. As per the prosecution version, this accused had filled the liquor supplied by A-4 through A-5 and A-10 in covers and on the fateful night (on 20.10.2000), he carried the same in Car to the residence of A-39 and she, in turn, sold the same to the customers. The evidence of PW-153 is clear enough, who complained that the liquor was found to be stronger and when he asked what the matter was, it was pressed by A-39 that the liquor was supplied by A-30. In fact, as per the evidence of PW-153, he had himself found A-30 bringing the liquor. Similar is the evidence of PW-154 who felt uneasy after drinking the liquor. He was required to be hospitalized. Even he has deposed that A-39 used to sell the liquor which was supplied to her by A-30 and A-31. He has also seen the liquor being supplied. In fact, he also spoke about the happenings on 20.10.2000. PW-164, the father of A-39 had also consumed the liquor and he also suffered. He also established the connection of A-30. Thus, there is enough evidence to establish that on the fateful day, A-30 accompanied by A-31 supplied three bundles of covers, each having 100 covers. He has made a disclosure statement that alcohol was poured in the closet of a latrine recently constructed on the eastern side of the Senior Orthodox Church. The liquid in this closet which was having smell of liquor was collected and it was established that it contained methyl alcohol. M.O. 256 is the sample while Exhibit P1001 is the chemical analysis report. There can be no dispute that there is enough evidence to show that A-30 was involved in the procurement of liquor from A-4. He then packed it in the covers and supplied to A-39. The High Court did not find

him guilty under Section 304 or Section 307, IPC. Instead, the High Court booked him for offence under Section 57A(2)(ii), Section 55(a), (h) and (i) and Section 58 of the Abkari Act. The contention raised that his conviction should not be maintained under Section 57A(2)(ii) as he did not have knowledge and he was not concerned with the preparation of the spurious liquor is liable to be rejected on the same reasoning as given for rejecting the similar contentions raised on behalf of A-25. The role played by both is almost the same. The contention raised that he could have been booked only under Sections 55(a), (h) and (i) and under Section 58, is also rejected. The statement made that this accused was also behind the bars for more than 10 years, was not seriously disputed on behalf of the Government. Therefore, his life imprisonment is set aside and brought down to that already undergone by him. The appeal filed by A-30 is dismissed with the modification in the sentence as indicated. [Para 58] [355-C-H; 356-A-H; 357-A]

7. This Court is not only perturbed by the enormousness of the tragedy but the enormousness of the liquor trade run by A-7 and that was under the so-called vigilant eyes of those who had duty to stop it. The avarice is not only on the part of the accused persons, but also on the part of those who benefit from this horrible business. It is hoped and expected that the Kerala Government takes up this issue and takes definite steps for overhauling the system. It will be, therefore, for the administrators and the Government to take positive steps, firstly, to overhaul the system by weeding out the corrupts by punishing those who are responsible for the whole system looking sideways. This Court is not aware as to whether such an exercise is taken up, but if it has not been taken up the government is directed to take such steps. [Para 59] [357-E-H; 358-A]

State of Maharashtra v. Mayer Hans George **1965 (1) SCR 123;** *State of Gujarat v. Acharya D. Pandey & Ors.* **(1970) 3 SCC 183: 1971 (2) SCR 557;** *Sanjay Dutt v. State Through* ***CBI*** **(1994) 5 SCC 410: 1994 (3) Suppl. SCR 263;** *Kalpnath Rai v. State (through CBI)* **(1997) 8 SCC 732 – distinguished.**

Lim Chin Aik v. Reginam **[1963] 1 All ER 223;** *Sweet v. Parsley* **[1969] 1 All Er 347;** *B (a minor) v. Director of Public Prosecutions* **[2000] 1 All 833 – referred to.**

Case Law Reference:

1994 (5) Suppl. SCR 526	**relied on**	**Para 20,48,49,55**
1970 (3) SCR 530	**referred to**	**Para20**
1994 (2) SCR 375	**referred to**	**Para 20**
1988 13 EHRR 379	**referred to**	**Para 21**
(1935) A.C. 462	**referred to**	**Para 21**
(1942) A.C. 1	**referred to**	**Para 21**
[1975] Q.B. 27	**referred to**	**Para 21**
(1981) A.C. 648	**referred to**	**Para 21**
26 D.L.R, (4th) 200	**referred to**	**Para 21**
(71) L.Ed. 749	**referred to**	**Para 21**
78 Law. Ed. 664	**referred to**	**Para 21**
412 US 837	**referred to**	**Para 21**
442 US 140	**referred to**	**Para 21**
395 US 619	**referred to**	**Para 21**
1960 SCR 461	**referred to**	**Para 21**
1994 (2) SCR 179	**referred to**	**Para 37**

1994 (4) SCC 478	**referred to**	**Para 37**
1994 (2) SCR 179	**referred to**	**Para 37**
1968 SCR 624	**relied on**	**Para 37**
1996 (9) Suppl. SCR 938	**referred to**	**Para 37**
2001 (3) SCR 777	**referred to**	**Para 37**
1994(5) Suppl. SCR 526	**referred to**	**Para 37**
1971 (2) SCR 557	**referred to**	**Para 37**
1994 (3) Suppl. SCR 263	**referred to**	**Para 37**
1968 SCR 624	**referred to**	**Para 42**
1996 (9) Suppl. SCR 938	**referred to**	**Para 43**
2001 (3) SCR 777	**referred to**	**Para 43**
1963] 1 All ER 223	**referred to**	**Para 54**
1965 (1) SCR 123	**distinguished**	**Para 54**
1969] 1 All Er 347	**referred to**	**Para 54**
(1970) 3 SCC 183	**referred to**	**Para 54**
1971 (2) SCR 557	**distinguished**	**Para 54**
(1994) 5 SCC 410	**referred to**	**Para 54**
1994 (3) Suppl. SCR 263	**distinguished**	**Para 54**
(1997) 8 SCC 732	**distinguished**	**Para 54**
[2000] 1 All 833	**referred to**	**Para 54**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1528 of 2005.

From the Judgment & Order dated 8.10.2004 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 824 of 2002.

WITH

Criminal Appeal Nos. 1530,1531, 1532 of 2005 and 864 of 2011.

K. Radhakrishnan, V. Shekhar, A. Sharan and J.C. Gupta, K.K. Mani, Abhishek Krishna, R. Shivkumar, Adolf Mathew, Siddarth Dave (for A. Raghunath), Jemtiben AO, Malini Paduval, Babita Sant, Mohd. Sidduque, Rajasree Ajay, S. Ganesh, Deepakshi Jain, V.K. Sidharthan, Geetha, R. Satish and G.S. Mani for the appearing parties.

The following Judgment of the Court was delivered

J U D G M E N T

1. This judgment will dispose of Criminal Appeal No.1528 of 2005 (Chandran @Manichan @ Maniyan v. State of Kerala) filed by Chandran (accused No.7), Criminal Appeal No.1530 of 2005 (Manikantan @ Kochani v. State of Kerala) filed by Manikantan (original accused No.4), Criminal Appeal No.1531 of 2005 (Manoharan v. Kerala State Rep. by Public Prosecutor) filed by Manoharan (original accused No.30), Criminal Appeal No.1532 of 2005 (Vinod Kumar @ Vinod v. State of Kerala) filed by Vinod Kumar (original accused No.8), SLP (Crl.) 842 of 2006 (Suresh Kumar @ Suresh v. State of Kerala) filed by Suresh Kumar (original accused No.25) and Criminal Appeal No.800 of 2006 (Herunessa @ Thatha v. State of Kerala) filed by Herunessa (original accused No.1). Out of all these appeals, the appeal filed by accused Herunessa @ Thatha has become infructuous since accused No.1, Herunessa is reported to have expired.

2. Leave granted in SLP (Crl) 842 of 2006.

3. All the accused-appellants stood convicted by the Sessions Judge, Kollam by its judgment dated 16.7.2002 for various offences punishable under Sections 120B, 302, 307, 326, 328 and 201 read with Section 34 of the Indian Penal Code (IPC) as also under Sections 55 (a) (g) (h) (i) , 57A and 58 of the Abkari Act. We need not refer to the punishments awarded to all these accused persons. Suffice it to say, that

practically all of them were convicted for offences under Section 302, IPC Section 57A (1) (iii) of the Abkari Act which is a State Act for the State of Kerala. The accused persons under those Sections were sentenced to suffer rigorous imprisonment for life. They have also been awarded lesser sentences and have been slapped with heavy fines. They appealed against this verdict, the conviction and the sentences before the Kerala High Court which has set aside the conviction for offence under Sections 302 and Section 307, IPC, however, maintained the convictions of most of the appellants for offence under Section 57A (1) (ii) under the Abkari Act along with convictions under Sections 324, 326, 328 and 201, IPC as also the other Sections like Section 55 (h) and (i) and 58 of the Abkari Act. In short, most of the accused persons were directed to suffer rigorous imprisonment for life and, as the case may be, rigorous imprisonment for 10 years along with fine. All these appeals were heard jointly since they were against the common judgment. As many as 48 accused persons came to be tried before the Sessions Judge. Some of them were acquitted at the stage of trial and some others at the appeal stage, leaving the above mentioned appellants in the fray who are before us.

4. Alcohol has already proved itself to be one of the major enemies of the human beings. However, its grip is not loosened in spite of the realization of the evil effects of alcohol on the human life. On the other hand, the unholy grip is being tightened day by day. Therefore, when the standard and healthy alcohol in the form of liquor is not available or is too costly for a common man, the poor section of the society goes for illicitly distilled liquor which is sold by the bootleggers. The conscienceless bootleggers – thanks to their avarice for money – take full advantage of this human weakness and without any compunction or qualms of conscience, distill illicit liquor and then to increase the sale and to gain astronomical profits make their product more potent at least in taste so as to attract the poor customers. Such poor customers invariably become the prey of such unholy avarice on the part of the bootleggers and in the process even lose their lives at times or suffer such

injuries which are irreparable like total blindness etc. and that is precisely what has happened in this case.

5. On 22.10.2000, in the wee hours, Sub-Inspector of Police, Paripally received information that one Raghunatha Kurup of Kulathoorkonam and seven others were admitted in the Medical College Hospital Thiruvananthapuram for treatment on account of illness caused by consumption of illicit liquor. He reached the Hospital and recorded the first information statement of Raghunatha Kurup at 2 a.m. By that time, one Sasidharan who had consumed the illicit liquor had died and two others were lying in unconscious condition. On that basis, Sub-Inspector registered Crime No. 268 of 2000 under Section 302, 307, IPC read with Section 34, IPC and under Section 57A of the Abkari Act. Little did he know the exact ramifications or vastness of the grim tragedy which was about to take place. Three other similar crimes were registered at Kottarakkara police station and this was followed by further crimes registered in the same police station being Crime No.809 of 2000, Crime No.810 of 2000, Crime No.811 of 2000 and Crime No.817 of 2000. All these crimes were consolidated with crime No.268 of 2000 of Parippally police station and the information started trickling regarding the consumption of spurious liquor by poor persons and their admittance to the hospital from within Anchal and Pooyappally police station limits. Similar incidents had taken place within the limits of Mangalapuram police station and the crime was registered there also. Investigation machinery quickly responded to the happenings and a special investigation team (SIT) was constituted as per the directions of Director General of Police, Kerala, Thiruvananthapuram on 25.10.2000 which was to be headed by Shri Sibi Mathews, IPS who was the Inspector General of Police. He was to head the team of seven persons, six other persons being the police officers of the level of Inspectors and above. All these earlier mentioned crimes were taken over for investigation by SIT. They started investigation in all the concerned police stations where the crimes were reported. It was realized that as many as 31

persons had lost their lives, six persons had suffered total blindness in Kollam District whereas more than 500 persons suffered serious injuries on account of the drinking of the illicit liquor.

6. Unfortunately, all this was going on in God's own country, Kerala which was turned into hell by the liquor mafia. Eventually, investigation by the SIT was completed and the final report was filed before the Judicial Magistrate, 1st Class, Paravoor on 21.1.2001 against 47 persons. After the charge-sheet was filed, accused No.48 was also added by a supplementary charge-sheet. However, as many as four accused persons, they being accused Nos. 34, 36, 39 and 45 died on account of consumption of their own medicine, the spurious liquor. Accused No.3 had lost his eye sight completely. Few accused were absconding, their cases were split up. Rest of the accused were sent for trial before the Sessions Judge before whom a marathon trial took place wherein 271 witnesses were examined, as many as 1105 documents were proved and relied upon and over 291 material objects were produced. The defence also examined as many as 17 witnesses and relied on 110 documents being Exhibits D-1 to D-111.

7. Prosecution alleged that methyl alcohol which is a poisonous substance used to be brought from Karnataka and mixed with Ethyl alcohol. At times, this concoction was mixed with toddy and other essences resulting in a drink called *Kalapani*. The methyl alcohol used to be mixed with ethyl alcohol which was also illegally and illicitly procured in order to add potency to the drink so that more and more people would purchase the same. These sales were made from the regularly licensed toddy shops and from other places. There was well-oiled machinery, huge in proportion, the main component of which was Chandran (accused No.7) who was a toddy contractor. His brothers, Manikantan (accused No.4) and Vinod Kumar (accused No.8) were deputies helping him. This group

had servants like Balachandran (A-15), the Manager. Even their wives did not lag behind. There were laboratories, assistants and labourers. There were drivers and a fleet of vehicles which were used for importing methyl alcohol from Karnataka and then it used to be brought to the laboratories maintained by Chandran (A-7), Manikantan (A-4) and Vinod Kumar (A-8) where the mixing used to take place. Accused Nos.A-4 (Manikantan @ Kochani), A-7 (Chandran @ Manichan), A-8 (Vinod Kumar), A-15 (Balachandran), A-18 (Usha), A-19 (Sugathan), A-20 (Vijayan), A-21 (Rassuludeen), A-22 (Suresh @ Sankaran) and A-23 (Binu @ Monukuttan) were active in firstly procuring the methyl alcohol and then mixing the same in the laboratories and then distributing the same in the whole district, more particularly, to the various outlets for sale of toddy. Chandran (A-7) used to control these shops which were either in his name or some other names. It was alleged by the prosecution that all these accused persons hatched a criminal conspiracy in or about March, 2000 prior to the auction of toddy shops for the period between 2000-01 and well-oiled machinery was created for importing methyl alcohol from a place called Arihant Chemicals, Bangalore. Chandran (A-7) controlled toddy shop Nos.1 to 26 of Chirayinkil Panchayat so that there were easy outlets available for the sale of spurious liquor. Once methyl alcohol was imported, it used to be brought to the huge laboratories constructed for that purpose and carefully concealed which was located at Pandakasala. It was alleged by the prosecution that Gunasekharan (A-17) purchased two barrels of methyl alcohol as part of the criminal conspiracy from Arihant Chemicals, Bangalore and the same was entrusted to Anil Kumar (A-16) for import to Kerala for the purpose of its mixing with the spirit ethyl alcohol and for sale by Manikantan @ Kochani (A-4), Chandran @ Manichan (A-7), Vinod Kumar (A-8), Balachandran (A-15), Usha (A-18), Sugathan (A-19), Vijayan (A-20), Rassuludeen (A-21), Suresh @ Sankaran (A-22), Binu @ Monkuttan (A-23). It was brought by Anil Kumar (A-16) in a Fiat car which had fake registration number. This Fiat car was fitted with a secret tank and thus the poisonous

methyl alcohol was imported and was mixed with 56,200 litres of spirit which was also imported to Kerala by Mahesh (A-12), Salil Raj (A-13), Ashraf (A-14) and Sakthi (A-48). All the mixing was done at Pandakasala and then it was given for distribution to Manikantan (A-4) who transported it through Anil Kumar (A-5), Shibu (A-6), Santhosh @ Kochu Santhosh (A-9), Santhosh @ Valiya Santhosh (A-10), Mohammed Shaji @ Shabu (A-11), knowing it to be injurious to health, through various other vehicles.

8. The said methyl alcohol which was mixed in the Pandakasala godown meant for toddy shop Nos.1 to 26 of Chirayinkil Panchayat and then got distributed by the above accused persons who all knew very well that it was injurious to health and was fatal. For this purpose, cars bearing registration No. PY01M-6582 and TN-1-R 9283 and a Van bearing registration No. KLOQ-2787 were used.

9. It was further the case of the prosecution that from this poisonous spirit, 35 litres were taken in a car bearing registration No.TN-1-R 9283 on 20.10.2000 at about 3.30 p.m. with the assistance of Anil Kumar (A-5) and Shibu (A-6) and was given to Herunnesa (A-1), Rajan (A-2) and Raju @ Mathilakom Raju (A-3) in the house of A-1 and A-2 at Kalluvathukkal. It was alleged that accused Nos.1 and 2 and 3 diluted the spirit by adding water and sold it through their outlets because of which 18 persons died due to consumption of spurious liquor. It was pointed out that two persons lost their eyesight and number of others sustained grievous injuries. It was further alleged in the charge that Manikantan (A-4) with the help of Anil Kumar (A-5) and Santhosh (A-10) transported 10 Kannas full of spurious liquor having capacity of 35 litres in the car bearing fake registration No. KL 01M 7444 on 20.10.2000 night to Charuvila Puthen Veedu, Anthamon Muri and Kalyanpuram village at Kottarakkara and there the said liquor was sold by A-30 with the assistance of A-31 who earlier diluted the spurious liquor by adding water at the house of A-30 and

packed liquor in polythene covers containing 100 ml each. The said pouches were also sealed with the help of sealing machine. Then the pouches were loaded in one Maruti car on the same day and the same was entrusted to A-39, Latha Kumari. Even these accused knew the spurious nature of the liquor and its lethal effects. Some liquor out of this was sold to one Soman Pillai and CWs 630 to 634 and on that account Latha Kumari and Soman Pillai died while others suffered serious injuries.

10. It was further alleged by the prosecution that the remaining five Kannas full of spurious liquor were then transported in the car bearing fake registration No. KL 01M 7444 with the help of accused Nos. 5 and 10 on the same day near the shops of CWs 633 and 664 at Pallikkal in Mylom village at about 8.45 p.m. and entrusted the same to A-25 who with the help of some other accused like Sujith (A-24), Dileep (A-26), Shyjan (A-27), Anil Kumar @ Kittu (A-28), Rathy (A-29), Sashikumar (A-32), Shibu (A-33), Rajan (A-34), Sudhakaran (A-35), Pachan (A-36), Santhosh (A-37), Samuel (A-38), Sathyan (A-40), Soman (A-41) sold the spurious liquor at various places in Kottarakkara Taluk at Pallikkal, Kalyanpuram Puthoor and Mylom after diluting the same with water. Because of the consumption of this liquor, as many as 7 persons died and out of them Rajan (A-34) and Pachan (A-36) also died by consuming the same liquor. Some others lost their eye sight and still some others sustained grievous injuries.

11. Another round of 35 litres of kannas was taken by A-4 with the help of all on 20.10.2000 in the evening to Attingal Avanavancherry and was sold to A-42 who along with A-47 took the spurious liquor in an auto rickshaw driven by A-47 near the CRPF camp in Thiruvananthpuram District and sold it to A-45 who further sold about 14 litres of spirit to A-44 and 7 litres of spirit to A-46 on 25.10.2000 in the evening. The said liquor was diluted by A-45 with the help of A-43 by mixing water and converted it into arrack and further sold it to a person called

Bhaskaran Kutty Nair. It is alleged that because of the consumption of the same liquor, A-45 himself died while some others suffered grievous injuries.

12. The prosecution also alleged that A-44 diluted the spirit by adding water and sold it on 26.10.2000 near Apollo colony to CWs 433 to 456. They consumed the same liquor and sustained grievous injuries and one of them lost his eyesight.

13. The prosecution alleged that the conspiracy was hatched in March, 2000 amongst all the accused and because of the criminal act on the part of the accused of mixing poisonous methyl spirit, death of as many as 31 persons was caused, as many as 266 persons suffered grievous injuries while 5 persons lost their eye sight completely. All the accused persons were, therefore, charged with the offences under Sections 302, 307, 326, 328, 201,120B read with Section 34 of the Indian Penal Code as also under Section 55 (a) (g) (h) and (i), Section 57A and Section 58 of Abkari Act. On the basis of this charge, evidence was led of about 270 witnesses. The accused persons abjured their guilt and claimed to be tried.

14. The sessions Judge categorized the accused persons in the following manner:

(1) those who were involved in the manufacture of the illicit liquor;

(2) those who were engaged in the distribution and transportation of the same;

(3) Those who were mainly engaged in the sale of illicit liquor.

15. Accused Nos.13, 17, 31, 32, 37, 40, 43, 46, 27, 48 were found not guilty. They were straightaway acquitted. Some of the accused persons died during the trial. Those who were convicted by the Sessions Judge were awarded sentences depending upon the seriousness of the crime as per the

classifications which have been shown above. Naturally, the persons in category (1) and category (2) were dealt with severely and most of them were awarded the maximum punishment of life imprisonment along with heavy fine. Those accused persons who were in category (3) were dealt with a little lightly in the sense that they were not given life imprisonment but imprisonment ranging from 3 years to 10 years was awarded to them. The convicted accused filed appeals before the High Court. The High Court also acquitted few of the accused persons and those whose appeals were dismissed have now come before us by way of separate appeals which we have indicated in the first paragraph of this judgment. The High Court has considered the appeals filed by various accused before it separately. We also propose to do the same thing. We have to consider mainly the appeals filed by accused Nos. A-7, A-4, A-30, A-8 and Suresh Kumar (A-25) who filed SLP (Crl) 842 of 2006. Before we take up this task, we would analyze the impugned judgment of the High Court.

16. To begin with, the High Court, after quoting Sections 8, 55, 57A and 58 of the Kerala Abkari Act, proceeded to consider the entire evidence appeal-wise. In that, the High Court appreciated the evidence of the individual witnesses insofar as they were relevant to the particular accused whose appeal was being considered as also the documentary evidence as figured against that particular accused. Therefore, it so happened that sometimes the appreciation of evidence of common witnesses is repeated in the High Court's judgment but considering the large number of witnesses, more than 276 in all, that was inevitable. Still, it will be our endeavour to avoid the repetition while considering the matter at this stage.

17. These appeals are against the concurrent findings of fact and, therefore, it is obvious that this Court does not enter the area of re-appreciation of evidence. That can be done only in case the appreciation is substantially defective and the

inferences drawn by the Courts below could not have been drawn in law. This Court has, time and again, declared that even where the Courts have acted upon inadmissible evidence or have left out of the consideration some material piece of evidence, the defence would be entitled to address this Court on those issues, and the Court would proceed to re-appreciate the evidence and re-examine the factual findings on that basis alone. We must, at this juncture, record that at least *prima facie* such is not the case here. On the other hand, we find that the evidence has been meticulously appreciated by both the Trial and the appellate Court. We also found no instance of inadmissible evidence having been accepted or some material evidence having been ignored by the Courts below. The arguments mostly related to the interpretation of the provisions of Abkari Act as also the provisions of the Indian Penal Code (IPC). The common feature of the arguments was that the Courts below have mis-interpreted the provisions of Abkari Act and, more particularly, of Section 57A (1) (i) and (ii) as also Section 57A (2) (ii). It has been again the common feature of arguments that the Courts below have erred in convicting the accused persons for offences under those Sections as the essential ingredients of those Sections were not proved by the prosecution as against the accused persons. It will be, therefore, proper to first examine the scope of Section 57A. However, such scope will have to be examined in the light of some other provisions of the Act as also the Statement of Objects and Reasons and the history of the Legislation. Suffice it to say, at this juncture, that the original nomenclature of the Act was Cochin Abkari Act, Act 1 of 1077 and Abkari Act (Travancore) 4 of 1073. These acts provided for the levy of fees for the licences for manufacture and sale of liquor and intoxicating drugs. Three acts were operating, they were Cochin Abkari Act, Travancore Abkari Act and Madras Abkari Act. Since that was causing difficulty, an Ordinance came to be promulgated on 01.05.1967. This was replaced by a Bill and that is how Abkari Act was born.

18. Section 2 (6A) of the Act defines 'arrack'. It means any potable liquor other than toddy, beer, spirits of wine, wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol. Section 2 (8) defines 'toddy' to mean fermented or unfermented juice drawn from a coconut, palmyra, date or any other kind of palm tree. Section 2 (9) speaks about the 'spirits' meaning any liquor containing alcohol and obtained by distillation. Sub-section (10) provides the definition of 'liquor' which includes spirits of wine, arrack, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol. Section 2(12) defines country liquor which means toddy or arrack while Section 2(13) defines foreign liquor which includes all liquor other than country liquor. Thus, it will be seen that 'liquor' is the broadest concept and engulfs all the intoxicating drinks. Section 6 prohibits import of liquor or intoxicating drug being imported without permission of the Government authorized to give permission in that behalf. Similarly, Section 7 prohibits the export of liquor or intoxicating drug. Section 8 is an important Section which speaks for the prohibition of manufacture, import, export, transport, transit, possession, storage and sale of arrack. The contravention of this Section is punishable with 10 years' imprisonment as also with fine of not less than Rs.1 lakh. Some other provisions relate to the various other prohibitions including the provisions for searches. Under Section 41A, the offence under this Act are made cognizable and non-bailable. Section 55 onwards provides for penalties under the Act for various offences. Section 55 speaks about the illegal import and is a general section which speaks about the effects of the contravention of the Act or rules or orders made thereunder relating to the import, export, manufacture of liquor tapping of toddy, drawing of toddy from any tree, construction of any distillery, brewery, winery or other manufactory in which liquor is manufactured, used, or possession of any materials, still, utensils, implements or apparatus etc. bottling of liquor for sale of liquor or any intoxicating drug. The punishment provided in this Section is 10 years' imprisonment with fine which shall not

be less than Rs.1 lakh, excepting for clauses (d) and (e), where punishment is of one year imprisonment. This punishment has been brought in by way of an amendment by Act 16 of 1997 before which the punishment was merely two years and with fine of not less than Rs.20,000/-. There was a gruesome liquor tragedy in Earnakulam district in the year 1982 resulting in loss of eye-sight and physical incapacity in case of several persons and, therefore, severe penalties were provided for those who were responsible for adulteration of liquor and its sale. These punishments were made further stringent by the Amendment Act No.12 of 1995. In short, the stringency was introduced in order to check the sale of spurious liquor. The Statement of Objects and Reasons for Amendment Act 21 of 1984, 12 of 1995, 4 of 1996 and 16 of 1997 suggest the reasons why deterrent punishments were provided for the offence under the Act. Original Section 57 provided the punishment for adulteration by the licenced vendor or manufacturer. A new Section was added by Amendment Act No.21 of 1984 being Section 57A which is the most relevant section for our purpose. The Section reads as under:-

> **"57A. For adulteration of liquor or intoxicating drug with noxious substances, etc.**-(1) whoever mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable.
>
> (i) if, as a result of such act, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;
>
> (ii) if, as a result of such act, death is caused to any person, with death or imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to

fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year, but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

Explanation- for the purpose of this section and section 57B the expression 'grievous hurt' shall have the same meaning as in section 320 of the Indian Penal Code, 1860 (Central Act 45 of 1860).

(2) whoever omits to take reasonable precautions to prevent the mixing of any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, punishable-

(i) if as a result of such omission, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(ii) if as a result of such omission, death is caused to any person, with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with the fine which may extend to fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(3) whoever possesses any liquor or intoxicating drug in which any substance referred to in sub-section (1) is mixed, knowing that such substance is mixed with such liquor or intoxicating drug shall, on conviction, be

punishable with imprisonment for a term which shall not be less than one year but may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(4) notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), no person accused or convicted of an offence under sub-section (1) or sub-section (3) shall, if in custody, be released on bail or on his own bond, unless –

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872)-

(a) where a person is prosecuted for an offence under sub section (1) or sub-section (2) the burden of proving that he has not mixed or permitted to be mixed or, as the case may be, omitted to take reasonable precautions to prevent the mixing of, any substance referred to in that sub-section with any liquor or intoxicating drug shall be on him;

(b) where a person is prosecuted for an offence under sub-section (3) for being in possession of any liquor or intoxicating drug in which any substance referred to in sub-section (1) is mixed, the burden of proving that he did not know that such substance was mixed with such liquor or intoxicating drug shall be on him."

19. A plain reading of the Section would mean that now the offence is not limited to the licence holders, but refers to anybody who mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human

life with any liquor. The Section, therefore, is extremely general. In addition to the mixing or permitting to be mixed, sub-section (2) brings in the dragnet of the offence, a person who omits to take reasonable precaution to prevent the mixing of any noxious substance. It is significant to note that if, as a result of such act of mixing of the liquor with noxious or dangerous substance death is caused, the extreme penalty of death also is provided. Imprisonment provided is for a term not less than three years but which may extend to imprisonment for life as also with a fine of Rs.50,000/-. Similar such penalties provided in sub-section 2(ii) and sub-section 2(iii) are also relevant providing for residuary cases. Section 3 is the punishment for possession of any liquor or intoxicating drug which is mixed with noxious substance or dangerous drug knowing it to be so. Sub-section (4) prohibits the bail and the conditions for grant thereof. Sub-section (5) which is the most important section, puts the burden of proving that the accused has not mixed or permitted to be mixed or has not omitted to take reasonable precautions to prevent the mixing, is on the accused himself. Similarly, the burden would be on the accused to prove that while he was in possession of such liquor mixed with noxious or dangerous substance, he did not know that such substance was mixed with such liquor. Section 58 speaks for the possession of illicit liquor. At this juncture, we need not go to the other offences of the Indian Penal Code like murder, attempt to murder etc. In this case, the charge is predominantly under Sections 55 (a), (g), (h), (i) 57A and 58 of the Abkari Act.

20. Since the burden to prove the offence which normally lies on the prosecution under the criminal jurisprudence was shifted to the accused, it was but natural that the constitutional validity of the Section came to be challenged. However, in *P.N. Krishna Lal & Ors. v. Govt. of Kerala & Anr.* reported in 1995 Suppl. (2) SCC 187, this Court proceeded to uphold the same. While upholding the constitutional validity, the Court has in detail explained the mode of proof by prosecution and the extent of burden of proof which lies on the accused. The challenge which

was made to the validity of the Section was on the basis of the Universal Declaration of Human Rights (UDHR) and the International Convention for Civil and Political Rights (ICCPR), to which India is a member which guarantee fundamental freedom and liberty to the accused. It was suggested that in criminal jurisprudence it was settled law that it was on the prosecution to prove all the ingredients of the offence with which the accused has been charged. It was suggested that Sub-section (5) relieves the prosecution of its duty to prove its case beyond reasonable doubt which is incumbent under the Code and the Evidence Act and makes the accused to disprove the prosecution case. Thereby, the substantive provisions and the burden of proof not only violate the fundamental human rights but, also fundamental rights under Articles 20(3) and 14. The provision was criticized as arbitrary, unjust and unfair and infringing upon the right to life and unjust procedure violating the guarantee under Article 21 also. The provision was also criticized as providing unconscionable procedure. It was further suggested that though Sections 299 and 300 of IPC make a distinction between culpable homicide and murder but the Amendment Act has done away with this salutary distinction and mere death of a person by consumption of adulterated arrack, makes the offender liable for conviction and imprisonment for life or penalty of death. It was further suggested that mere negligence in taking reasonable precaution to prevent mixing of noxious substance or any other substance with arrack or Indian made foreign liquor or intoxicating foreign drug was made punishable with minimum sentence was harsh, unjust and excessive punishment offending Articles 14 and 21 of the Constitution of India. Section 58B which was also challenged was severally criticized as being unfair and unjust. It was further suggested that presumption envisaged in sub-section (5) of section 57-A per se violated the fundamental rights and the Universal Declaration. It was further criticized that mere possession of adulterated liquor without any intent to sell, to become a presumptive evidence

to impose punishment without the prosecution proving that the person in possession was not a *bona fide* consumer or had its possession without animus to sell for consumption and place the burden on the accused to prove his innocence is procedure, which is unjust and oppressive violating the cardinal principles of proof of crime beyond reasonable doubt. The Section was also criticized for the excess of proportionality for imposition of sentence. Further the Section was criticized on the ground that compelling the accused to state the facts constituting offence under Section 57A by operation of sub-section (5) was opposed to mandate of Article 20 (3) amounted to and compelled him to be a witness to prove his innocence. While commenting on Article 20 (3), this Court referred to *R.C. Cooper v. Union of India* reported as 1970 (1) SCC 248 as also *Kartar Singh v. State of Punjab* [(1994) 3 SCC 569] where it was held that freedom could not last long unless it was coupled with order, freedom can never exist without order and both freedom and order may co-exist. It was observed that Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. It was then stated that liberty would not always be an absolute licence but must arm itself within the confines of law, In other words, there can be no liberty without social restraint. The Court also observed that the liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number. The Court observed that common happiness is an end of the society, lest lawlessness and anarchy should tamper social wheel and harmony and powerful courses or forces would be at work to undermine social welfare and order. The Court then observed in paragraph 24 as under:

> "The State has the power to prohibit trade or business which are illegal, immoral or injurious to the health and welfare of the people. No one has the right to carry on any trade or occupation or business which is inherently vicious and pernicious and is condemned by all civilized

> societies. Equally no one could claim entitlement to carry on any trade or business or any activities which are criminal and immoral or in any articles of goods which are obnoxious and injurious to the safety and health of general public. There is no inherent right in crime. Prohibition of trade or business of noxious or dangerous substance or goods, by law is in the interest of social welfare."

21. Coming to the burden of proof, the Court observed that though in civilized criminal jurisprudence the accused is presumed to be innocent unless he is found guilty and though the burden of proof always is on the prosecution to prove the offence beyond reasonable doubt yet the rule gets modulated with the march of time. The Court referred to the absolute right of the state to regulate production, transport, storage, possession and sale of liquor or intoxicating drug and held that the accused did not have the absolute right to business or trade of liquor. The Court also referred to the prohibitions regarding mixing of noxious substance with liquor or possession thereof and further held that the State possessed the right to complete control on all kinds of intoxicants. The Court found that the regulation of sale of potable liquor prevents reckless propensity for adulterating liquor to make easy gain at the cost of health and precious life of consumer. The Court also noted the object of the Amendment Act which was to prevent recurrence of large scale deaths or grievous hurt to the consumers of adulterated liquor mixed with noxious substance. Referring to a judgment reported as *Salabiaku v. Grance* [1988] 13 EHRR 379, the Court observed that the national legislature would be free to strip the Trial Court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words *'according to law'* were construed exclusively with reference to domestic law. It was held in that case that Article 6 (2) of the Universal Declaration of Human Rights did not refer to presumption of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of that

is at stake and maintain the rights of the defence. Providing exceptions or to place partial burden on the accused was not violative of universal declaration of human rights or even Convention on Civil or Political Rights. The Court then referred to the reported decisions in UK, Hong Kong, Malaysia, USA, Australia and Canada to find the permissible limits of burden of proof of the accused. The Court referred to the decisions in *Woolmington v. Director of Public Prosecutions,* (1935) A.C. 462*; Mancini v. Director of Public Prosecutions,* (1942) A.C. 1*; Reg. v. Edwards* [1975] Q.B. 27*; Ong Ah Chuan v. Public Prosecutor,* (1981) A.C. 648*; Queen v. Oakes*, 26 D.L.R, (4th) 200; *Ed Tumey v. State of Ohio*, (71) L.Ed. 749; *Morrison v. California*, 78 Law. Ed.664; *United States v. Gainey*, 13, Law. Ed. 2nd. p. 658; *Barnes v. United States*, 412 US 837; *In County Court of Ulster, New York v. Samuel Allen*, 442 US 140; *Herman Solem v. Jerry Buckley Helm*, 463 US 277; *Timothy F. Leary v. U.S.*, 395 US 6, which were the foreign Court judgments to the issue of burden of proof. The Court also referred to Sections 5, 6, 101, 105 and 106 as also to Sections 113A and 114A of the Indian Evidence Act and relied on the observations made in *Shambu Nath Mehra v. State of Ajmer*, [1956] SCR 199. Further the Court also referred to *C.S.D. Swamy v. The State*, [1960] 1 SCR 461 and commented on the presumptions raised under the Prevention of Corruption Act. The Court observed in para 39 as under:

> "39.It is the cardinal rule of our criminal jurisprudence that the burden in the web of proof of an offence would always lie upon the prosecution to prove all the facts constituting the ingredients beyond reasonable doubt. If there is any reasonable doubt, the accused is entitled to the benefit of the reasonable doubt. At no stage of the prosecution case, the burden to disprove the fact would rest on the defence. However, exceptions have been provided in sections 105 and 106 of the Evidence Act, as stated hereinbefore. Section 113-A of the Evidence Act raises a presumption as to abatement of suicide by a married woman by her

husband or his relatives. Similarly section 114-A raises presumption of absence of consent in a rape case. Several statutes also provided evidential burden on the accused. On the general question of the burden of proof of facts within special knowledge of the accused, this Court, in *Shambu Nath Mehra v. State of Ajmer,* [1956] SCR 199, laid the rule thus :-

> "Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and section 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible, or a proportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience."

The Court further observed in para 46:

> "46. It is thus settled law even under general criminal jurisprudence that sections 105 and 106 of the Evidence Act place a part of the burden of proof on the accused to prove facts which are within his *knowledge when the prosecution establishes the ingredients of the offence charged, the burden shifts on to the accused to prove certain facts within his knowledge or exceptions to which he is entitled to. Based upon the language in the statute the burden of proof varies.* However, the test of proof of preponderance of probabilities is the extended criminal jurisprudence and the burden of proof is not as heavy as on the prosecution. *Once the accused succeeds in showing, by preponderance of probabilities that there is reasonable doubt in his favour, the burden shifts again on to the prosecution to prove the case against the accused beyond reasonable doubt, if the accused has to be convicted.* From this conceptual criminal

jurisprudence, question emerges whether sub-section (5) placing the burden on the accused of the facts stated therein would offend Articles 20(3), 21 and 14 of the Constitution."

(emphasis supplied)

Further in paragraph 52, the Court observed and quoted:

"52.The question of intention bears no relevance to an offence under section 57-A and equally of culpability or negligence. It is seen that mixing or permitting to mix noxious substance or any other substance with liquor or intoxicated drug or omission to take reasonable precaution or being in possession without knowledge of its adulteration for the purpose of unjust enrichment would be without any regard for loss of precious human lives or grievous hurt. The legislature has noted the inadequacy and deficiency in the existing law to meet the menace of adulteration of liquor etc. and provided for new offences and directed with mandatory language protection of the health and precious lives of innocent consumers. While interpreting the law, the court must be cognizant to the purpose of the law and respect the legislative animation and effectuate the law for social welfare. The legislature enacted deterrent social provisions to combat the degradation of human conduct. These special provisions are to some extent harsh and are a departure from normal criminal jurisprudence. But it is not uncommon in criminal statutes. It is a special mode to tackle new situations created by human proclivity to amass wealth at the alter of human lives. So it is not right to read down the law."

22. Ultimately, in paragraph 53 the Court noted the object of the Amendment Act which was to put down the menace of adulteration of arrack etc. by prescribing deterrent sentences. It held that the statute cannot be struck down on hypothesized individual case. It also noted that under the Code, the accused

has the opportunity before imposing sentence to adduce evidence even on sentence and has an opportunity to plead any mitigating circumstance in his favour and it would be for the trial judge to consider on the facts situation in each case the sentence to be imposed. It held that all the accused are to be treated as a class and there was reasonable nexus between the offence created and the case to be dealt with, the procedure, presumption and burden of proof placed on the accused, are not unjust, unfair or unreasonable offending Articles 21 and 14. It also held that the provisions did not violate Article 20 (3) of the Constitution and thus Sections 57A and 57B were held to be valid.

23. In this *locus classicus* this Court has described complete scope of section 57A as a whole with special reference to Section 57A (5). It is in this backdrop of this exposition of law that the Courts below were expected to decide upon the criminality of the accused involved. It will now, therefore, be our task to see whether the parameters fixed by this Court in the aforementioned judgment have been scrupulously followed by the Courts below. Our answer to this vexed question is in the affirmative.

24. **Accused No.7**

He appears to be the boss who was running this illegal business of liquor along with his family members including accused Nos.A-4 and A-8 and even their wives were not left behind which is clear from the fact that they were arrayed as accused along with others but could not be brought to book as they were absconding and hence their cases were separated. It appears to be an admitted position that shop Nos. 1 to 26 meant for selling toddy were being managed by this accused. He had the licence for running those toddy shops in Chirayinkil Range. He had obtained them in the auction using his own money. The shops were obtained in the name of his wife who was accused No.18 and also a relative being accused No.19. This auction was held for the year 2000-01, in March, 2000. It

was only at that time that he realized that he had paid Rs.4 crores which may not be possible for him to recover if he sold only toddy through these 26 outlets. The prosecution case is that, therefore, he started procuring illicit ethyl alcohol and for that purpose accused No.4 and other accused being A-12, A-13, and A-48 helped him. The prosecution alleged that methyl alcohol used to be purchased by A-17 outside the state of Kerala and used to be supplied to A16 who delivered it to the godown at Pandaksala bearing door No. VI/98 of Chirayinkil Panchayat. Pandaksala was, in one sense, a factory for the production of the spurious liquor as per the prosecution case. There is no dispute that Pandaksala godown was owned and controlled completely by A-7. The prosecution alleged against him that A-7 was doing the business in liquor in the name of a firm called Ushus Traders. His wife's name is Usha and her younger sister's name is Ambili and it was alleged by the prosecution that his wife's brother Raju also helped him in his business. There was a large organization which becomes clear from the fact that his premises were raided by the Income Tax Department on 14.10.1999. PW-127, A. Mohan is the deputy Director of Income Tax who conducted the raid along with others. Sworn statements were recorded from A-7 as also the original accused No.15 on that day. Prosecution proved some documents relating to this raid vide Exhibits P-335, 336, 337 and 338. The statement of A-7 was marked as Exhibit P-339 while that of A-15 as Exhibit P-340. Statements of others were also recorded they being Exhibits P-341, 342 and 343. From these statements and from the documents, it became clear that a full-fledged business in illicit liquor was going on. Accounts were contained in Exhibit P-335 and P-336. A bunch of duplicate stickers was also found vide Exhibit P-338. They were of Kerala State Bewerage Corporation allegedly signed by the Excise Commissioner. It came in light that they used to sell arrack in 150 litre cover indicated in the accounts as letters PKT or P2 while toddy used to be mixed with spirit that was indicated as Spl. The more potent brand which was by adding spirit to toddy was named as KP. The spirit which was brought,

of course, illegally was indicated as SBT. Sale of arrack in retail was indicated by MN. *The accounts also indicated the packets given to the salesmen for sale, illegal gratification given to excise, police, politicians in code language.* The High Court has rightly held that this could not bring to light the offence under Section 57A. However, the High Court had held that this went on to suggest that there was a huge business going on in liquor and at times by mixing toddy with ethyl alcohol.

25. High Court had considered the properties owned by A-7. Shri Radhakrishnan, learned Senior counsel appearing on behalf of A-7 did not seriously dispute these findings. It is an admitted position that the outhouse of A-7 to the building numbered as door No.XIII/656 bearing door No.IV/1248 and a house bearing door No.XIII/655 were owned by this accused. PW-270, K.K. Joswa, conducted a search in the outhouse vide Exhibit P134 and found two tanks of 5 thousand litres capacity in the underground cellar of the North-Eastern corner of the building. These tanks were fitted with PVC pipes for the purpose of filling and emptying the same. The sample collected from the tanks for chemical analysis showed that it was ethyl alcohol. In a raid by PW-249, Rajan John who was the Circle Inspector of Police, Kadakkavoor, broken parts of four synthetic tanks of 5 thousand capacity were found as also the tanks of one thousand litres and synthetic tank of 5 thousand litres were found and seized. They were buried in the South-Eastern portion of the building. Multi-pack machine with two keys was found concealed in the Northern-Eastern part of the building. PVC pipe connection was seen going to the property of A-7. The High Court has referred to the oral evidence and has also referred to number of documents to show that several buildings were owned, possessed and controlled by A-7 and his wife wherefrom A-7 conducted his liquor business. Shri Radhakrishnan did not seriously contradict this finding of the High Court.

26. When the factory of A-7 was searched by PW-

270,K.K.Joswa on 18.11.2000 vide Exhibit P106 he detected underground cellar with 18 synthetic tanks of 5 thousand capacity each arranged in two rows of nine each containing illicit liquor. It is found that all these tanks had 48,600 of liquor. PW-71, C. Rajan was a plumber who made meticulous arrangement and pipe connection from these synthetic tanks. All this shows the huge volume of business of A-7.

27. The High court has further held that the toddy business was carried on in the building where firm Ushus Traders was operating. The toddy godown was just behind the Ushus office in building bearing No.CP III/580. The said godown was a licenced one for conducting toddy shop Nos.1 to 26 of Chirayinkil village. Two hidden tanks were found vide M.Os 63 and 64 and it is here that the liquor activities connected with business were going on. The High Court has held that the registered owners Chellamma and Sahadevan were not in the possession of premises. In this search, one tank of 5 thousand litres capacity, two tanks of 1 thousand capacity and one tank of 2 thousand capacity were seized. So also from these premises the vehicles with fake numbers, they being M.O. Nos. 83, 84, 85 and 86 were seized from these premises. The High Court also referred to analysis of cotton swabs collected from this place which showed that there was methyl alcohol. Still another property of 19.5 cents shown as Arayathuruthu was also found being owned by Raju who was brother of A-18. This property was also used by A-7 to destroy the evidence by burning plastic cans and other items. Still another property in village Sarkara was used by A-7 for illicit business which was clear from the documents seized by PW-256, P.K. Kuttappan in the presence of PW-119, Asheraf. The High Court also made reference to other properties which were used by A-7 for the purpose of illicit business, which properties belonged to mother-in-law of A-7. The High Court rightly came to the conclusion that it was A-7 who was controlling the whole affair. It is significant that when trace evidence was collected from the vehicles seized from the areas, in some of the items methyl alcohol was

detected.

28. It is not as if methyl alcohol was restricted only to the above mentioned premises. However, from the evidence of PW-256 it has come out that some plastic cans were also found in the search conducted by him in Thundathhil Purayidom which was in possession of accused No.7. The chemical analysis of the contents of those cans showed that methyl alcohol was detected in four items. In the toddy godown of A-7 from Vanchiyurkadavilla these vehicles were seen abandoned and from a Maruti car having registration No. PYOIN 463 methyl alcohol was detected in the samples taken. Methyl alcohol was also detected from the mini lorry bearing registration No.KL 01 843 belonging to A-7. Some other vehicles were belonging to A-4 who was none else but the brother of A-7 and in those vehicles also methyl alcohol was detected. The High Court has noted the further argument that the detection of methyl alcohol from the trace evidence was not possible. However, it has further observed that PW-233, Sindhu, Assistant Director, Forensic Sciences very clearly deposed that even if there is evaporation, even after 10 days, it is possible to detect the absorbed molecules of a liquid. It was, therefore, clear from her evidence that the scientific evidence collected by the prosecution was rightly relied upon by the Courts below and we also find no reason to reject that evidence. Therefore, it is clear that methyl alcohol which was the main culprit, was not only a dangerously poisonous substance but was also used in mixing the liquor which was under the control of A-7 who was being helped by his brothers, servants and relatives. We will consider separately the evidence against A-4 and A-8 who were the brothers of A-7. However, one thing was certain that this was a huge well-oiled machinery for running the liquor business and the enormousness is mind-boggling. All this suggests that A-7 was the captain of the whole team.

29. The High Court has also commented on the evidence

of PW-61, Dennis A. and PW-57, Thulasidar and has also referred to the evidence of officers of BSNL, Escotel and BPL for the use of land phones and mobile phones and conversation in between A-7 and A-4 as also the others including the servants and relatives. The High Court has then proceeded to believe the evidence that the cans which were having the illicit liquor duly mixed with methyl alcohol were removed from the godown and for this purpose has relied upon the evidence of C. Somarajan (PW-79), the cashier of the petrol pump as also the evidence of PW-76, Anfar, the auto rickshaw driver who had seen the vehicles which were used for removing the liquor.

30. The reason why accused No.7 had to mix the methyl alcohol and/or methynol is not far to see. It is clarified from the evidence of PW-96, V. Ajith Kumar that A-7 had put the bid of Rs. 4 crores for the 26 toddy shops and even if all the toddy shops had worked in their full capacity he could not have recovered even half the amount and it was, therefore, that this idea of bringing ethyl alcohol, mixing it with methyl alcohol and creating various drinks like *Kalapani* etc. was mooted. The result thereof was for all to see which resulted in death of 31 persons. The High Court has correctly observed that the basic reason for bidding for 26 shops for toddy was to get the legitimate godown for toddy. It is proved that those godowns, instead, were used not for storing toddy but for storing ethyl alcohol and mixing it with methyl alcohol for making enormous profits. It is not as if A-7 was selling only toddy. In addition to that he was creating various drinks preferably by mixing ethyl alcohol with methyl alcohol. Thus, there was a full liquor industry going on under his captainship.

31. The last nail in the coffin is the evidence of PW-53, Sunil. We have very carefully gone through his evidence and the High Court has also extensively dealt with his evidence. PW-53 is a close relative of A-7 and worked in the godown from March, 2000. Before that he was supplying spirit to A-7 from various places. He has graphically described in his evidence

as to how the spirit business was being done inasmuch as he deposed that the spirit used to be brought from the tankers and used to be collected in the syntex tanks and was filled in 35 litres cans. This spirit was used for making a drink called *Kalapani* by mixing with essence and some toddy. It was then filled in the cans and dispatched in the vehicles. The evidence of this witness further goes on to show the position of godown which was used for the storage of ethyl alcohol and methyl alcohol. He referred to methyl alcohol as 'essence'. He described that the spirit was brought from Karnataka and essence used to come on Thursdays in a white Fiat car. The Fiat car had a secrete chamber. That car was identified as M.O.-24. The tank and the platform were built in the back seat and the front seat of the car. There were three valves attached to the same and 35 litres of methyl alcohol i.e. the essence could be carried in the said car. He gave a graphic description of mixture with spirit which ultimately was sold. He specifically named A-20, A-22, A-23 and A-21 who were supervising the mixing. In his evidence he has also specifically referred that he had seen M.O.-24, the car, importing the essence i.e. the methyl alcohol precisely two days prior to the liquor tragedy. He has also named A-16 and another boy who were the occupants of the said car. He also suggested that he and the other employees were filling up the essence in 10 cans. The High Court has referred to the further evidence on the part of this witness that in the night at about 10.30 p.m. the tanker lorry came with spirit and the said spirit was filled in the syntex tank and cans. Those half filled cans were then filled with the methyl alcohol meaning thereby it was mixed. He then went on to depose that the employees of A-4, namely, A-5, A-6, A-9 and A-10 came there with three vehicles and essence and they mixed up the essence with the spirit. He claimed that in all 60 cans were filled up and were dispatched in three cars for transporting to various places for sale. According to him he came to know about the Kalluvathaukkal tragedy on 21.10.2000. On that day at about 7.30 p.m. A-7 and 15 came and slapped Vijayan for not properly mixing and A-7 then left the place telling them to destroy

the evidence. According to him, thereafter, what was left in the syntex tank was poured in the river, un-used cans were removed and plastic covers were disposed of by setting fire. A-7 had also taken adequate care to send away the employees for sometime and it was through him that the witness came to know that people had died by drinking the spirit supplied by A-4 and his employees due to a mistake in mixing by A-20 and A-22.

32. Shri Radhakrishnan, learned Senior Counsel very seriously argued that even if the evidence of this witness is entirely accepted, it does not suggest that A-7 himself mixed the methyl alcohol with the spirit and, therefore, there could be no question of his being booked under Section 57A of the Abkari Act. We have already explained the real scope of Section 57A. For being convicted under that Section, it is not necessary that the person concerned must himself do the mixing. It is obvious that A-7 was the boss. In fact PW-53 describes him as the boss. It is, therefore, obvious that everything was done as per his command and if it was so, then in order to be convicted under Section 57A, the prosecution is not required to prove that A-7 physically mixed the methyl alcohol or the injurious substance with the spirit. In our opinion, even if A-7 commanded his servants to mix up, he is equally guilty under the Section. In fact illegally importing ethyl alcohol and mixing the same with methanol was a regular trading activity on the part of A-7. The licences for running the toddy shops was merely a facade. He had undoubtedly put a very tall bid for those licences and could not have afforded to continue merely on the basis of those 26 toddy shops. The High Court has rightly referred to that part and we approve of the High Court's findings in that behalf. Therefore, he gave his business a complete new turn, that is, instead of selling toddy through those outlets he started selling alcoholic drink prepared from ethyl alcohol and methanol and that illegally imported both and all this was going on with the corrupt cooperation of those who could have checked it. Therefore, it is a proved position from

the evidence of PW-53 that A-7 was the boss of the illegal trade. He got the methanol imported and used his godown which he rightfully possessed on account of his licences for 26 shops. Therefore, his knowledge that methanol was being mixed, the fact that he was running the business along with his hirelings and the further fact that he used to be present at the time of the mixing are properly proved by the prosecution with the aid of testimony of PW-53 and are enough for a finding about Section 57A (1) (ii).

33. PW-53 very specifically deposed that on 19.10.2000 around midnight mixing was done by A-20, 21, 22 and 23 and that methanol was brought by A-16 in the Fiat car with secrete chambers and ethyl alcohol was brought by PW-48, K. Sivaram in a truck to the Pandaksala godown. There can be no doubt that PW-53 was present there and had seen this. Shri Radhakrishnan tried to take advantage of this evidence suggesting that it was A-20 to 23 who were actually mixing methanol which was delivered by the workers of A-4 from the godown in the very same night. From this, Shri Radhakrishnan tried to argue that it was not actually mixed by A-7. It was clear that this mixing took place at Pandaksala godown owned by A-7. Shri Radhakrishnan also pointed out that the High Court had held that the accused No.7 was liable to be convicted for offence under Section 57A (1) (ii). It was also pointed out by him that the High Court had observed that he could not be convicted under Section 57A (1) (i) and (iii). In short, the contention is that since according to the evidence of PW-53, A-7 had not himself mixed or did not permit to be mixed noxious substance endangering the human life with any liquor or intoxicating drug A-7 could not be convicted for the offence under Section 57 A 1 (ii) also.

34. The argument is clearly fallacious. We have already pointed out that it was not necessary that A-7 had physically mixed the methyl alcohol for his being convicted. It was actually done on his command and within his knowlege. His offence

could also come within the definition on account of the other words of the Section '*or permits to be mixed*'. While interpreting these words, namely, *'whoever mixes or permits to be mixed'* the real import of the words would have to be taken into consideration and thereby if A-7 directed his servants to mix methanol with methyl alcohol that would also be covered within the scope of the words '*mixes or permits to be mixed*' in the Section. It has already come in the evidence that all this mixing was done at the instance of, with the direction of and to the knowledge of the accused No.7. He was the king pin or the main actor on whom the huge business of liquor trade rested. It cannot, therefore, be said that the conviction under section 57A (1) (ii) was in any manner incorrect. Of course that would be only and only if the evidence of PW-53 along with other relevant witnesses held to be reliable.

35. There is no reason for us to discard the testimony of PW-53 which was read word to word before us by Shri Radhakrishnan. We find that the evidence was most natural and was not shaken in any manner in his cross-examination. He has given a complete graphic description of what happened. He claimed that he was working with A-7 from March, 2000 in the godown and before that he used to supply spirit in different places for A-7. He gave the names of persons working in the Pandaksala godown. He referred to methanol as 'essence' and pointed out that essence was added to the spirit collected in syntax tank to make *Kalapani* and then it used to be filled in the plastic vessels having capacity of 35 litres. He pointed out that the spirit was poured in the small syntax tanks and little toddy, water, powder etc. were mixed and essence used to be added to it and that substance and then it used to be filled in the bottles. He gave graphically the details of the operations and also deposed that apart from the 26 toddy shops, his boss was running 75 shops without licences and it was a small scale industry. He asserted that it is only the things supplied by the boss which are sold in those shops. He asserted that when the essence was mixed in the spirit the

vitality would increase. He also described the role of Anil Kumar (A-16) who used to bring essence and come only on certain days in month mostly on Thursdays. He also described the Fiat car and the secret tank and pointed out that the essence brought therein used to be filled in plastic vessels having capacity of 35 litres through hose and by using hand motor and essence used to be added to the spirit in the tank and then the concoction used to be supplied for sale. He spoke about the night when the whole operation took place and involved A-4, A-22 and A-21. He pointed out that alcohol came in the tanker at night. The concoction was prepared by accused Vijayan, Suresh, Monkuttan and Rasool. Three cars came thereafter being white Maruti Van, red Maruti car and Blue Maruti car. After mixing, the cars were sent of. The said material was taken to the dealers of A-7. He has also spoken as to what happened on 21.10.2000 when accused Balachandran and A-7 came and A-7 gave a beating to Vijayan asking him as to how mixing was not properly done. He then directed the whole remaining material to be poured into the river and to destroy the cans. Accordingly, as per the direction, the concoction in the Syntex tank was poured in the river and the cans and the covers were burnt and buried under the sand. He pointed out that the essence mixed spirit was taken to the shed belonging to A-7 Attukadavu. He spoke about the electronic machine, hand machine and the process of filling the concoction in the plastic cans. He pointed out that on that day all the plastic covers were burnt by them. A-7 had also directed the witness and the other servants to remain absconding. In his cross-examination, he not only identified A-7 but called him Boss and Annan, elder brother. Some irrelevant questions were put to him which he answered suggesting that the property belonged to A-7 and the godown also belonged to him and the mixing used to be done there only.

36. We have seen the whole evidence very carefully. Though he was subjected to lengthy cross-examination, the main story about the mixing has not suffered any dent. On the other hand, the operation of mixing was explained again in the cross-

examination. He owned up that he himself carried Kalapani on number of occasions to the various shops of A-7. The evidence given by this witness sounds truthful because he has not tried to justify himself nor has he made any efforts to save himself. Most of the cross-examination was stereotyped, limiting to the minor omissions in his statement under Section 161 and 164 Cr.P.C. Even at the instance of the other accused persons, nothing much has come about in his cross-examination. In his cross-examination by A-4, he again explained the role of Anil Kumar who brought methanol and asserted the role played by A-4. In the cross-examination by A-5, A-6, and A-1 also merely some omissions were brought which were insignificant. However, considering the whole evidence, this witness is creditworthy.

37. Shri Radhakrishnan, however, pointed out that the evidence of this witness is in the nature of evidence of an accomplice and has to be red in the light of Section 133 and Section 114B of the Indian Evidence Act and that he also reiterated the settled principles that an accomplice must be tested with respect to his reliability and if he is unreliable his evidence cannot be the basis of the prosecution case. Learned counsel further argued that if the witness is found reliable then his evidence must be corroborated in material particulars. Learned senior counsel relied on *Shankar @ Gauri Shankar v. State of Tamil Nadu* [1994 (4) SCC 478] as also *Rampal Pithwa Rahidas v.State of Maharashtra* (1994) Suppl. (2) SCC 73, more particularly, in paragraphs 14 and 15 in the previous case and paragraph 9 in the latter case.

38. Shri Radhakrishnan further argued that the witness had stated that he was in good terms with A-7 and that he did not quarrel with A-7. This was suggested as a strange conduct. He also pointed out that the witness had stated that he had acted under the instructions of his boss. It is seen from the evidence that he was a minion of his boss i.e. A-7 and he answered that he gave all the answers to the police as per the instructions

given to him by A-7 there is nothing unnatural in it. He was a very small fry as compared to a mighty businessman like A-7 and it was suggested by Shri Radhakrishnan that his evidence did suggest that his behaviour was strange. Shri Radhakrishnan insisted that this witness was insisting that he had good relations with A-7 and yet he deposed against A-7 and this, amounted to strange behaviour. Under the peculiar circumstances of this case considering the position of this witness vis-à-vis A-7, we do not think that this amounts to a very strange behaviour on account of which this witness should be stamped with as an unreliable witness. Shri Radhakrishnan pointed out that PW-53 was under the tutelage of the police from 20th November and was tutored by the police. His Section 164 statement seems to have been recorded on 15th January and Section 161 statement was prior to that. Shri Radhakrishnan pointed out that both his statements were clubbed together and there he himself admitted having committed the offence under the Abkari Act. Shri Radhakrishanam, therefore, argued that the police should have arrested him but the police neither arrested him nor included him in the array of accused. Instead the prosecution planted him as a prosecution witness. In that the learned counsel further argued that the prosecution did not also resort to the procedure under section 306 for claiming pardon for the witness nor did not prosecution join him later on as an accused under section 319 of the Cr.P.C. The learned counsel further argued that the police were very soft towards PW-53 who was an accused in two Abkari cases. He was also immediately granted bail in those cases and, therefore, the prosecution had acted it in an unfair manner. Learned senior counsel also suggested that PW-53 was on inimical terms towards A-7 and, therefore, his evidence would have to be evaluated with caution. Shri Radhakrishnan also urged that there were number of prevarications, inconsistencies, discrepancies, improvements and omissions in the testimony of PW-53 which were highlighted by the learned counsel. Ultimately it was argued that his evidence was even not materially corroborated.

39. Learned counsel also argued that the evidence of PW-53 could not materially prove ingredients of offence, namely, mixes or permits to be mixes, under section 57A (1) (i) at Pandaksala godown. Sudheer, PW-60 was described as a planted witness while Dennis A.(PW-61) was said to be a chance witness. It was also argued that at the most A-7 could have been convicted under section 55 (a) (g) (h) (i) and 58 of the Abkari Act as it was not proved that he had mixed or permitted to mix methanol with ethyl alcohol for selling the same in the market. Shri Radhakrishnan also argued that though the burden of proof under Section 57A (5) was on the accused, the prosecution has miserably failed to project the case of Section57A (1) (i) and (ii) and the accused has discharged his burden under Section 55 by adverting to the evidence in the case in hand.

40. Lastly, it was pointed that there was no question of any conspiracy and even if there was any conspiracy all the links in the conspiracy were snapped by A-13, 14 and 48. It was pointed out that in fact it was A-17 who had placed the order for methanol with the chemical company and entrusted the two barrels of methanol to A-16 to import the same to Kerala. However, A-17 stood acquitted. So also A-12, 13, 143 and 48 who were alleged to have brought ethyl alcohol for mixing were also acquitted. Therefore, it was suggested that no ethyl alcohol was brought at all and the methanol was also not mixed much less at the instance of A-7.

41. Before we consider the other contentions which we have referred to in the earlier paragraphs, we must first consider the argument of Shri Radhakrishnan regarding PW-53 being an accomplice and the so-called unfairness on the part of prosecution in not prosecuting him or not proceeding under section 306 Cr.P.C. The learned Counsel was vociferous in further suggesting that the evidence of this witness firstly is not reliable as it is not corroborated in material particulars as required under section 133 and 114 B of the Indian Evidence

Act. We have already pointed out that his evidence was generally found to be reliable as there is very little in his cross-examination which will destroy his testimony or would even affect it in any manner. In fact it was not our task, in the Supreme Court to re-appreciate the evidence, particularly, when both the Courts below have not only appreciated it but have accepted the same after thoroughly discussing the intricacies and the small little details of his evidence. However, we have done that exercise in the light of the contention raised that this witness was not reliable and was not corroborated in material particulars. In fact there are very weighty corroborations to the evidence of this witness. We must refer to the evidence of PW-60, Sudheer who is the driver. He deposed that he got acquainted with A-16, Anil Kumar and he assured him of a job. It was at his instance that he went to Husur and he was engaged to drive the Fiat car which was to collect some material from there to Chirayinkeezhu. He thus, went to Chirayankeezhu in the car having registration No. TMY 8746. He referred to the secret chamber in that car and through his conversation with A-16, he also came to know that the material that he was carrying in the secret chamber was poison. He referred to the godown of A-7 which was 6-7 Kms. away from Atitingal Junction. He also met A-7 and said that he used to pay the price of the stuff and in his absence, Manikantan @ Kochani (A-4) used to make the payment. He referred to the last Thursday when claimed that he had brought the stuff to Chirayinkeezhu and came to know about the liquor tragedy on Sunday when he was in Husur. He has deposed that the stuff which he brought on Thursday in the car was unloaded in A-7's godown and on that day A-7's workers were there. This evidence is in complete corroboration of the evidence of PW-53 in whose presence the car was brought by A-16, Anil Kumar. He described that the stuff which was purchased used to be filled in the secret chambers of the car and after the tragedy, he was also told by A-16 to leave the place. The witness had also identified A-7 and A-16 as also A-4, Kochani. He also identified the Fiat car. It is to be noted that when the samples were taken from this car, it was positive

for methanol. Shri Radhakrishnan also did not contest this position. Most of his cross-examination is irrelevant. Some irrelevant and inadmissible questions were also put to him in the cross-examination in relation to his statement to the police. It was tried to be suggested that the stuff that he had brought in that car was not methanol or poison. However, his evidence on the whole establishes that he had met Anil Kumar and was working for him. Apart from A-7, there was cross-examination at the instance of A-17, A-16 and A-4. There will be no question about A-17 since he has already been acquitted. However, we do not find anything suspicious in the evidence of this witness even in his cross-examination of A-16 and A-4. This witness has been believed by the Trial Court and the appellate Court and, in our opinion, the evidence of this witness provides complete corroboration to the evidence of PW-53. This is apart from the fact that there is another piece of evidence which corroborates the evidence of PW-53 which is to be found in the evidence of K. K. Joshua, PW-270. The description given by the Investigating Officer, K.K. Joshua on his searches of the places and, more particularly, of the places as described by PW-53 completely tallies. These are also material particulars which would lend support to the testimony of PW-53. Shri Joshua has given the graphic description of all the places where the activity of mixing used to go on. He has also spoken about all the six vehicles found on the spot and some of which were with fake registration number. He has spoken about the search at Tabuk Industries where a black can having capacity of 10 litres was found and on eastern side of that building there was a platform build and near it pump sets and hoses were also kept. He has referred to the liquid which was collected. He has also spoken about the synthetic tank having capacity of five thousand litres which was kept on the platform. He has also referred to the synthetic tank with spirit found there. He had taken samples D-1 to D-18 which were ultimately found with ethyl alcohol. He had also searched the toddy godown in Ushus building which was on the southern side of Ushus building at Pandaksala. He has also spoken about the Pattarumadom

house of A-7 at Kunthalloor where also two underground cellars were found wherefrom also he collected samples. He has also referred to Chirayinkil where cans were recovered. On the whole there are number of other corroborations to the evidence of PW-53. The Trial Court and the appellate Court have referred to the said corroborations and have given a finding that his evidence was materially corroborated in material particulars. In that view we need not take on ourselves the task of referring to all the corroborations. In paragraph 69 of the judgment of the appellate Court, the discussion has come about the evidence of this witness and we are satisfied by that. The appellate Court has also discussed about the ill-effects of methanol and has recorded a finding that the samples taken from the place belonging to A-7, more particularly, the syntax tanks, cans and other equipments, it was found that there was ethyl alcohol and methanol. We are satisfied with the findings given by the appellate court and the Trial Court and, therefore, we accept the evidence of this witness.

42. The argument raised was that this evidence could not be taken into consideration and it would be inadmissible because this witness, though was an accomplice he was neither granted pardon under Section 306 Cr.P.C. nor was he prosecuted and the prosecution unfairly presented him as a witness for the prosecution. The contention is clearly incorrect in view of the decision of this Court in *Laxmipat Choraria & Ors. V. State Of Maharashtra* [AIR 1968 SC 938]. While commenting on this aspect, Hidayatullah, J. observed in paragraph 13 that there were number of decisions in the High Courts in which the examination of one of the suspects as the witness was not held to be legal and accomplice evidence was received subject to safeguards as admissible evidence in the case. The Court held:

> "On the side of the State many cases were cited from the High Courts in India in which the examination of one of the suspects as a witness was not held to be illegal and

accomplice evidence was received subject to safeguards as admissible evidence in the case. In those cases, s. 342 of the Code and s. 5 of the Indian Oaths Act were considered and the word 'accused' as used in those sections was held to denote a person actually on trial before a court and not a person who could have been so tried. The witness was, of course, treated as an accomplice. The evidence of such an accomplice was received with necessary caution in those cases. These cases have all been mentioned in In re Kandaswami Gounder (2), and it is not necessary to refer to them in detail here. The leading cases are: Queen Emperor v. Mona Puna (3), Banu Singh v. Emperor (4), Keshav Vasudeo Kortikar v. Emperor (5) , Empress v. Durant (6), Akhoy Kumar Mookerjee v. Emperor (7), A. V. Joseph v. Emperor () Amdumiyan and others v. Crown(8), Galagher v. Emperor (10), and Emperor v. Har Prasad, Bhargava (11). In these cases (and several others cited and, relied upon in them) it has been consistently held that the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was re-ceived although the procedure of s. 337, Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. Section 5 of the Indian Oaths Act and s. 342 of the Code of Criminal Procedure do not stand in the way of such a procedure."

The Court finally observed:

"It is not necessary to deal with this question any further because the consensus of opinion in India is that the

competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case."

The Court has also observed in paragraph 11:

The position that emerges is this : No pardon could be tendered to Ethyl Wong because the pertinent provisions did not apply. Nor could she be prevented from making a disclosure, if she was so minded. *The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring.* Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence. The expression 'criminal proceeding' in the exclusionary clause of s. 5 of the Indian Oaths Act cannot be used to widen the meaning of the word accused. The same expression is used in the proviso to S. 132 of the Indian Evidence Act and there it means a criminal trial and not investigation. The same meaning must be given to the exclusionary clause of s. 5 of the Indian Oaths Act to make it -conform to the provisions in pari materia to be found in Ss. 342, 342A of the Code and s. 132 of the Indian Evidence Act. The expression is also not rendered superfluous because if given the meaning accepted by us it limits, the operation of the exclusionary clause to criminal prosecution as opposed to investigations and civil proceedings. It is to be noticed that although the English Criminal Evidence Act, 1898, which (omitting the immaterial words) provides that "Every person charged with an offence..... shall be a competent witness for the defence at every stage of the proceedings" was not interpreted as conferring a right on the prisoner of giving evidence on his own behalf before the grand jury or in other words, it received a limited meaning; see *Queen v.*

Rhodes (1899) 1 QB 77."

This case would bring about the legal position that even if the prosecution did not prosecute PW-53 and used his evidence only as an accomplice, it was perfectly legal. The evidence of such witness subject to the usual caution was admissible evidence. The contention of Shri Radha Krishnnan that his evidence would be inadmissible because he was not granted pardon or he was not made accused would, thus, be of no consequence and is rejected. In this backdrop, after considering the whole material and the findings of the Trial Court and the appellate Court, we have no hesitation to hold that the Trial Court and the appellate Court were right in convicting A-7.

43. At this juncture itself we must also refer to the Trial Court's judgment which has painstakingly dealt with the huge evidence led on behalf of the prosecution *against all the accused.* We appreciate the efforts and the interest shown by the Trial Court in carefully analyzing and appreciating the evidence of as many as 271 witnesses as also 1105 documents and 291 material objects. Apart from the evidence of investigation witness from the police department, several injured witnessed were examined who were injured on account of drinking of the illicit liquor prepared and sold through agencies of A-7. The other batch of the witnesses are the attesting witnesses to the mahazars, the inventories and officers of the telephone department who were examined to prove the telephone calls made from various telephones to the accused as also the accused persons using the mobile phones. Officers of the mobile companies were also examined. PWs-197 to 203, 216 and 218 were doctors who conducted the autopsy of the 31 unfortunate men who died because of consumption of spurious liquor. Other doctors who treated the patients and the doctors who issued the injury certificates were also examined. We must mention PWs-233 and 253 who were the expert from forensic science laboratory, Thiruvananthapuram. Original accused No.27 turned approver

and was examined as PW-173. Apart from these persons, S. Anil Kumar (PW-251), M. Madhu (PW-257), Pramod Kumar (PW-260) and PWs-263 to 278 were members of the special investigating team. As has already been stated, 1101 documents were proved including the mahazars, investigation papers like inquest reports, seizure mahazars, account books, building tax assessment registers, room rent registers, medical certificates, chemical analysis reports etc. We must appreciate the Herculean effort on the part of the investigating agency for collecting the evidence as also the efforts shown by the Sessions Judge. Amongst the material objects which came before the Court and were observed and commented upon by it include the pouch filling machine, vessels, synthetic cans, plastic cans, bottles etc. The Trial Court returned the finding that firstly it was established by the prosecution that the deaths injuries of the victims were caused because of consumption of spurious liquor with methyl alcohol. The Trial Court further recorded a finding that number of the accused persons sold the same. The Sessions Judge has dealt with the deaths of all the 31 persons and on the basis of the inquest report as also the evidence of other witnesses came to the conclusion that all these deaths were caused due to the drinking of illicit liquor mixed with methyl alcohol. The medical certificates as also the post-mortem reports have been meticulously dealt with para-wise with the evidence of the witness proving such certificates as also the evidence of the doctors. The Sessions Judge then went on to appreciate the evidence of the relatives of those persons who lost their lives. The prosecution examined about 33 witnesses on this question. The Sessions Judge went on to accept the evidence of all these witnesses regarding the reason of the death of their kith and kin. On the question of S.32, Evidence Act the Trial court has relied upon the judgment of this Court in *Rattan Singh v. State of Himachal Pradesh* [1997 (4) SCC 161] as also *Smt. Laxmi v. Om Prakash* [AIR 2001 SC 2383]. The Sessions Judge also discussed the evidence of the few of those witnesses who had actually consumed the spurious liquor and suffered injuries because of that. All these

witnesses, number of which is substantial, deposed about the ill-effects felt after drinking from the shops where liquor provided by A-7 and carried by the other accused persons like A-4, A-8, A-25 and A-30, used to be sold. On the basis of these witnesses and also on the basis of the doctors who conducted the post-mortem, the Trial Court had no difficulty to arrive at the conclusion that injuries suffered by persons including the accused as also the deaths were occasioned because of the drinking of the spurious and illicit liquor. The Sessions Judge ultimately gave a finding that it is only after drinking the illicit liquor that the concerned persons developed symptoms characteristics of methanol poisoning.

44. The Sessions judge went on to discuss the evidence regarding the conspiracy of A-7 with the other accused persons. For ascertaining the role of A-7, the Sessions Judge then referred to the evidence of A. Mohan (PW-127), Deputy Director of Income Tax (Investigation) as also the sworn statements of A-7 to A-15 recorded on 14.10.1999 under Section 131 of the Income Tax Act. The Sessions Judge on the basis of all this voluminous evidence recorded the finding on the way the business of A-7 was being managed. His examination and the replies given to the various questions were also considered by the Sessions Judge wherein he admitted about liquor business and his dealing with the Income Tax Department as also the accounts, the huge profits that he made from this business. He also accepted that his two brothers Sunil Dutt and Murleedharan were his partners and that the accounts were written by Balachandran (A-15). It was an admitted position that A-7 was in this business right from 1984 to 1991 which he continued for seven years and thereby started again in 1997-1998 and that A-7 conducted 16 shops and his brothers conducted 10 shops. After dealing with the evidence regarding the accounts as also the various statements made in the income tax enquiries, the Trial Court went on to appreciate the other material regarding the purchase of shops. The Sessions Judge has then given the complete finding

regarding the business of A-7 and the other accused. These accounts very significantly include the monies paid to the police officers of various ranks as also the excise officers and including. All this was indicated in the accounts in the code language. The internal arrangements of the business with other accused persons were also discussed and also the financial aspects. He has also discussed about he incriminating circumstances. Accused No.7 had employed 33 salesmen and 18 toddy tapers who were members of the Union. According to the Sessions Judge these employees used to keep away from the business and would only receive salary and allowances. All the toddy collected used to be kept in the godowns of A-7 which were raided by the police officers. The Session Judge then in paragraph 220 of his judgment has recorded a finding on the basis of the documents and the accounts that A-7 had meticulously managed his toddy business which was of huge magnitude. The Sessions Judge also recorded a finding that A-7 made huge profits of over 9.5 crores within a span of four months. By doing the toddy business alone he could not have earned even 1 per cent of the bid amount of Rs.4 crores. The Sessions Judge then dealt with the properties including the godowns which were raided and from where samples were collected. We have discussed regarding the properties in the earlier part of the judgment and so we need not repeat the same.

45. The Sessions Judge as also referred to the material objects found in some of these properties and has also referred to the fact that methanol was detected in the vehicles found parked in this plot. Accused No.7 was also found to be frequent purchaser of polythene pouches from the evidence of K.S. Harish Kumar (PW-264), C.G. Perera (PW-78) and Exhibit P-83 of mahazar. Similar is the evidence of Peter Jacob (PW-81) referred by the Sessions Judge. The Sessions Judge then referred to the incriminating articles seized from the very premises occupied by A-7 analysis of which gave indication of nature of his business. These premises include Sreekrishna

Tabuk Industries. After referring to various sections, the Trial Court traced the role of A-7 and other accused persons like A-4. His vehicles were found to be fitted with additional spring leaves and it was obvious that they were being used for carrying spurious liquor. The Sessions Judge also recorded Exhibit P-855 and 859 which were search lists and Exhibit P-860 which is the mahazar prepared by him in this regard. Some of the items seized by this search list showed traces of methyl alcohol. Exhibit P-861 was relied upon for this. The Sessions Judge refuted the contention raised by the counsel of A-7 that considering the scientific properties of methyl alcohol it was impossible for them to find the trace in some of the vehicles or in the cans etc. as they would have evaporated. For this, the Sessions Judge relied on evidence of PW-233, Sindhu, Assistant Director of Forensic Science Laboratory who had collected the trace evidence. Her assertion that methyl alcohol could be traced even after ten days could not be shaken and was rightly accepted by the Sessions Judge. Her evidence that methyl alcohol was found in the three chambers fitted in the car bearing registration No. TMY 8748 cannot be assailed on any count. From all this voluminous evidence ultimately the Sessions Judge came to the conclusion that A-4, A-8, A-25, 30, and others were the close associates of accused No.7 and were also involved in the illicit manufacture and transport of arrack. The sessions Judge also held that some accused were involved in manufacture of the illicit arrack. We have carefully gone through the evidence referred to by the Sessions Judge and endorse his judgment.

46. We have deliberately referred to the judgment in details as one of the arguments by Shri Radhakrishnan against the High Court's judgment was that the High Court has dealt with the whole matter in a perfunctory manner and that it has not considered the findings by the Trial Court nor has the High Court dealt with the main objections raised in their defence. We are satisfied with the judgment of the Trial Court insofar as this accused is concerned and the High Court has rightly confirmed

the same. We accordingly dismiss the appeal filed by A-7.

47. We shall now consider the appeal filed by accused No.8, Vinod Kumar. He has been convicted for offences under Sections 324, 326 and 328 of the Indian Penal Code as also for the offence under section 57 A (1) (ii) of the Abkari Act and has been sentenced to undergo life imprisonment along with the fine of Rs.50,000/-. Has also been separately convicted under Section 57A (1) (i) as also under Section 55 (a) (i) and Section 58 of the Abkari Act. His conviction insofar as offences under Sections 302 and 57A (1) (iii) are concerned, the High Court has set aside the same. There is a specific finding in respect of his conviction under Section 120B IPC. The main evidence relied upon by the Courts below against this accused is PW-257, Mr. M. Madhu who conducted search being search mahajar Exhibit P.135. It is the contention of the prosecution that a search was conducted of a house which was under construction at that time and it belonged to A-8. It is claimed that plastic cans MO-32 and MO-39 to 43 vehicles were found in the premises. Exhibit P-782 which is the chemical analysis report suggests that traces of methyl alcohol and ethyl alcohol were detected in the cans as also in the samples taken from floor of the vehicles found parked in the said premises. The prosecution has come out with a case that since his house was being constructed, A-8 took a house in front of this house, namely, Roshini on rent. This house was also searched and Exhibit P-111 was executed whereby a mono block pump set and a telephone bill was recovered. Fake number plates being MOs 83 to 86 were seized from the premises under Exhibit P-191. Some of these number plates related to some of the vehicles recovered from the premises i.e. the plot where the house was being constructed. Exhibit P-135 is the search mahazar and report relied on in this regard.

48. It is to be understood that A-8 is the real brother of A-7 and it is the contention of the prosecution that A-8 was fully involved in the said business of illicit liquor which was headed

by his brother, A-7. The High Court in paragraph 81 of its judgment has held that the evidence adduced by the prosecution sufficiently established his complicity in the crime. The High Court has also relied on Section 58 A (5) of the Abkari Act which casts a burden on the accused to prove that he had not mixed or permitted to be mixed any noxious substance with the liquor. According to the High Court such burden has not been discharged. It was tried to be argued by Senior counsel Shri V. Giri that there is no veracity to the evidence relating to the presence of methyl alcohol in the floors of the cars or in the material objects found in the search on 30.10.2000. Shri Giri further strenuously asserted that even if Exhibit P-135 and the testimony of PW-257 and PW-253 are accepted still the accused could not have been booked for offence under section 57 A (1) (ii) of the Abkari Act. He suggested that there is no evidence to show that the accused had either mixed or permitted to be mixed any noxious substance. The learned Senior counsel also argued that the accused must himself know that whatever is being mixed with the liquor is itself a noxious substance which has the potential of endangering the human life and it is only when he mixes it in spite of the said knowledge then alone the offence under section 57A(1) (ii) could be established. The learned counsel was at pains to argue that there is nothing to prove that A-8 had any such idea that methanol is a noxious substance. The learned counsel then pointed out that there is no direct witness to depose about the steps taken by this accused for mixing methyl alcohol with ethyl alcohol or as the case may be toddy for making Kalapani. The learned counsel further argued that the evidence of PW-53 is of no consequence as it does not suggest that A-8 was aware of the mixing for noxious substance like methyl alcohol. He, therefore, urged that there is no evidence even remotely to connect A-8 with the mixing of noxious substance. Relying on the language of Section 57 A(1) (ii) it is the argument that it is only where the accused is a licencee under the Abkari Act and if any noxious substance is detected from any sample taken from any of the outlets operated by him then alone the burden

of proving that he had neither mixed nor permitted to be mixed will be that of the accused. However, in the case like the present one there would have to be positive evidence to connect the accused with the actual act of mixing. According to the learned counsel, merely because methyl alcohol was detected from the traces of evidence collected from the cans and the cars which was seized on 30.10.2000 that by itself could not be sufficient to attract Section 58A(1) (ii). It could only indicate the involvement of the accused in transportation of the noxious substance mixed with ethyl alcohol. Learned counsel further contended that the evidence regarding the telephone calls having been made from the said number to the house or other places belonging to or under the control of A-7 which the prosecution sought to prove by producing a telephone bill in the name of Shyamala Kumari was also of no consequence. The learned counsel argued that being the younger brother of A-7 there is nothing wrong if he made calls. The learned counsel further argued that the prosecution has relied on the fact that the number plates were recovered from a shed situated near Pandaksala godown actually belonged to some of the vehicles which were found in the house under construction belonging to A-8. It has been held by the Courts below that the fact that loose unattached number plates were actually recovered from the godown and a shed under the control of A-7 would show that A-8 was an active participant in the business conducted by A-7 and that he should, therefore, be treated as part of the conspiracy allegedly hatched by A-7. However, the learned counsel pointed out that firstly, the disclosure statement is inadmissible and secondly, the said discovery was extremely unnatural and artificial. The counsel pointed out that even if the said recovery is to the accepted it would be of no consequence insofar as the offence under Section 57A (1) (ii) is concerned. At the most, it would show that A-8 was a participant in the business and for that A-8 could be booked for the offence under Section 55. However, it will be totally insufficient for booking him for the offence under section 57 A (1) (ii).

Lastly, the learned counsel argued that there is no clear finding for the complicity under Section 120B, Indian Penal Code. According to the learned senior counsel the gist of crime though alleged has not been proved at all and even if it is presumed that accused knew that methyl alcohol was being imported, it will be too much to presume that he knew about the mixing of the same with alcohol. The learned counsel argued that the agreement for the conspiracy, as the case may be, has not been proved at all and merely because there is a burden on the accused under Section 57A (5), that cannot be used for proving offence under section 120B, IPC. The counsel then made extensive comments on the law laid down in *P.N. Krishna Lal v. Govt. of Kerala* [1995 suppl.(2) SCC 187]. His whole stress was on paragraph 39 as also paragraph 46. The learned counsel pointed out that a strictly literal interpretation of the rule was not possible because it would virtually dispense with any burden on the prosecution to prove the offence. Leaned counsel argued that the initial burden of proving always would lie on the prosecution which should suggest the involvement of the accused in mixing of the noxious substance. It is only then that it will be the burden of the accused to prove otherwise.

49. We shall now consider all these contentions in the light of the findings by the Trial Court and the appellate Court. We have already considered the nature of burden of proof on the prosecution as also on the defence in the earlier part of the judgment while considering the case of A-7. The question of said burden has been discussed thoroughly in *Krishna Lal's case (cited supra).* There can be no dispute that the prosecution has the initial burden to suggest that the accused person was involved in the business of illicit liquor and that he knew the nature thereof. It is only then that the burden would shift to the accused to prove that he had no means to know about the nature of the business or the fact that the liquor was being mixed with noxious substance like methanol. Now here in the present case, the accused is the real brother of A-7 and there are number of other circumstances to suggest that he was actively

engaged in the business. The High Court as also the Trial Court thoroughly discussed and considered the evidence and all the circumstances therein. In fact in the light of these concurrent findings, we need not discuss the whole evidence. However, it is clear from the evidence of discovery regarding the fake number plates that accused No.8 was neck deep into the business of spurious liquor. He was an active member in carrying the said spurious liquor and the fact that a vehicle under his possession found from his premises had the trace of methanol is sufficient to hold that he had the necessary knowledge that methanol played a major part in the business which was headed by his real brother A-7 and in which he was an active partner. The contentions raised by Shri Giri that he may at the most be booked for transporting the spurious liquor is also not correct because if that is established then his active participation in the business also comes to the forefront. Thereby his knowledge that the liquor was being mixed with methanol has also to be presumed. There was no necessity for keeping the fake unattached number plates in his premises and the whole objective is clear of shielding the cars by attaching fake number plates to them. In paragraph 80, the High Court thoroughly discussed about vehicle PYO1 M 2464 which was sold by PW-68, S. Vasudevan and was found in the possession of this accused. The High Court has also discussed about the transaction of his house, namely, Roshini which was in front of the half built house where obnoxious liquor trade was going on. He had also taken a good care to un-authorizedly obtain the telephone number 620069 from Shyamala Kumari, PW-73. It has referred to the evidence of PW-260, Pramod Kumar who had proved the recovery mahazar Exhibit P-191. The evidence of PW-68, S. Vasudevan was also referred to by him. He also urged that the house did not belong to A-8. We have already referred to the circumstance that A-8 had taken a house right in front of the aforementioned half built house and it was at his instance that the real number plates of the car which had the traces of methanol were found. We, therefore, find no reason to discard the evidence of this discovery.

50. As if this was not sufficient according to PW-49, S. Shiju, who was the driver of A-8, liquor would be brought from the house of A-7 in the maruti car to be carried to the places such as Adoor, Ezhukone and Pathanapuram. It is this witness who established the nexus of A-8 with the two cars PY01 M 2464 and PY01 N 1014, MOs 41 and 43, respectively. Therefore, it is obvious that this accused was engaged in the business of manufacture, storing, sale and supply of illicit liquor along with A-7 which resulted in liquor tragedy. It is obvious that this accused was well aware of the nature of the business as he was thoroughly into it. Therefore, the offence under section 57A (1) (i) and (ii) as also the other offences under Sections 324, 326 and 328 read with Section 34, IPC have been rightly held proved against him. We are not impressed with the argument of Shri Giri that the discovery was unnatural and was farcical since both the Courts have held the said discovery to have been proved. Again his frequent calls to his brother would cut both ways and would also show that he was actively involved in the business. As we have already shown from our earlier discussion that it is not necessary that the accused had to mix or permit to be mixed the noxious substance himself. He could be booked on the same basis as A-7 has been booked by us on the same logic. Again we are not prepared to accept the argument of Shri Giri that A-8 had no idea that methanol is a noxious substance. If a huge business was going on and methanol was being imported along with ethyl alcohol in huge quantity and if the car which brought the methanol was in his possession and further if the methanol is established to be a noxious substance, it would be a travesty to hold that A-8 did not know that methanol was obnoxious substance. It is also well established that this accused could be convicted with the aid of Section 120B, IPC and also independently of the offence under Section 57 A (1) (ii) as he was not only the part of the business but had actively taken part in it. That by itself is sufficient to hold that he had the knowledge about the mixing of the ethyl alcohol with the noxious substance like methanol and in spite of it,continued. His offence would be covered fully

in the phraseology '*or permits to be mixed*'. We accordingly, confirm his conviction.

51. Shri Giri suggested that the chemical analyzer report was not put to the accused and took us through the examination of the accused. In fact vide the question numbers 51, 63, 131, 141,143, 219, 220, 221, 224, 263, 691, 692, 706 and 709 and, more particularly, question No.624 all circumstances regarding incriminating circumstances have been put to this witness. Therefore, this argument of Shri Giri has to be rejected.

52. Lastly, Shri Giri also argued about the sentence and contended that at the most this accused could be booked for the offence under section 55 (g) and (h). There can be no doubt that he can be booked for those offences, however, in our opinion, the Trial Court and the appellate Court have not committed any illegality in booking him under section 57A (1) (ii) also. Considering the number of deaths caused on account of the business in which this accused was neck deep, we do not think that any leniency can be shown. We accordingly dismiss the appeal of A-8.

53. This takes us to the case of A-4, who is another brother of A-7 and A-8. In fact the part played by A-4, Manikantan @ Kochani is not less than the part played by A-8, if not more. His connection with the business and A-7 is deposed by A. Raju (PW-40), an auto rickshaw driver who had seen A-4 coming out of the house of A-1 in a red maruti car. His business connections have been deposed to by M.M. Ibrahim (PW-65) and it is proved from the evidence of PW-37 that he also arranged for the finance of Rs. 30 lakhs at the instance of A-1. He was also identified by S. Dharmapalan (PW-36) as a person going to the house of A-1 with spirit in car. It is very important to note here that appeal by A-1 has abated on account of her death. It was A-1, who was the retail distributor of liquor. Allegedly her shop was for sale of toddy but it has come in evidence that liquor used to be supplied from her house. Few

injured witnesses have been examined who were the customers of liquor saying that on the fateful day the liquor tested a little different. PW-53 in his evidence specifically involved this accused suggesting that the methanol was first brought in the plastic vessels and then mixed with spirit kept in the tank and thereafter it was supplied for sale. He specifically stated that this was done under the leadership of A-4 along with few others. He has specifically deposed that on the fateful day, MO24 car came to the godown of A-7 between 10 to 11 O'clock in the morning and that was being driven by Anil Kumar A-16. He further deposed that the essence i.e. methanol was filled in 10 plastic vessels and they were kept inside the godown. At that time, probably ethyl alcohol had not come and it was told to them that spirit load would come. He further deposed that the tanker of ethyl alcohol came at about 11 O' clock in the night, the driver of which was Shakthi from Tamil Nadu. It was then mixed by the workers of A-4 with the ethyl alcohol. He then suggested that the liquor was then dispatched in three vehicles to the dealers at Attukadavu and Pulimuttukadavu. Even after the tragedy happened, he deposed about the operations to destroy the spurious liquor. In the cross examination at the instance of this accused, beyond putting an innocuous suggestion that he was telling lies, there was nothing much. The accused was tried to be painted as the chief link of Kayamkulam lobby to which he specifically answered that it was Anil Kumar who used to do the same. This accused was also involved by V. Harikumar (PW-167) who also knew this accused along with four other accused persons who were the driver of A-4. According to this witness, they used to purchase flowers to put in their cars. S. Vasudeven (PW-68) who is the vehicle broker also recognized A-4, A-7 and A-8 and deposed that he had effected sale of the car to A-8 and arranged two cars for the manager of A-7. However, the money for all this was provided by A-4. The High Court has also referred to the evidence of T. Shyjan (PW-173) an accomplice to show the involvement of A-4. Even Usha (PW-62) spoke about the adjacent building being rented out in the name of A-4. The

search list Exhibit P-112 which was proved and produced by PW-270, various articles were seized and samples collected showed the ethyl alcohol and methyl alcohol which fact got proved by Exhibit P-782. These objects were MO-26 four blue cans and MO-27, 12 white cans. He along with his brother raised loans from Chirayinkil Service Cooperative Society, obviously for running the business along with A-7. He stood as a guarantor for A-7. Exhibits P-74 (d) (e) (f) (g) (h) were proved for that purpose. The High Court has discussed about his house properties from where number of cans were seized. It has also come in the evidence that the samples collected from the floor of these buildings showed the presence of methanol. Thus, it is clear that this witness was thoroughly in the business like his brothers A-7 and A-8. It is, therefore, clear that this was nothing but a conspiracy to run a patently illegal business along with his two brothers and others. It was argued by Shri Dave that the case against this appellant stands on the same footing as A-5 and A-11 and, therefore, he deserved to be given the same punishment. We do not agree. A-5 and A-11 along with A-6 and A-10 are proved to have physically transported the mixed substance to various places. However, they are not the persons who took active part in the business as its proprietors as A-4 did. In fact A-4 was at the helm of the affairs unlike those accused who merely transported the liquor. The case of A-4, therefore, is quite different. It was argued that he himself had not transported the noxious substance which was done by A-15. That may not be so, but he was practically managing the whole show. It has rightly been held by the Trial Court and the appellate court that A-5 was a worker of A-4 and took active part in the transportation of methanol. We do not accept the argument of Shri Dave that his case was comparable to that of A-5 and such a contention has rightly not been accepted by the trial and the appellate Court. His involvement in the business is so deep that it was clear that he was a conspirator and it was in pursuance of conspiracy that the whole liquor business which essentially involved the mixing of methanol with the ethyl alcohol was being conducted. Shri Dave tried to dub the

evidence of PW-53 as a general evidence which argument does not impress us. We have already commented upon the evidence of PW-53.

54. Shri Dave then dubbed Section 57A as a draconian piece of legislation. Relying on the language of the whole section, Shri Dave contended like the other learned counsels that the act of mixing the noxious substance has to be proved for being punished under this section. We have already commented upon the real import of Section 57A of the Abkari Act. The language of Section 57 A (1) is wide enough as we have already commented in the earlier part of the judgment and A-4 will fit in the broad language. Shri Dave argued that the section does not use the word 'knowledge' or 'knowingly'. He also argued that *mens rea* to be read in all the offences unless the legislature has expressly or by necessary implications excluded *mens rea* as the ingredient of offence. Reading the language of Section 57 A (1) as it is, it is more than proved that all these accused persons entered into a conspiracy to do the illegal liquor business and in order to succeed in their business, took recourse to mixing methanol with ethyl alcohol and brought out a new type of spurious liquor. In order to increase the potency of the drink and in order to probably give taste, they mixed the methanol. Once ethyl alcohol is proved to be a noxious drug, if they are found to be mixing or permitting mixing methanol with ethyl alcohol then the offence would be complete whether they had the knowledge regarding the qualities of methanol or not. That is apart from the fact that in this case itself to say that the accused did not know about the properties of methanol would be wrong. If that had been so they would not have been running between Hosur and Kerala to bring methanol in the cars which had fake registration numbers and secrete chambers. As many as 7 reported decisions were relied upon by Shri Dave for the question of mens rea. We have nothing against the principles laid down thereunder but we must point out that in none of the seven cases relied upon by the learned counsel the case related to an offence like Section 57

A (1). The whole discussion on mens rea, therefore, is of no consequence. The following cases were relied on:

(1) *Lim Chin Aik v. Reginam* [1963] 1 All ER 223

(2) *State of Maharashtra v. Mayer Hans George,* 1965 (1) SCR 123

(3) *Sweet v. Parsley* [1969] 1 All Er 347

(4) *State of Gujarat v. Acharya D. Pandey & Ors.* (1970) 3 SCC 183

(5) *Sanjay Dutt v. State Through CBI* (1994) 5 SCC 410

(6) *Kalpnath Rai v. State (through CBI)* (1997) 8 SCC 732

(7) *B (a minor) v. Director of Public Prosecutions* [2000] 1 All 833

55. There can be no question about the absence of conspiracy. The whole business itself was a conspiracy. It may not be the conspiracy to mix the noxious substance but the fact of the matter is that in order to succeed in the business which itself was a conspiracy they mixed or allowed to be mixed methanol and used it so freely that ultimately 31 persons lost their lives. We are not at all impressed by the argument regarding knowledge. Shri Dave also referred to the case of *P.N. Krishna Lal (cited supra).* The argument was that if Section 57A (v) is to be worked out in its literal manner then it is the defence which would lead the evidence of disproving. The argument is clearly incorrect. We have already explained the responsibility on the prosecution in the earlier part of the judgment. In our view, in this case the prosecution has discharged its primary burden. The accused persons, more particularly, these three brothers have not offered any evidence so as to discharge the burden put against them under section

57A (1) (v). In this case the prosecution has clearly proved that there was a noxious substance which was likely to endanger the human life. Secondly, they have proved that substance was mixed, permitted to be mixed and was being regularly mixed with liquor. They have thirdly proved that the persons mixing had the knowledge that methanol was a dangerous substance that aspect would be clear from the fact that after the tragedy A-7 went and punished his servants and remonstrated them for '*not properly*' mixing methanol with ethyl alcohol. Lastly, it is proved that as a result of mixing of methanol with the liquor and as a result of consuming such liquor as many as 31 persons lost their lives and number of others suffered grievous injuries. We reject the argument of Shri Dave that the initial burden was not proved by the prosecution which we confirm the finding of conviction and sentence as imposed against A-4. We accordingly dismiss the appeal filed by A-4.

56. This takes us to the SLP (Crl.) 842 of 2006 of A-25 represented by senior Counsel Shri Shekhar in which we have granted leave to appeal. The argument of learned senior counsel was almost on the same lines with that of Shri Dave and Shri Giri insofar as the contentions regarding the burden of proof and the interpretation of Section 57 A (1) were concerned. It is well proved by the prosecution that this A-25 was a major link used to purchase liquor from A-4 and he was the one to used to distribute the same. Learned counsel argued that this accused had no control over this business and he was merely transporting the spurious liquor and, therefore, he should have been booked under section 57 A (1) (iii).

A-25 was selling liquor in retail through A-32, A-35 etc. A-25 and A-10 were the employees of A-4 who were supplying the liquor to A-21. Thus, he was getting the readymade liquor. As per the evidence of P. Thulaseedharan (PW-131), because of the liquor sold to his father on 21.10.2000 at 11 pm that his father was admitted in the hospital. Name of the father is Pachan. In fact, as per the evidence of PW-131, he was told

by his father that he had consumed little from the liquor entrusted to him by A-24 for sale. Thereafter, he felt headache and abdominal pain. The prosecution suggests that later on he died. As per the evidence of P. Ramu (PW-163), his father used to drink the liquor supplied by A-25 and he had also seen on the fateful day, his father consuming alcohol supplied by A-25. Thus, his father who died was himself a further supplier of the drink, which was used to be supplied by A-25. The liquor sold on that day tasted differently, which was the evidence of M. Ponappan (PW-133). He had, however, purchased the liquor from A-32. When he enquired about the reason, he was told that it was liquor of A-7 brought through A-25. Evidence of T. Chandrasekhara Babu (PW-146) is also to the same tune. PW-173 is another witness who is an accomplice. He claimed to have known A-25. He was used to be given a canister whenever he became indebted. He used to sell 35 litres of liquor in that canister. Thus, it is established that A-25 used to take the liquor manufactured by A-7 and the same used to be supplied to him by A-4 and the same was distributed by him further. Obviously, this witness used to sell the liquor supplied by A-25 at a higher price of Rs.20/- per litre and he purchased the liquor from A-25 twice or thrice in a week. It was for the last time that he purchased the liquor from A-25 on 20.10.2000 as he told that he waited near Pallikkal temple near milma booth and after 10 or 15 minutes, A-5 and A-25 came there in a blue Maruti Car and five canisters of liquor were unloaded there. It was distributed amongst A-24, A-6, A-29 and A-28. It was A-25 who asked A-32 to destroy the balance of liquor after the tragedy. The prosecution alleged, as the High Court has noted, that he absconded and he was arrested from K.S.R.T.C. Bus stand on 11.12.2000. The Trial Court thoroughly discussed his evidence. It was contended before the Trial Court that evidence of PW-173 could not be accepted as he was given pardon only towards the fag end of the case. The Trial Court and the High Court have found nothing wrong with the grant of pardon under Sections 306 and 307 of the Cr.P.C. The Trial Court has correctly appreciated the legal position that evidence of PW-173 could

not be accepted unless it is corroborated by other witnesses. A finding is recorded that the evidence of PW-173 was corroborated by PWs-131, 133 and 163 insofar as the role played by A-25 is concerned. Thus, the sale on the part of A-25 and his active participation in the business run by A-4 and A-7 was clearly brought out. He was convicted for the offence under Sections 57A(2)(i) and was heavily fined for Rs.50,000/-, Rs.25,000/- and Rs.2 lakhs on different counts including Section 55(a)(i) as also under Section 58 of the Abkari Act. He was, thus, in a position for distributors and it has come out in the evidence that the liquor sold by sub-distributors killed number of persons. The sub-distributors were none, but A-37, A-35 and A-41. It was the chain of distribution of liquor mixed with methyl alcohol. It is obvious that he was in possession of the poisoned liquor and does not seem to have taken care that it was not mixed with methyl alcohol. It was urged by the learned counsel appearing that there was no evidence on record to suggest that A-25 had anything to do with the mixing of the methylene with the liquor. It was suggested that he had no control over the operation and he was a mere distributor and sold the liquor as he received from A-4. There is no doubt that this accused was acquitted of the offence under Section 120B, IPC by the Trial Court and there is no appeal against it. The conviction of this accused is for offence punishable under Section 57A(2) and on that account, he has been awarded life imprisonment. Shri V.Shekhar, learned senior counsel contended that since this witness was not a conspirator and had nothing to do with the business of A-7 and was merely a distributor, the sentence of life imprisonment is excessive. As against this, learned senior counsel appearing on behalf of the State contended that this accused cannot escape the conviction under Section 57A(2). The learned senior counsel urged that if this accused was selling the liquor, then it was for him to take the reasonable precaution to see that the liquor that he sells is not mixed with toxic substance. There can be no dispute that this witness had no control over the business run by A-7 and, therefore, he was rightly acquitted for the offence under Section 120B, IPC i.e.

conspiracy. However, it cannot be said that his conviction under Section 57A(2) is incorrect on that count. We also find from the evidence of P.S. John (PW-252) that there was a search in the house of this accused on 23.10.2010 vide Exhibit P-803 and a bottle was seized which was mixed with ethyl and methyl. This was substantiated by Chemical Analysis Report (Exhibit P-784). He was also in possession of pure methyl alcohol, which is substantiated by Exhibit P-417, a disclosure made by him to M.G. Manilal (PW-269) as per Exhibit P-1019. Even this was found to be methyl alcohol. Once this fact regarding the possession of methyl alcohol is proved, A-25 cannot argue that the possession of methyl alcohol was only incidental. There is no reason for keeping methyl alcohol with him. After all, he was not going to use it as a deodorant or perfume. This may suggest that he had a hand in mixing the alcohol with methyl alcohol, but there is no evidence for that and he has not been convicted for the offence under Section 57A(1). The words "omits to take reasonable precaution" would cast a duty on him to see that the liquor that he sells is not mixed with poisonous substance. Again, under sub-Section (5) of Section 57A, he was bound to prove that he had taken reasonable precaution, as contemplated in sub-Section (2). There is no evidence to the contrary nor has the accused discharged his burden in any manner. In our opinion, therefore, his conviction for offence punishable under Section 57A(2) is justified. However, we agree with Shri V. Shekhar, learned senior counsel, who suggests that he should not be punished with life imprisonment. We find that this accused is convicted for offence punishable under Section 55 as also under Section 58, the maximum punishment for which Section is 10 years and that he has already undergone more than 10 years of imprisonment. The statement made by the learned senior counsel that the accused had undergone more than 10 years of imprisonment was not seriously controverted. In our view, therefore, this accused should have been dealt with not at par with A-7, A-4 and A-8 at least insofar as the punishment is concerned. We, therefore, deem it fit while confirming his conviction for the other offences

and the sentences therefor to bring down the sentence from life imprisonment to what is undergone by him (relying on the statement made by the learned senior counsel that the accused has undergone more than 10 years of imprisonment). Insofar as the punishment of fine is concerned, we do not interfere and confirm the sentence of fines.

57. We accordingly dismiss his appeal with the modification in the sentence as indicated.

58. This takes us to the Criminal Appeal No. 1531 of 2005 filed by A-30. His case more or the less is identical with Suresh (A-25). As per the prosecution version, this accused had filled the liquor supplied by A-4 through A-5 and A-10 in covers and on the fateful night on 20.10.2000, he carried the same in Car bearing registration No. PT01M 8122 to the residence of A-39 and she, in turn, sold the same to the customers. It is ironical that A-39 herself also consumed liquor and died, so also one Soman Pilai and several others had sustained injuries. The evidence of PW-153 is clear enough, who complained that the liquor was found to be stronger and when he asked what the matter was, it was pressed by A-39 that the liquor was supplied by A-30. In fact, as per the evidence of a. Gopi (PW-153), he had himself found A-30 bringing the liquor. Similar is the evidence of N. Prasad (PW-154) who felt uneasy after drinking the liquor at 12 in the noon on 20.10.2000. He was required to be hospitalized. Even he has deposed that A-39 used to sell the liquor which was supplied to her by A-30 and A-31. He has also seen the liquor being supplied. In fact, he also spoke about the happenings on 20.10.2000. G. Raghavan Pillai (PW-164), the father of A-39 had also consumed the liquor and he also suffered. He also established the connection of A-30. Thus, there is enough evidence to establish that on the fateful day, A-30 accompanied by A-31 supplied three bundles of covers, each having 100 covers. He has made a disclosure statement that alcohol was poured in the closet of a latrine recently constructed on the eastern side of the Senior Orthodox Church. The liquid in this closet which was having smell of liquor was

collected and it was established that it contained methyl alcohol. M.O. 256 is the sample while Exhibit P1001 is the chemical analysis report. One Badaruddin (PW-172) also spoke about the role played by A-30 who purchased the new car under hire purchase agreement. This was none else but car bearing registration No. PT01M 8122. He also discovered a sealing machine from the residence of one Sukumaran (PW-181). M.O. 97 was that sealing machine, which seizure was proved by S. Bhaskaran (PW-175). This accused offered himself as a defence witness and admitted therein that the car was owned by him and since there was default in payment of the hire purchase installments, the car was seized by the financer. It is found by the High Court that his house was near to Senior Orthodox Church near to rubber plantation. He claimed that he was made accused because of the political enmity. There can be no dispute that there is enough evidence to show that A-30 was involved in the procurement of liquor from A-4. He then packed it in the covers and supplied to A-39. The High Court has not found him guilty under Section 304 or Section 307, IPC. Instead, the High Court has booked him for offence under Section 57A(2)(ii), Section 55(a), (h) and (i) and Section 58 of the Abkari Act. Ms. Malini, learned counsel very earnestly urged that his conviction should not be maintained under Section 57A(2)(ii) as he did not have knowledge and he was not concerned with the preparation of the spurious liquor. We reject the contention on the same reasoning that we have given for rejecting the similar contentions raised on behalf of A-25. The role played by both is almost the same. We also reject the contention raised that he could have been booked only under Sections 55(a), (h) and (i) and also under Section 58. The learned counsel has also prayed for leniency. For the same reasons that we have given in respect of A-25, we take the same view in respect of this accused also. The learned counsel made a statement that this accused was also behind the bars for more than 10 years, which contention was not seriously disputed by Shri J.C. Gupta, learned counsel appearing on behalf of the Government. We, therefore, set aside his life

imprisonment and bring down the sentence to what has been undergone. We accordingly dismiss the appeal filed by A-30 with the modification in the sentence as indicated.

59. Before we part with this case, we must note some very disturbing facts which have been revealed from the voluminous evidence by the prosecution. Here was a person who was unabashedly running his empire of spurious liquor trade and for that purpose had purchased politicians including the public representatives, police officers and other officers belonging to the Excise Department. The trade was going unabated. Unfortunately, it is the elite of the society or the "haves" of the society who never purchase this kind of spurious liquor for the obvious reasons. It is only the poor section of the society which becomes the prey of such obnoxious trade and ultimately suffers. As many as 31 persons have lost their lives, about 5 or more persons have lost their eye-site forever and several others have suffered in their health on account of the injuries caused to them. It is only by an accident that the mixing was not done properly on the fateful day in the sense that the liquor mixed did prove to be fatal or injurious. But that does not mean when it was mixed on other day for months together that it was not injurious. The use of methanol was a dangerous proposition. It only shows that the human avarice could create hell in God's own country Kerala. We are not only perturbed by the enormousness of the tragedy but the enormousness of the liquor trade run by A-7 and that was under the so-called vigilant eyes of those who had duty to stop it. The avarice is not only on the part of the accused persons, but also on the part of those who benefit from this horrible business. Though 10 years have passed, the reverberations of this grin tragedy have not become silent. We hope and expect that the Kerala Government takes up this issue and takes definite steps for overhauling the system. We are worried about the rotten system that allowed such trade not only to continue, but to thrive. It will be, therefore, for the administrators and the Government to take positive steps, firstly, to overhaul the system by weeding out the

corrupts by punishing those who are responsible for the whole system looking sideways. We do not know as to whether such an exercise is taken up, but if it has not been taken up the government is directed to take such steps. We do not think that the things would come under control unless such exercise is taken, so as to save the poor man from such ghastly disaster.

60. Again before parting, we appreciate the assistance that we have had from all the defence counsel as also from Shri A. Sharan and Shri J.C. Gupta, learned Senior Counsel, who appeared for the prosecution. We must make a special reference to the assistance that the Court got from Shri Mohan Raj, Assistant to the Special Public Prosecutor before the trial Court, who, at our request, spared his substantial time and labour for assisting this Court. We dispose of all the appeals accordingly.

B.B.B. Appeals disposed of.

SRI RADHY SHYAM (D) THROUGH LRS. & ORS.
V.
STATE OF U.P. & ORS.
(Civil Appeal No. 3261 of 2011)

APRIL 15, 2011

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

Land Acquisition Act, 1894 – ss. 17(1) & (4) and 5-A:

Acquisition of land – Power of eminent domain – Power conferred upon the State to acquire private property – Invocation of urgency clause and dispensing with enquiry as envisaged under s.5-A – When permissible – Principles re-stated.

Writ petition filed by appellants questioning the acquisition of their land for planned industrial development of District Gautam Budh Nagar through Greater NOIDA Industrial Development Authority by invoking s.17(1) and 17(4) of the Act, as amended by Uttar Pradesh Act No.8 of 1974 – Plea of appellants that there was no justification to invoke the urgency clause and to dispense with the inquiry envisaged under s.5-A – High Court non-suited the appellants and dismissed the writ petition – On appeal, held: The appellants had succeeded in making out a strong case for deeper examination of the issues raised in the writ petition and the High Court committed serious error by summarily non-suiting them – The assertion by the appellants that there was no urgency in the acquisition of land; that the concerned authorities did not apply mind to the relevant factors and records and arbitrarily invoked the urgency provisions and thereby denied him the minimum opportunity of hearing in terms of s.5-A(1) and (2), should have been treated by the High Court as sufficient for calling upon the respondents to file their response and produce the relevant records to justify

the invoking of urgency provisions – On facts, the acquisition was primarily meant to cater private interest in the name of industrial development of the district – Even if planned industrial development of the district is treated as public purpose within the meaning of s.4, on facts there was no urgency which could justify the exercise of power by the State Government under s.17(1) and 17(4) – The time required for ensuring compliance of the provisions contained in s.5-A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition – There was no warrant to exclude the application of s.5-A which represent the statutory embodiment of the rule of audi alteram partem – There is also merit in the appellants' plea that the acquisition of their land was vitiated due to violation of the doctrine of equality enshrined in Article 14 of the Constitution inasmuch as the respondents adopted the policy of pick and choose in acquiring some parcels of land – The Court cannot refuse to protect the legal and constitutional rights of the appellants merely because some other landowners did not come forward to challenge the illegitimate exercise of power by the State Government – Respondent No.1 directed to pay cost of Rs.5,00,000/- to the appellants for forcing unwarranted litigation on them – However, the respondents shall be free to proceed from the stage of s.4 notification and take appropriate action after complying with s.5-A(1) and (2) – If the appellants feel aggrieved by the fresh exercise undertaken by the State Government then they shall be free to avail appropriate legal remedy – Constitution of India, 1950 – Article 14.

Constitution of India, 1950 – Article 226 and 300A – Acquisition of land – Invocation of s.17(1) and/or 17(4) – Writ petition filed by landowner under Art.226 – Held: While examining the land owner's challenge to the acquisition of land in a petition filed under Article 226, the High Court should not adopt a pedantic approach – It should decide the matter keeping in view the constitutional goals of social and

economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A, no person can be deprived of his property except by authority of law – In cases where the acquisition is made by invoking s.4 read with s.17(1) and/or 17(4), the High Court should insist upon filing of reply affidavit by the respondents and production of the relevant records and carefully scrutinize the same before pronouncing upon legality of the impugned notification/action because a negative result without examining the relevant records to find out whether the competent authority had formed a bona fide opinion on the issue of invoking the urgency provision and excluding the application of s.5-A is likely to make the land owner a landless poor and force him to migrate to the nearby city only to live in a slum – A departure from this rule should be made only when land is required to meet really emergent situations like those enumerated in s.17(2) – If the acquisition is intended to benefit private person(s) and the provisions contained in s.17(1) and/or 17(4) are invoked, then scrutiny of the justification put forward by the State should be more rigorous and relief should not be denied to the petitioner by applying the technical rules of procedure embodied in the Code of Civil Procedure and other procedural laws – While dealing with challenge to the acquisition of land belonging to those who suffer from handicaps of poverty, illiteracy and ignorance and do not have the resources to access the material relied upon by the functionaries of the State and its agencies for forming an opinion or recording a satisfaction that the urgency provisions contained in s.17(1) should be resorted to and/or the enquiry envisaged under s.5A should be dispensed with, the High Court should not literally apply the abstract rules of burden of proof enshrined in the Evidence Act – Land Acquisition Act, 1894 – ss. 17(1) & (4) and 5-A.

The State Government acquired the land owned by the appellants for the planned industrial development of

District Gautam Budh Nagar through Greater NOIDA Industrial Development Authority by invoking Section 17(1) and 17(4) of the Land Acquisition Act, 1894, as amended by the Uttar Pradesh Act No. 8 of 1974. The appellants filed writ petition challenging the acquisition of their land on grounds (i) that the land could not be used for industrial purposes because in the draft Master Plan of Greater NOIDA (2021), the same was shown as part of residential zone; (ii) that they had already constructed dwelling houses and as per the policy of the State Government, the residential structures were exempted from acquisition; (iii) that the State Government arbitrarily invoked Section 17(1) read with Section 17(4) of the Act and deprived them of their valuable right to raise objections under Section 5-A and (iv) that the acquisition of land was vitiated by arbitrariness, mala fides and violation of Article 14 of the Constitution inasmuch while the lands of the Member of Legislative Assembly and other influential persons were left out from acquisition despite the fact that they were not in abadi, the appellant-landowners were not given similar treatment although their land was part of abadi and they had constructed dwelling units. The writ petition was dismissed by the High Court.

In the instant appeal, the appellants contended that the High Court had failed to consider the issues raised in the writ petition in a correct perspective. They contended that though they had specifically pleaded that there was no valid ground to invoke the urgency clause contained in Section 17(1) and to dispense with the application of Section 5-A but the High Court did not even call upon the respondents to file counter affidavit and brushed aside the challenge to the acquisition proceeding on a wholly untenable premise that the affidavit filed in support of the writ petition was laconic. It was further contended on behalf of the appellants that

the purpose for which land was acquired i.e. planned industrial development of the district did not justify invoking of the urgency provisions and denial of opportunity to the appellants and other land owners to file objections under Section 5-A (1) and to be heard by the Collector in terms of the mandate of Section 5-A (2) and further that the High Court had misdirected itself in summarily dismissing the writ petition ignoring the substantive plea of discrimination raised by the appellants.

The questions which therefore arose for consideration in the instant appeal were (1) whether the High Court was justified in non-suiting the appellants on the ground that they had not raised a specific plea supported by a proper affidavit to question the decision taken by the State government to invoke Section 17(1) and 17(4) of the Land Acquisition Act, 1894 and (2) whether the appellants had succeeded in *prima facie* proving that there was no justification to invoke the urgency clause and to dispense with the inquiry envisaged under Section 5-A.

Allowing the appeal, the Court

HELD:1.1. At the outset, this Court records its disapproval of the casual manner in which the High Court disposed of the writ petition without even calling upon the respondents to file counter affidavit and produce the relevant records. A reading of the averments contained in the writ petition, coupled with the appellants' assertion that the acquisition of their land was vitiated due to discrimination inasmuch as land belonging to influential persons had been left out from acquisition, but their land was acquired in total disregard of the policy of the State Government to leave out land on which dwelling units had already been constructed, show that the appellants

had succeeded in making out a strong case for deeper examination of the issues raised in the writ petition and the High Court committed serious error by summarily non-suiting them. [Para 15] [388-E-G]

1.2. The majority of the landowners do not have any idea about their constitutional and legal rights, which can be enforced by availing the constitutional remedies under Articles 32 and 226 of the Constitution. They reconcile with deprivation of land by accepting the amount of compensation offered by the Government and by thinking that it is their fate and destiny determined by God. Even those who get semblance of education are neither conversant with the functioning of the State apparatus nor they can access the records prepared by the concerned authorities as a prelude to the acquisition of land by invoking Section 4 with or without the aid of Section 17(1) and/or 17(4). Therefore, while examining the land owner's challenge to the acquisition of land in a petition filed under Article 226 of the Constitution, the High Court should not adopt a pedantic approach, as has been done in the present case, and decide the matter keeping in view the constitutional goals of social and economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A, no person can be deprived of his property except by authority of law. In cases where the acquisition is made by invoking Section 4 read with Section 17(1) and/or 17(4), the High Court should insist upon filing of reply affidavit by the respondents and production of the relevant records and carefully scrutinize the same before pronouncing upon legality of the impugned notification/action because a negative result without examining the relevant records to find out whether the competent authority had formed a *bona fide* opinion on the issue of invoking the urgency provision

and excluding the application of Section 5-A is likely to make the land owner a landless poor and force him to migrate to the nearby city only to live in a slum. A departure from this rule should be made only when land is required to meet really emergent situations like those enumerated in Section 17(2). If the acquisition is intended to benefit private person(s) and the provisions contained in Section 17(1) and/or 17(4) are invoked, then scrutiny of the justification put forward by the State should be more rigorous in cases involving the challenge to the acquisition of land, the pleadings should be liberally construed and relief should not be denied to the petitioner by applying the technical rules of procedure embodied in the Code of Civil Procedure and other procedural laws. [Para 18] [390-E-H; 391-A-F]

1.3. It is clear that while dealing with challenge to the acquisition of land belonging to those who suffer from handicaps of poverty, illiteracy and ignorance and do not have the resources to access the material relied upon by the functionaries of the State and its agencies for forming an opinion or recording a satisfaction that the urgency provisions contained in Section 17(1) should be resorted to and/or the enquiry envisaged under Section 5A should be dispensed with, the High Court should not literally apply the abstract rules of burden of proof enshrined in the Evidence Act. It is too much to expect from the rustic villagers, who are not conversant with the intricacies of law and functioning of the judicial system in India to first obtain relevant information and records from the concerned State authorities and then present skillfully drafted petition for enforcement of their legal and/or constitutional rights. The Court should also bear in mind that the relevant records are always in the exclusive possession/domain of the authorities of the State and/or its agencies. Therefore, in the instant case, an assertion by the appellants that there was no urgency in the

acquisition of land; that the concerned authorities did not apply mind to the relevant factors and records and arbitrarily invoked the urgency provisions and thereby denied him the minimum opportunity of hearing in terms of Section 5-A(1) and (2), should be treated as sufficient for calling upon the respondents to file their response and produce the relevant records to justify the invoking of urgency provisions. [Para 19] [392-E-H; 393-A-B]

Authorised Officer, Thanjavur v. S Naganatha Ayyar **(1979) 3 SCC 466: 1979 (3) SCR 1121 – relied on.**

Narayan Govind Gavate v. State of Maharashtra **(1977) 1 SCC 133 and** *Anand Singh v. State of Uttar Pradesh* **(2010) 11 SCC 242: 2010 (9) SCR 133 – referred to.**

Woolmington v. Director Public Prosecutions, **1935 AC 462 – referred to.**

Phipson on Evidence (11th Edn) – referred to.

2.1. The acquisition of land under Section 4 read with Section 17(1) and/or 17(4) of the Land Acquisition Act, 1894 has generated substantial litigation in the last 50 years. From an analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out in this regard:

(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good

(ii) The legislations which provide for compulsory

acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly.

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, the compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the land owner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even few weeks or months. Therefore, before excluding the application of Section 5-A, the concerned authority must be fully satisfied that time of few weeks or months likely to be taken in

conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The Court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually

take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of *audi alteram partem* embodied in Section 5-A (1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition. [Para 53] [436-E-H; 437-A-H; 438-A-H; 439-A-B]

2.2. In the instant case, upon receipt of proposal from the Development Authority, the State Government issued directions to the concerned authorities to take action for the acquisition of land in different villages. The comments/ certificate signed by three officers, which was submitted in the context of Government Order dated 21.12.2006 was accompanied by several documents including proposal for the acquisition of land, preliminary inquiry report submitted by the Amin, Land Acquisition, copies of khasra khatauni and lay out plan, 10 per cent of the estimated compensation and a host of other documents. In the note dated nil jointly signed by Deputy Chief Executive Officer, Greater Noida, Collector, Gautam Budh Nagar and four other officers/officials, the following factors were cited in justification of invoking the urgency provisions: (a) The area was notified under Uttar Pradesh Industrial Areas Development Act, 1976 for planned industrial development; (b) If there is any delay in the acquisition of land then the same is likely to be encroached and that will adversely affect the concept of planned industrial development of the district; (c) Large tracts of land of the nearby villages have already been acquired and in respect of some villages, the acquisition

proceedings are under progress; (d) the Development Authority urgently requires land for overall development, i.e. construction of roads, laying of sewerages, providing electricity, etc. in the area; (e) the development scheme has been duly approved by the State Government but the work has been stalled due to non-acquisition of land; (f) Numerous reputed and leading industrial units of the country want to invest in the State of Uttar Pradesh and, therefore, it is extremely urgent and necessary that land is acquired immediately; (g) If land is not made available to the incoming leading and reputed industrial concerns of the country, then they will definitely establish their units in other States and if this happens, then it will adversely affect employment opportunities in the State and will also go against the investment policy of the Government; (h) If written/oral objections are invited from the farmers and are scrutinized, then it will take unprecedented long time and disposal thereof will hamper planned development of the area and (i) as per the provisions of the Act, there shall be at least one year's time gap between publication of the notifications under Sections 4 and 17 and Section 6. In the considered view of this Court, the above noted factors do not furnish legally acceptable justification for the exercise of power by the State Government under Section 17(1) because the acquisition is primarily meant to cater private interest in the name of industrial development of the district. It is neither the pleaded case of the respondents nor any evidence has been produced before the Court to show that the State Government and/or agencies/ instrumentalities of the State are intending to establish industrial units on the acquired land either by itself or through its agencies/instrumentalities. The respondents have justified the invoking of urgency provisions by making assertions, which are usually made in such cases by the executive authorities i.e. the inflow of funds in the State in the form of investment by private entrepreneurs

and availability of larger employment opportunities to the people of the area. However , this Court does not find any plausible reason to accept this tailor-made justification for approving the impugned action which has resulted in depriving the appellants' of their constitutional right to property. Even if planned industrial development of the district is treated as public purpose within the meaning of Section 4, there was no urgency which could justify the exercise of power by the State Government under Section 17(1) and 17(4). The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lot of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns. The private entrepreneurs, who are desirous of making investment in the State, take their own time in setting up the industrial units. Usually, the State Government and its agencies/ instrumentalities would give them two to three years' to put up their factories, establishments etc. Therefore, time required for ensuring compliance of the provisions contained in Section 5-A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition. In this context, it is apposite to note that the time limit for filing objection under Section 5-A (1) is only 30 days from the date of publication of the notification under Section 4(1). Of course, in terms of sub-section (2), the Collector is required to give opportunity of hearing to the objector and submit report to the Government after making such further inquiry, as he thinks necessary. This procedure is likely to consume some time, but as has been well said, "Principles of natural justice are to some minds burdensome but this price-a small price indeed-has to be paid if we desire a society governed by the rule of law." [Paras 54, 55] [439-D-H; 440-A-H; 441-A-H; 441-A-H; 442-A-B]

2.3. In this case, the Development Authority sent proposal some time in 2006. The authorities up to the level of the Commissioner completed the exercise of survey and preparation of documents by the end of December, 2006 but it took one year and almost three months to the State Government to issue notification under Section 4 read with Section 17(1) and 17(4). If this much time was consumed between the receipt of proposal for the acquisition of land and issue of notification, it is not possible to accept the argument that four to five weeks within which the objections could be filed under sub-section (1) of Section 5-A and the time spent by the Collector in making inquiry under sub-section (2) of Section 5-A would have defeated the object of acquisition. [Para 56] [442-C-E]

2.4. The apprehension of the respondents that delay in the acquisition of land will lead to enormous encroachment is totally unfounded. It is beyond the comprehension of any person of ordinary prudence to think that the land owners would encroach their own land with a view to frustrate the concept of planned industrial development of the district. The perception of the respondents that there should be atleast one year's time gap between the issue of notifications under Sections 4 and 6 is clearly misconceived. The time limit of one year specified in clause (ii) of the proviso to Section 6(1) is the outer limit for issue of declaration. This necessarily means that the State Government can complete the exercise under Sections 5-A and 6 in a shorter period. There was no real and substantive urgency which could justify invoking of the urgency provision under Section 17(1) and in any case, there was no warrant to exclude the application of Section 5-A which, as mentioned above, represent the statutory embodiment of the rule of *audi alteram partem*. [Paras 57, 58 and 59] [442-F-H; 443-A-B]

2.5. There is also merit in the appellants' plea that the acquisition of their land is vitiated due to violation of the doctrine of equality enshrined in Article 14 of the Constitution. A reading of the survey report shows that the committee constituted by the State Government had recommended release of land measuring 18.9725 hectares. Many parcels of land were released from acquisition because the land owners had already raised constructions and were using the same as dwelling units. A large chunk of land measuring 4.3840 hectares was not acquired apparently because the same belong to an ex-member of the legislative assembly. The appellants had also raised constructions on their land and were using the same for residential and agricultural purposes. Why their land was not left out from acquisition has not been explained in the counter affidavit filed by the respondents. The High Court should have treated this as sufficient for recording a finding that the respondents had adopted the policy of pick and choose in acquiring some parcels of land and this amounted to violation of Article 14 of the Constitution. [Para 60] [443-C-F]

2.6. The argument of the respondents that the Court may not annul the impugned acquisition because land of other villages had already been acquired and other land owners have not come forward to challenge the acquisition of their land cannot be entertained and the Court cannot refuse to protect the legal and constitutional rights of the appellants merely because the others have not come forward to challenge the illegitimate exercise of power by the State Government. It is quite possible that others may have, due to sheer poverty, ignorance and similar handicaps not been able to avail legal remedies for protection of their rights, but that cannot be made basis to deny what is due to the appellants. [Para 61] [443-G-H; 444-A-B]

Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd., **AIR (1954) SC 119: 1954 SCR 674 ;** *Chiranjit Lal Chowdhuri v.Union of India* **AIR (1951) SC 4: 1950 SCR 869;** *Jilubhai NanbhaiKhachar v. State of Gujarat* **(1995) Supp. (1) SCC 596;** *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* **(2003) 5 SCC 622: 2003 (2) SCR 1;** *State of Maharashtra v. B.E. Billimoria* **(2003) 7 SCC 336: 2003 (2) Suppl. SCR 603;** *Dev Sharan v. State of U.P.* **Civil Appeal No.2334 of 2011 decided on 7.3.2011 – relied on.**

Raja Anand Brahma Shah v. State of Uttar Pradesh **(1967) 1 SCR 373:1967 SCR 373;** *Om Prakash v. State of U.P.* **(1998) 6 SCC 1;** *Union of India v. Krishan Lal Arneja* **(2004) 8 SCC 453:2004 (1) Suppl. SCR 801;** *Esso Fabs Private Limited v. State of Haryana* **(2009) 2 SCC 377;** *Babu Ram v. State of Haryana* **(2009) 10 SCC 115: 2009 (14) SCR 1111;** *Anand Singh v. State of Uttar Pradesh* **(2010) 11 SCC 242: 2010 (9) SCR 133;** *State of U.P. v. Pista Devi* **(1986) 4 SCC;** *Rajasthan Housing Board v. Shri Kishan* **(1993) 2 SCC 84: 1993 (1) SCR 269;** *Chameli Singh v. State of U.P.* **(1996) 2 SCC 549;** *First Land Acquisition Collector v. Nirodhi Prakash Gangoli* **(2002) 4 SCC 160:2002 (2) SCR 326;** *Tika Ram v. State of Uttar Pradesh* **(2009)10 SCC 689: 2009 (14) SCR 905;** *Nand Kishore Gupta v. State of Uttar Pradesh* **(2010) 10 SCC 282: 2010 (11) SCR 356;** *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071;** *Union of India v.Mukesh Hans* **(2004) 8 SCC 14;** *Shyam Nandan Prasad v. State of Bihar* **(1993) 4 SCC 255:1993 (1) Suppl. SCR 533;** *Nandeshwar Prasad v. The State of Uttar Pradesh* **(1964) 3 SCR 425;** *A.P. Sareen v. State of U.P.* **(1997) 9 SCC 3591997 (1) SCR 210;** *Ghaziabad Development Authority v. Jan Kalyan Samiti* **(1996) 2 SCC 365: 1996 (1) SCR 307;** *Jai Narain v. Union of India* **(1996) 1 SCC 9: 1995 (5) Suppl. SCR 769;** *Munshi Singh v. Union of India* **(1973) 2 SCC 337: 1973 (1) SCR 973;** *Hindustan Petroleum Corporation Limited v. Darius Shapur Chenai*

(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388; *Swadeshi Cotton Mills v. Union of India* **(1981) 1 SCC 664: 1981 (2) SCR 533;** *A.K. Kraipak v. Union of India* **(1969) 2 SCC 262: 1970 (1) SCR 457;** *Mohinder Singh Gill v. Chief Election Commissioner* **(1978) 1 SCC 405: 1978 (2) SCR 272;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 248: 1978 (2) SCR 621;** *State of Orissa v Dr. Bina Pani Dei* **1967 (2) SCR 625:1967 SCR 625;** *Sayeedur Rehman v. State of Bihar* **(1973) 3 SCC 333: 1973 (2) SCR 1043 – referred to.**

Cooper v. Wandsworth Board of Works **(1863) 143 ER 414;** *Board of Education v. Rice* **(1911 AC 179 at 182);** *O'Reilly v. Mackman* **1983 2 AC 237;** *Lloyd v. Mcmahon* **1987 AC 625 and** *Ridge v. Baldwin* **1964 AC 40;** *King Emperor v. Shibnath Banerjee* ***[*Criminal Appeal No.110 of 1966 decided on July 27, 1966];** *Jaichand Lal Sethia v. State of West Bengal* **(1958) 1 WLR 546;** *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust* **(1914) 1 Ch 438;** *Ross Clunis v. Papadopoullos* **44 1A 11 and** *R. v. Australian Stevedoring Industry Board* **39 1A 133 – referred to.**

3. Respondent No.1 is directed to pay cost of Rs.5,00,000/- to the appellants for forcing unwarranted litigation on them. However, the respondents shall be free to proceed from the stage of Section 4 notification and take appropriate action after complying with Section 5-A(1) and (2) of the Act. If the appellants feel aggrieved by the fresh exercise undertaken by the State Government then they shall be free to avail appropriate legal remedy. [Para 62] [444-C-D]

Case Law Reference:

1979 (3) SCR 1121	**Relied on**	**Para 18**
(1977) 1 SCC 133	**Referred to**	**Para 20**
1935 AC 462	**Referred to**	**Para 20**

2010 (9) SCR 133	**Referred to**	**Para 21**
(1863) 143 ER 414	**Referred to**	**Para 24**
(1911 AC 179 at 182)	**Referred to**	**Para 25**
1964 AC 40	**Referred to**	**Para 26**
1983 2 AC 237	**Referred to**	**Para 26**
1987 AC 625	**Referred to**	**Para 26**
1973 (2) SCR 1043	**Referred to**	**Para 28**
1978 (2) SCR 272	**Referred to**	**Para 29**
1978 (2) SCR 621	**Referred to**	**Para 30**
1981 (2) SCR 533	**Referred to**	**Para 31**
1970 (1) SCR 457	**Referred to**	**Para 31**
1967 (2) SCR 625	**Referred to**	**Para 31**
1973 (1) SCR 973	**Referred to**	**Para 32**
1980 (1) SCR 1071	**Referred to**	**Para 33**
1993 (1) Suppl. SCR 533	**Referred to**	**Para 34**
(2004) 8 SCC 14	**Referred to**	**Para 35**
2005 (3) Suppl. SCR 388	**Referred to**	**Para 35**
(1964) 3 SCR 425	**Referred to**	**Para 36**
(1967) 1 SCR 373	**Referred to**	**Para 37**
(1958) 1 WLR 546	**Referred to**	**Para 37**
(1914) 1 Ch 438	**Referred to**	**Para 37**
44 1A 117	**Referred to**	**Para 37**
39 1A 133	**Referred to**	**Para 37**

1993 (1) SCR 269	**Referred to**	**Para 39**
1997 (1) SCR 210	**Referred to**	**Para 39**
1996 (1) SCR 307	**Referred to**	**Para 39**
1995 (5) Suppl. SCR 769	**Referred to**	**Para 39**
2004 (1) Suppl. SCR 801	**Referred to**	**Para 41**
2009 (14) SCR 1111	**Referred to**	**Para 43**
2002 (2) SCR 326	**Referred to**	**Para 49**
2009 (14) SCR 905	**Referred to**	**Para 49**
2010 (11) SCR 356	**Referred to**	**Para 51**
1954 SCR 674	**Relied on**	**Para 53**
1950 SCR 869	**Relied on**	**Para 53**
(1995) Supp. (1) SCC 596	**Relied on**	**Para 53**
2003 (2) SCR 1	**Relied on**	**Para 53**
2003 (2) Suppl. SCR 603	**Relied on**	**Para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3261 of 2011.

From the Judgment and Order dated 15.12.2008 of the High Court of Judicature at Allahabad in CMWP No. 64127 of 2008.

N.P. Singh, Advocate for the Appellants.

Dinesh Dwivedi, Sanjay Visen, Ravindra Kumar, Shashank Kumar Lal and Gunnam Venateswara Rao for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal is directed against order dated 15.12.2008 passed by the Division Bench of the Allahabad High Court whereby the writ petition filed by the appellants questioning the acquisition of their land for planned industrial development of District Gautam Budh Nagar through Greater NOIDA Industrial Development Authority (hereinafter referred to as the, "Development Authority") by invoking Section 17(1) and 17(4) of the Land Acquisition Act, 1894 (for short, "the Act"), as amended by Uttar Pradesh Act No.8 of 1974, was dismissed.

3. Upon receipt of proposal from the Development Authority for acquisition of 205.0288 hectares land of village Makora, Pargana Dankaur, Tehsil and District Gautam Budh Nagar, which was approved by the State Government, notification dated 12.3.2008 was issued under Section 4(1) read with Section 17(1) and 17(4) of the Act. The relevant portions of the notification are extracted below:

> "Under Sub-Section (1) of Section 4 of the Land Acquisition Act 1894 (Act no.1 of 1894), the Governor is pleased to notify for general information that the land mentioned in the scheduled below, is needed for public purpose, namely planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority.
>
> 2. The Governor being of the opinion that the provisions of sub-section 1 of Section 17 of the said Act, are applicable to said land inasmuch as the said land is urgently required, for the planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority and it is as well necessary to eliminate the delay likely to be caused by an enquiry under Section 5A of the said Act, the Governor is further pleased to direct under sub-section 4 of Section 17 of the said Act that the provisions of Section 5A of the said Act, shall not apply."

4. Since the appellants' land was also included in the notification, they made a representation to the Chairman-cum-Chief Executive Officer of the Development Authority (Respondent No.4) with copies to the Chief Minister, Principal Secretary, Housing and Urban Development, U.P., the District Magistrate and the Special Officer, Land Acquisition, Gautam Buddh Nagar with the request that their land comprised in Khasra No.394 may not be acquired because they had raised construction 30-35 years ago and were using the property for abadi/habitation. The concerned functionaries/authorities did not pay heed to the request of the appellants and the State Government issued notification dated 19.11.2008 under Section 6 read with Section 9 of the Act.

5. The appellants challenged the acquisition of their land on several grounds including the following:

(i) That the land cannot be used for industrial purposes because in the draft Master Plan of Greater NOIDA (2021), the same is shown as part of residential zone.

(ii) That they had already constructed dwelling houses and as per the policy of the State Government, the residential structures are exempted from acquisition.

(iii) That the State Government arbitrarily invoked Section 17(1) read with Section 17(4) of the Act and deprived them of their valuable right to raise objections under Section 5-A.

(iv) The acquisition of land is vitiated by arbitrariness, mala fides and violation of Article 14 of the Constitution inasmuch as lands of the Member of Legislative Assembly and other influential persons were left out from acquisition despite the fact that they were not in abadi, but they were not given similar treatment despite the fact that their land was part of abadi and they had constructed dwelling units.

6. In support of their challenge to the invoking of Section 17(1) and (4), the appellants made detailed averments in paragraphs 11 and 16 and raised specific grounds A and F, which are extracted below:

"11. That as per the scheme of the said Act, each and every section from sections 4 to 17 has an independent role to play though there is an element of interaction between them. Section 5-A, has a very important role to play in the acquisition proceedings and it is mandatory of the part of the government to give hearing to the person interested in the land whose land is sought to be acquired. It is relevant to point out that the acquisition proceedings under the Act, are based on the principal of eminent domain and the only protection given to the person whose land is sought to be acquired is an opportunity under Section 5-A of the Act to convince the enquiring authority that the purpose for which the land is sought to be acquired is in fact is not a public purpose and is only purported to be one in the guise of a public purpose.

It is relevant to mention here that excluding the enquiry under Section 5-A can only be an exception where the urgency cannot brook any delay. The enquiry provides an opportunity to the owner of land to convince the authorities concerned that the land in question is not suitable for purpose for which it is sought to be acquired or the same sought to be acquired for the collateral purposes. *It is pertinent to mention here that the respondents No. 1 & 2 without the application of mind dispensed with the enquiry on the ground of urgency invoking the power conferred by Section 17 (1) or (2) of the Act. Further, the respondent No. 1 & 2 without application of mind did not considered the survey report of the abadi of the village Makaura where the entire land is being used for the purpose of residence and grazing of cattle's in Khasra No. 394. Further, the petitioners were*

surprised to find that their land have not been included in the Abadi irrespective the same is in use for habitable and keeping the cattle and other uses. The petitioners have constructed their houses and using the same for their residence and keep their cattle's and agricultural produce. The survey report clearly shows that the impugned Khasra No. 394 is in use for residence. The report in respect of the land in question falling in Khasra No. 394 given by the respondent No. 4 vide communication dated 26th March, 2007 is annexed as Annexure 6.

16. *That the said notification under Section 4 of the Act issued by the respondent No. 1 and 2 is without application of mind and there was no urgency in the acquisition of land, for the planned industrial development, as the land, as per the master plan – 2021 the land of the village Makaura is reserved for "residential" of which the respondent No. 2 invoked Section 17 (1) and subsection 4 of the Act by dispensing with an enquiry under Section 5A of the Act.* The said action on the part of the respondents are un-warranted and is in gross violation of Article 14,19, 21 and 300A of the constitution. *The such illegal act on the part of the respondents show mala fide and their oblique motive to deprive the owners from their houses in order to fulfill their political obligations/promise to the private builders by taking the shelter of section 17 of the Act by dispensing with the enquiry under Section 5-A of the Act as well as overlooked purpose as stipulated in the Master Plan 2021 which is any way do not require any urgent attention.*

A. That the whole acquisition proceedings are void, unconstitutional, tainted with mala fide, abuse of authority and power, non-application of mind, and as such, liable to be quashed as violative of Articles 14,19 and 300-A of the Constitution of India.

F. That the purpose stated in the notification under Section 4 and declaration under section 6 by invoking section 17 is presently non-existent and thus the notification is bad in law. There is no urgency for the invocation when the land is to be acquired for planned development for the purpose of setting residential colony. The impugned notification is without any authority of law and volatile of Article 300-A of the Constitution of India, which limits the power to acquire land to the authority under the Land Acquisition Act. Therefore, the notification in question is bad in law."

(emphasis supplied)

7. The High Court negatived the appellants' challenge at the threshold mainly on the ground that the averments contained in the petition were not supported by a proper affidavit. This is evident from the following portions of the impugned order:

"Here the petitioners neither have pleaded that there exist no material before the State Government to come to the conclusion that the enquiry under Section 5-A should be dispensed with by invoking Section 17(4) of the Act nor the learned counsel for the petitioners could place before us any such averment in the writ petition. Though, in para-11 of the writ petition, an averment has been made that the respondents no. 1 and 2 without the application of mind dispensed with the enquiry on the ground of urgency invoking the power conferred by Section 17(1) or (2) of the Act, but in the affidavit, the said paragraph has been sworn on the basis of perusal of record. Similarly in para 16 of the writ petition, the only averment contained therein is as under:

"16. That the said notification under Section 4 of the Act issued by the respondent No.1 and 2 is without application of mind and there was no urgency in the acquisition of land, for the planned industrial development, as the land, as per the master plan-2021 the land of the village

Makaura is reserved for "residential" of which the respondent No.2 invoked Section 17(1) and sub-section 4 of the Act by dispensing with an enquiry under Section 5-A of the Act. The said action on the part of the respondents are un-warranted and is in gross violation of Article 14,19,21 and 300A of the Constitution. The such illegal act on the part of the respondents show mala fide and their oblique motive to deprive the owners from their houses in order to fulfill their political obligations/ promise to the private builders by taking the shelter of Section 17 of the Act by dispensing with the enquiry under Section 5-A of the Act as well as overlooked purpose as stipulated in the Master Plan 2021 which is any way do not require any urgent attention."

However, in the affidavit, this para has not been sworn at all and in any case with respect to dispensation of enquiry under Section 5-A by invoking Section 17(4) of the Act nothing has been said except that the exercise of power is violative of Articles 14,19, 21 and 300-A of the Constitution.

We, therefore, do not find any occasion even to call upon the respondents to file a counter affidavit placing on record, the material if any for exercising power under Section 17(1) and (4) of the Act in the absence of any relevant pleading or material and the question of requiring the respondents to produce the original record in this regard also does not arise."

8. The High Court distinguished the judgment of this Court in *Om Prakash v. State of U.P.* (1998) 6 SCC 1, albeit without assigning any cogent reason, relied upon the judgments of the Division Benches in *Kshama Sahkari Avas Samiti Ltd. v. State of U.P.* 2007 (1) AWC 327, *Jasraj Singh v. State of U.P.* 2008 (8) ADJ 329 and *Jagriti Sahkari Avas Samiti Ltd. Ghaziabad v. State of U.P.* 2008 (9) ADJ 43 and held that the decision of the Government to invoke Section 17(1) cannot be subjected

to judicial review. The High Court also rejected the appellants' plea that in terms of the policy framed by the State Government, the land covered by abadi cannot be acquired by observing that no material has been placed on record to show that the policy framed in 1991 was still continuing. To buttress this conclusion, the High Court relied upon the judgment of this Court in *Anand Buttons Limited v. State of Haryana* (2005) 9 SCC 164.

9. By an order dated 29.10.2010, this Court, after taking cognizance of the fact that the respondents did not get opportunity to file reply to the writ petition, directed them to do so. Thereupon, Shri Harnam Singh, Additional District Magistrate (Land Acquisition)/Officer on Special Duty (Land Acquisition) NOIDA, District Gautam Budh Nagar filed counter affidavit on behalf of respondent Nos.1 to 3. In paragraph 10 of his affidavit, Shri Harnam Singh has attempted to justify invoking of the urgency clause by making the following assertions:

"That in invoking the urgency clause the State Government has taken into consideration the following factors:-

(i) Greater Noida Industrial Development Authority was constituted under the U.P. Industrial Area Development Act, 1976 to promote Industrial and Urban Development in the Area. The acquired land was urgently required by the Development Authority for planned Industrial Development of the area.

(ii) That the land in the adjoining villages were already acquired by the Greater Noida Industrial Development Authority. Thus, the acquired land was urgently required for continuity of infrastructure services and planned Industrial Development of the Area. If, the proposed land was not acquired immediately and delay in this regard would lead to encroachments and would adversely affect the Planned Industrial Development of the Area.

(iii) That the acquired land was required for overall development i.e. construction of roads, laying of sewerages, providing electricity etc. in the area and the said scheme has been duly approved by the state government.

(iv) That the acquired land consists of 246 plots numbers with 392 recorded tenure holders. If objections are to be invited and hearing be given to such large number of tenure holders, it would take long time to dispose of the objections thereof and would hamper the planned development of the area.

(v) That reputed industrial houses who are interested in investing in the State and in case the land is not readily available, they might move to other states and such a move would adversely affect the employment opportunities in the State."

Shri Harnam Singh also controverted the appellants' plea for exemption by stating that the constructions made by them on land of Khasra Nos.101 and 399 were insignificant and the construction raised on Khasra No.394 is not part of village Abadi.

10. Shri Manoj Kumar Singh, Tehsildar filed a separate affidavit on behalf of Respondent No.4 and justified the invoking of urgency clause by asserting that large tracts of land were acquired for industrial development of the district. According to him, as per the policy of industrial development of the State Government, the land is required to be allotted to industrial houses.

11. On 8.11.2010, *Shri Dinesh Dwivedi* learned senior counsel for the State made a request for permission to file additional affidavit with some documents. His request was accepted. Thereafter, the respondents filed an affidavit of Shri Sushil Kumar Chaubey, Tehsildar, Land Acquisition, Gautam

Budh Nagar along with eight documents of which seven have been collectively marked as Annexure A-1. The first of the documents marked Annexure A-1 is copy of letter dated 25.2.2008 sent by the Commissioner and Director, Directorate of Land Acquisition, Revenue Board, U.P. to the Special Secretary, Industrial Development on the subject of issuance of notification under Sections 4 and 17 of the Act for acquisition of lands measuring 205.0288 hectares of village Makora. The second document is an undated letter signed by Deputy Chief Executive Officer, Greater Noida, Collector, Gautam Budh Nagar and four other officers/officials. The next document has been described as comments/certificate on the issues raised in Government Order No.5261/77-4-06-251N/06 dated 21.12.2006 with regard to proposal for acquisition of 205.0288 hectares lands in village Makora. This document is accompanied by seven forms containing various particulars. The third document is communication dated 29.10.2007 sent by the Commissioner, Meerut Division, Meerut to the District Magistrate, Gautam Budh Nagar conveying the consent of the Divisional Land Utility Committee for the acquisition of lands of five villages including Makora. This letter is accompanied by minutes of the meeting of the Divisional Land Utility Committee held on 29.10.2007. The fifth document is form No.43A-1. The sixth document is communication dated 22.2.2008 sent by Collector, Land Acquisition/Special Land Acquisition Officer, Greater Noida. The last document which forms part of Annexure A-1 is form No.16 showing the list of properties having constructions etc. Annexure A-2 is copy of letter dated 31.10.2008 sent by the Director, Directorate of Land Acquisition to the Special Secretary, Industrial Development.

12. Shri N.P.Singh, learned counsel for the appellants argued that the impugned order is liable to be set aside because the High Court failed to consider the issues raised in the writ petition in a correct perspective. Learned counsel submitted that the appellants had specifically pleaded that there was no valid ground to invoke the urgency clause contained in

Section 17(1) and to dispense with the application of Section 5-A but the High Court did not even call upon the respondents to file counter affidavit and brushed aside the challenge to the acquisition proceeding on a wholly untenable premise that the affidavit filed in support of the writ petition was laconic. Learned counsel further argued that the purpose for which land was acquired i.e. planned industrial development of the district did not justify invoking of the urgency provisions and denial of opportunity to the appellants and other land owners to file objections under Section 5-A (1) and to be heard by the Collector in terms of the mandate of Section 5-A (2). In support of his argument, learned counsel relied upon the judgments in *Narayan Govind Gavate v. State of Maharashtra* (1977) 1 SCC 133 and *Esso Fabs Private Limited v. State of Haryana* (2009) 2 SCC 377. Another argument of the learned counsel is that the High Court misdirected itself in summarily dismissing the writ petition ignoring the substantive plea of discrimination raised by the appellants.

13. Shri Dinesh Dwivedi, learned senior counsel appearing for the respondents urged that this Court should not nullify the acquisition at the instance of the appellants because the pleadings filed before the High Court were not supported by proper affidavit. Shri Dwivedi argued that the High Court was justified in non-suiting the appellants because they did not produce any evidence to effectively challenge the invoking of urgency provision contained in Section 17(1). Learned senior counsel emphasized that the satisfaction envisaged in Section 17(1) is purely subjective and the Court cannot review the decision taken by the State Government to invoke the urgency clause. He submitted that planned industrial development of District Gautam Budh Nagar is being undertaken in consonance with the policy decision taken by the State Government and the appellants cannot be heard to make a grievance against the acquisition of their land because they will be duly compensated. In support of his argument, Shri Dwivedi relied upon the judgment of this Court in *State of U.P. v. Pista Devi* (1986) 4

SCC 251 and *Chameli Singh v. State of U.P.* (1996) 2 SCC 549. Learned senior counsel further submitted that the appellants' land cannot be released from acquisition because that will result in frustrating the objective of planned industrial development of the district. On the issue of discrimination, Shri Dwivedi argued that even if the land belonging to some persons has been illegally left out from acquisition, the appellants are not entitled to a direction that their land should also be released.

14. The first issue which needs to be addressed is whether the High Court was justified in non-suiting the appellants on the ground that they had not raised a specific plea supported by a proper affidavit to question the decision taken by the State Government to invoke Section 17(1) and 17(4) of the Act. We shall also consider an ancillary issue as to whether the appellants had succeeded in prima facie proving that there was no justification to invoke the urgency clause and to dispense with the inquiry envisaged under Section 5-A.

15. At the outset, we record our disapproval of the casual manner in which the High Court disposed of the writ petition without even calling upon the respondents to file counter affidavit and produce the relevant records. A reading of the averments contained in paragraphs 11 and 16 and grounds A and F of the writ petition, which have been extracted hereinabove coupled with the appellants' assertion that the acquisition of their land was vitiated due to discrimination inasmuch as land belonging to influential persons had been left out from acquisition, but their land was acquired in total disregard of the policy of the State Government to leave out land on which dwelling units had already been constructed, show that they had succeeded in making out a strong case for deeper examination of the issues raised in the writ petition and the High Court committed serious error by summarily non-suiting them.

16. The history of land acquisition legislations shows that

in Eighteenth Century, Bengal Regulation I of 1824, Act I of 1850, Act VI of 1857, Act XXII of 1863, Act X of 1870, Bombay Act No. XXVIII of 1839, Bombay Act No. XVII of 1850, Madras Act No. XX of 1852 and Madras Act No.1 of 1854 were enacted to facilitate the acquisition of land and other immovable properties for roads, canals, and other public purposes by paying the amount to be determined by the arbitrators. In 1870, the Land Acquisition Act was enacted to provide for proper valuation of the acquired land. That Act envisaged that if the person having interest in land is not agreeable to part with possession by accepting the amount offered to him, then the Collector may make a reference to the Civil Court. The 1870 Act also envisaged appointment of assessors to assist the Civil Court. If the Court and the assessor did not agree on the amount then an appeal could be filed in the High Court. This mechanism proved ineffective because lot of time was consumed in litigation. With a view to overcome this problem, the legislature enacted the Act on the line of the English Lands Clauses Consolidation Act, 1845. However, the land owners or persons having interest in land did not have any say in the acquisition process either under pre-1984 legislations or the 1984 Act (un-amended). They could raise objection only qua the amount of compensation and matters connected therewith. The absence of opportunity to raise objection against the acquisition of land was resented by those who were deprived of their land. To redress this grievance, Section 5A was inserted in the Act by amending Act No.38 of 1923. The statement of Objects and Reasons contained in Bill No.29 of 1923, which led to enactment of the amending Act read as under:

> "The Land Acquisition Act I of 1894 does not provide that persons having an interest in land which it is proposed to acquire, shall have the right of objecting to such acquisition; nor is Government bound to enquire into and consider any objections that may reach them. The object of this Bill is to provide that a Local Government shall not declare, under Section 6 of the Act, that any land is needed

> for a public purpose unless time has been allowed after the notification under Section 4 for persons interested in the land to put in objections and for such objections to be considered by the Local Government."

17. The Act, which was enacted more than 116 years ago for facilitating the acquisition of land and other immovable properties for construction of roads, canals, railways etc., has been frequently used in the post independence era for different public purposes like laying of roads, construction of bridges, dams and buildings of various public establishments/institutions, planned development of urban areas, providing of houses to different sections of the society and for developing residential colonies/sectors. However, in the recent years, the country has witnessed a new phenomena. Large tracts of land have been acquired in rural parts of the country in the name of development and transferred to private entrepreneurs, who have utilized the same for construction of multi-storied complexes, commercial centers and for setting up industrial units. Similarly, large scale acquisitions have been made on behalf of the companies by invoking the provisions contained in Part VII of the Act.

18. The resultant effect of these acquisitions is that the land owners, who were doing agricultural operations and other ancillary activities in rural areas, have been deprived of the only source of their livelihood. Majority of them do not have any idea about their constitutional and legal rights, which can be enforced by availing the constitutional remedies under Articles 32 and 226 of the Constitution. They reconcile with deprivation of land by accepting the amount of compensation offered by the Government and by thinking that it is their fate and destiny determined by God. Even those who get semblance of education are neither conversant with the functioning of the State apparatus nor they can access the records prepared by the concerned authorities as a prelude to the acquisition of land by invoking Section 4 with or without the aid of Section 17(1) and/or 17(4). Therefore, while examining the land owner's

challenge to the acquisition of land in a petition filed under Article 226 of the Constitution, the High Court should not adopt a pedantic approach, as has been done in the present case, and decide the matter keeping in view the constitutional goals of social and economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A, no person can be deprived of his property except by authority of law. In cases where the acquisition is made by invoking Section 4 read with Section 17(1) and/or 17(4), the High Court should insist upon filing of reply affidavit by the respondents and production of the relevant records and carefully scrutinize the same before pronouncing upon legality of the impugned notification/action because a negative result without examining the relevant records to find out whether the competent authority had formed a bona fide opinion on the issue of invoking the urgency provision and excluding the application of Section 5-A is likely to make the land owner a landless poor and force him to migrate to the nearby city only to live in a slum. A departure from this rule should be made only when land is required to meet really emergent situations like those enumerated in Section 17(2). If the acquisition is intended to benefit private person(s) and the provisions contained in Section 17(1) and/or 17(4) are invoked, then scrutiny of the justification put forward by the State should be more rigorous in cases involving the challenge to the acquisition of land, the pleadings should be liberally construed and relief should not be denied to the petitioner by applying the technical rules of procedure embodied in the Code of Civil Procedure and other procedural laws. In this context it will be profitable to notice the observations made by this Court in *Authorised Officer, Thanjavur v. S Naganatha Ayyar* (1979) 3 SCC 466, which are as under:

> "……It is true that Judges are constitutional invigilators and statutory interpreters; but they are also responsive and responsible to Part IV of the Constitution being one of the

> trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order. The judiciary, in its sphere, shares the revolutionary purpose of the constitutional order, and when called upon to decode social legislation must be animated by a goal-oriented approach. This is part of the dynamics of statutory interpretation in the developing countries so that courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations now so familiar in the country and illustrated by the several cases under appeal. This caveat has become necessary because the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme."

19. We may now advert to the ancillary question whether the High Court was justified in non suiting the appellants on the ground that they failed to discharge the primary burden of proving that the State Government had invoked Section 17(1) and 17(4) without application of mind to the relevant considerations. In this context, it is apposite to observe that while dealing with challenge to the acquisition of land belonging to those who suffer from handicaps of poverty, illiteracy and ignorance and do not have the resources to access the material relied upon by the functionaries of the State and its agencies for forming an opinion or recording a satisfaction that the urgency provisions contained in Section 17(1) should be resorted to and/or the enquiry envisaged under Section 5A should be dispensed with, the High Court should not literally apply the abstract rules of burden of proof enshrined in the Evidence Act. It is too much to expect from the rustic villagers, who are not conversant with the intricacies of law and functioning of the judicial system in our country to first obtain relevant information and records from the concerned State authorities and then present skillfully drafted petition for enforcement of his legal and/or constitutional rights. The Court should also bear in mind that the relevant records are always

in the exclusive possession/domain of the authorities of the State and/or its agencies. Therefore, an assertion by the appellants that there was no urgency in the acquisition of land; that the concerned authorities did not apply mind to the relevant factors and records and arbitrarily invoked the urgency provisions and thereby denied him the minimum opportunity of hearing in terms of Section 5-A(1) and (2), should be treated as sufficient for calling upon the respondents to file their response and produce the relevant records to justify the invoking of urgency provisions.

20. In *Narayan Govind Gavate v. State of Maharashtra* (supra), the three-Judge Bench of this Court examined the correctness of the judgment of the Bombay High Court whereby the acquisition of land by the State Government by issuing notification under Section 4 read with Section 17(1) and 17(4) for development and utilisation as residential and industrial area was quashed. The High Court held that the purpose of acquisition was a genuine public purpose but quashed the notifications by observing that the burden of proving the existence of circumstances which could justify invoking of urgency clause was on the State, which it had failed to discharge. Some of the observations made by the High Court, which have been extracted in paragraphs 11 and 12 of the judgment of this Court, are reproduced below.

> "When the formation of an opinion or the satisfaction of an authority is subjective but is a condition precedent to the exercise of a power, the challenge to the formation of such opinion or to such satisfaction is limited, in law, to three points only. It can be challenged, firstly, on the ground of mala fides; secondly, on the ground that the authority which formed that opinion or which arrived at such satisfaction did not apply its mind to the material on which it formed the opinion or arrived at the satisfaction, and, thirdly, that the material on which it formed its opinion or reached the satisfaction was so insufficient that no man could

reasonably reach that conclusion. So far as the third point is concerned, no court of law can, as in an appeal, consider that, on the material placed before the authority, the authority was justified in reaching its conclusion. The court can interfere only in such cases where there was no material at all or the material was so insufficient that no man could have reasonably reached that conclusion.

In the case before us the petitioner has stated in the petition more than once that the urgency clause had been applied without any valid reason. The urgency clause in respect of each of the said two notifications concerning the lands in Groups 1 and 2 is contained in the relative Section 4 notification itself. The public purpose stated in the notification is 'for development and utilization of the said lands as an industrial and residential area'. To start with, this statement itself is vague, in the sense that it is not clear whether the development and utilization of the lands referred to in that statement was confined to the lands mentioned in the schedule to the notification or it applied to a wider area of which such lands formed only a part. So far as the affidavit in reply is concerned, no facts whatever are stated. The affidavit only states that the authority i.e. the Commissioner of the Bombay Division was satisfied that the possession of the said lands was urgently required for the purpose of carrying out the said development. Even Mr Setalvad conceded that the affidavit does not contain a statement of facts on which the authority was satisfied or on which it formed its opinion. *It is, therefore, quite clear that the respondents have failed to bring on record any material whatever on which the respondents formed the opinion mentioned in the two notifications.* The notifications themselves show that they concern many lands other than those falling in the said first and third groups. It is not possible to know what was the development for which the lands were being acquired, much less is it possible to know what were the

circumstances which caused urgency in the taking of possession of such lands. *We have held that the burden of proving such circumstances, at least prima facie is on the respondents. As the respondents have brought no relevant material on the record, the respondents have failed to discharge that burden.* We must, in conclusion, hold that the urgency provision under Section 17(4) was not validly resorted to."

(emphasis supplied)

While dealing with the argument of the State that it was for the petitioner to prove that there was no material to justify invoking of the urgency clause, this Court observed:

"We do not think that a question relating to burden of proof is always free from difficulty or is quite so simple as it is sought to be made out here. Indeed, the apparent simplicity of a question relating to presumptions and burdens of proof, which have to be always viewed together is often deceptive. Over simplification of such questions leads to erroneous statements and misapplications of the law."

The Court then referred to the judgment in *Woolmington v. Director Public Prosecutions,* 1935 AC 462, extensively quoted from *Phipson on Evidence* (11th Edn), noticed Sections 101 to 106 of the Evidence Act and observed:

"Coming back to the cases before us, we find that the High Court had correctly stated the grounds on which even a subjective opinion as to the existence of the need to take action under Section 17(4) of the Act can be challenged on certain limited grounds. But, as soon as we speak of a challenge we have to bear in mind the general burdens laid down by Sections 101 and 102 of the Evidence Act. It is for the petitioner to substantiate the grounds of his challenge. This means that the petitioner has to either lead

evidence or show that some evidence has come from the side of the respondents to indicate that his challenge to a notification or order is made good. If he does not succeed in discharging that duty his petition will fail. But, is that the position in the cases before us? We find that, although the High Court had stated the question before it to be one which "narrows down to the point as to the burden of proof" yet, it had analysed the evidence sufficiently before it to reach the conclusion that the urgency provision under Section 17(4) had not been validly resorted to.

… … …

… *We think that the original or stable onus laid down by Section 101 and Section 102 of the Evidence Act cannot be shifted by the use of Section 106 of the Evidence Act, although the particular onus of providing facts and circumstances lying especially within the knowledge of the official who formed the opinion which resulted in the notification under Section 17 (4) of the Act rests upon that official. The recital, if it is not defective, may obviate the need to look further. But, there may be circumstances in the case which impel the court to look beyond it. And, at that stage, Section 106 Evidence Act can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content which non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny.*

… … …

In the cases before us, if the total evidence from whichever side any of it may have come, was insufficient to enable the petitioners to discharge their general or stable onus, their petitions could not succeed. On the other hand, if, in addition to the bare assertions made by the petitioners,

that the urgency contemplated by Section 17(4) did not exist, there were other facts and circumstances, including the failure of the State to indicate facts and circumstances which it could have easily disclosed if they existed, the petitioners could be held to have discharged their general onus.

… … …

It is also clear that, even a technically correct recital in an order or notification stating that the conditions precedent to the exercise of a power have been fulfilled may not debar the court in a given case from considering the question whether, in fact, those conditions have been fulfilled. And, a fortiori, the court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case with a view to determining that a condition precedent to the exercise of a power has been fulfilled. If it appears, upon an examination of the totality of facts in the case, that the power conferred has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that the exercise of power could only serve some other or collateral object, the court will interfere."

The Court finally held as under:

"…….There is no indication whatsoever in the affidavit filed on behalf of the State the mind of the Commissioner was applied at all to the question whether it was a case necessitating the elimination of the enquiry under Section5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under Section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on

the need to dispense with the enquiry under Section 5A of the Act. It is certainly a case in which the recital was at least defective. The burden, therefore, rested upon the State to remove the defect, if possible, by evidence to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5A of the Act and that the mind of the Commissioner was applied to this essential question. *It seems to us that the High Court correctly applied the provisions of Section 106 of the Evidence Act to place the burden upon the State to prove those special circumstances, although it also appears to us that the High Court was quite correct in stating its view in such a manner as to make it appear that some part of the initial burden of the petitioners under Sections 101 and 102 of the Evidence Act had been displaced by the failure of the State to discharge its duty under Section 106 of the Act. The correct way of putting it would have been to say that the failure of the State to produce the evidence of facts especially within the knowledge of its officials, which rested upon it under Section 106 of the Evidence Act, taken together with the attendant facts and circumstances including the contents of recitals, had enabled the petitioners to discharge their burden under Sections 101 and 102 of the Evidence Act."*

(emphasis supplied)

21. The ratio of the aforesaid judgment was recently followed by the two-Judge Bench in *Anand Singh v. State of Uttar Pradesh* (2010) 11 SCC 242.

22. We shall now consider whether there was any valid ground or justification for invoking the urgency provision contained in Section 17(1) and to exclude the application of Section 5A for the acquisition of land for planned industrial development of the district. Sections 4, 5-A (as amended), 6 and 17 of the Act which have bearing on this question read as under:

"4. Publication of preliminary notification and power of officers thereupon.- (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).

(2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government in this behalf, and for his servants and workmen, –

to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle;

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier

thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

5A. Hearing of objections. - (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorized by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

6. Declaration that land is required for a public purpose. - (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or

of some officer duly authorized to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (1) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1), -

(i) xx xx xx xx

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

Explanation 1. - In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.

Explanation 2. - Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the

locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the date of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing.

17. Special powers in case of urgency. – (1) In cases of urgency whenever the appropriate Government, so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1) take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, or the appropriate Government considers it necessary to acquire the immediate possession of any land for the

purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at that time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and from any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall, without prejudice to the provisions of sub-section (3)-

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in section 31, sub-section

(2),

and where the Collector is so prevented, the provisions of section 31, sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3B) The amount paid or deposited under sub-section (3A), shall be taken into account for determining the amount of compensation required to be tendered under section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under section 11, the excess may, unless refunded within three months from the date of Collector's award, be recovered as an arrear of land revenue.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the date of the publication of the notification under section 4, sub-section (1).

Section 17 has been amended five times by the Uttar Pradesh legislature. However, the only amendment which is relevant for deciding this case is the insertion of proviso to Section 17(4) vide Uttar Pradesh Act No.8 of 1974. That proviso reads as under:

"Provided that where in the case of any land, notification under section 4, sub-section (1) has been published in the Official Gazette on or after September 24, 1984 but before January 11, 1989, and the appropriate Government has under this sub-section directed that the provisions of section 5A shall not apply, a declaration under section 6 in respect of the land may be made either simultaneously

with, or at any time after, the publication in the Official Gazette of the notification under section 4, sub-section (1)."

23. *ANALYSIS OF THE PROVISIONS:*

Section 4(1) lays down that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, then a notification to that effect is required to be published in the Official Gazette and two daily newspapers having circulation in the locality. Of these, one paper has to be in the regional language. A duty is also cast on the Collector, as defined in Section 3(c), to cause public notice of the substance of such notification to be given at convenient places in the locality. The last date of publication and giving of public notice is treated as the date of publication of the notification. Section 4(2) lays down that after publication of the notification under Section 4(1), any officer authorised by the Government in this behalf, his servants or workmen can enter upon and survey and take levels of any land in the locality or to dig or bore into the sub-soil and to do all other acts necessary for ascertaining that land is suitable for the purpose of acquisition. The concerned officer, his servants or workmen can fix the boundaries of land proposed to be acquired and the intended line of the work, if any, proposed to be made on it. They can also mark such levels and boundaries by marks and cutting trenches and cut down and clear any part of any standing crops, fence or jungle for the purpose of completing the survey and taking level, marking of boundaries and line. However, neither the officer nor his servants or workmen can, without the consent of the occupier, enter into any building or upon any enclosed court or garden attached to a dwelling house without giving seven days' notice to the occupier. Section 5A, which embodies the most important dimension of the rules of natural justice, lays down that any person interested in any land notified under Section 4(1) may, within 30 days of publication of the notification, submit objection in writing against the proposed acquisition of

land or of any land in the locality to the Collector. The Collector is required to give the objector an opportunity of being heard either in person or by any person authorized by him or by pleader. After hearing the objector (s) and making such further inquiry, as he may think necessary, the Collector has to make a report in respect of land notified under Section 4(1) with his recommendations on the objections and forward the same to the Government along with the record of the proceedings held by him. The Collector can make different reports in respect of different parcels of land proposed to be acquired. Upon receipt of the Collector's report, the appropriate Government is required to take action under Section 6(1) which lays down that after considering the report, if any, made under Section 5-A (2), the appropriate Government is satisfied that any particular land is needed for a public purpose, then a declaration to that effect is required to be made under the signatures of a Secretary to the Government or of some officer duly authorised to certify its orders. This section also envisages making of different declarations from time to time in respect of different parcels of land covered by the same notification issued under Section 5(1). In terms of clause (ii) of proviso to Section 6(1), no declaration in respect of any particular land covered by a notification issued under Section 4(1), which is published after 24.9.1989 can be made after expiry of one year from the date of publication of the notification. To put it differently, a declaration is required to be made under Section 6(1) within one year from the date of publication of the notification under Section 4(1). In terms of Section 6(2), every declaration made under Section 6(1) is required to be published in the official gazette and in two daily newspapers having circulation in the locality in which land proposed to be acquired is situated. Of these, at least one must be in the regional language. The Collector is also required to cause public notice of the substance of such declaration to be given at convenient places in the locality. The declaration to be published under Section 6(2) must contain the district or other territorial division in which land is situate, the purpose for which it is needed, its

approximate area or a plan is made in respect of land and the place where such plan can be inspected. Section 6 (3) lays down that the declaration made under Section 6(1) shall be conclusive evidence of the fact that land is needed for a public purpose. After publication of the declaration under Section 6, the Collector is required to take order from the State Government for the acquisition of land to be carved out and measured and planned (Sections 7 and 8). The next stage as envisaged is issue of public notice and individual notice to the persons interested in land to file their claim for compensation. Section 11 envisages holding of an enquiry into the claim and passing of an award by the Collector who is required to take into consideration the provisions contained in Section 23. Section 16 lays down that after making an award the Collector can take possession of land which shall thereafter vest in the Government. Section 17(1) postulates taking of possession of land without making an award. If the appropriate Government decides that land proposed to be acquired is urgently needed for a public purpose then it can authorise the competent authority to take possession. Section 17(2) contemplates a different type of urgency in which, the State Government can authorise taking of possession even before expiry of 15 days period specified in Section 9 (1). Section 17(4) lays down that in cases where appropriate Government comes to the conclusion that there is existence of an urgency or unforeseen emergency, it can direct that provisions of Section 5-A shall not apply.

24. Before adverting to the precedents in which Section 5A has been interpreted by this Court, it will be useful to notice development of the law relating to the rule of hearing. In the celebrated case of *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414, the principle was stated thus:

> "Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat".

Therein the District Board had brought down the house of the plaintiff's (Cooper), because he had failed to comply with The Metropolis Local Management Act. The Act required the plaintiff to notify the board seven days before starting to build the house. Cooper argued that even though the board had the legal authority to tear his house down, no person should be deprived of their property without notice. In spite of no express words in the statute the court recognized the right of hearing before the plaintiff's house built without permission was demolished in the exercise of statutory powers. Byles J stated:

> 'Although there are not positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature'.

25. Perhaps the best known statement on the right to be heard has come from Lord Loreburn, L.C. in *Board of Education v. Rice* (1911 AC 179 at 182), where he observed:

> "Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds…In such cases… they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such questions as though it were a trial …they can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial in their view."

26. In *Ridge v. Baldwin* 1964 AC 40 Lord Reid emphasized on the universality of the right to a fair hearing whether it concerns the property or tenure of an office or membership of an institution. In *O'Reilly v. Mackman* 1983 2 AC 237, Lord Diplock said that the right of a man to be given

a fair opportunity of hearing, what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that failure to observe the same should render null and void any decision reached in breach of this requirement. In *Lloyd v. Mcmahon* 1987 AC 625 Lord Bridge said:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

27. In the United States, principles of natural justice usually find support from the Due Process clause of the Constitution. The extent of due process protection required is determined by a number of factors; first the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural requirement would entail.

28. The amplitude, ambit and width of the rule of *audi alteram partem* was lucidly stated by the three-Judge bench in *Sayeedur Rehman v. State of Bihar* (1973) 3 SCC 333 in the following words:

"11…….This unwritten right of hearing is fundamental to

> a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties."

29. In *Mohinder Singh Gill v. Chief Election Commissioner* (1978) 1 SCC 405, Krishna Iyer J. speaking for himself, Beg CJ and Bhagwati J. highlighted the importance of rule of hearing in the following words:

> **"43.** Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has, many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam — and of Kautilya's Arthasastra — the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.
>
> ….. ….. …..
>
> **48.** Once we understand the soul of the rule as fair play in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a

democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more — but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that *audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."

30. In *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, Bhagwati J. speaking for himself and Untwalia and Fazal Ali JJ. observed:

"14. …….The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. *But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned*

save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. *The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."*

(emphasis supplied)

31. In *Swadeshi Cotton Mills v. Union of India* (1981) 1 SCC 664 the majority of the three Judge Bench held that rule of *audi alteram partem* must be complied with even when the Government exercises power under Section 18AA of the Industries (Development & Regulation) Act, 1951 which empowers the Central Government to authorise taking over of the management of industrial undertaking. Sarkaria J. speaking for himself and Desai J. referred to the development of law relating to applicability of the rule of *audi alteram partem* to administrative actions, noticed the judgments in *Ridge v. Baldwin* (supra), *A.K. Kraipak vs. Union of India* (1969) 2 SCC 262, *Mohinder Singh Gill v. Union of India* (supra), *Maneka Gandhi v. Union of India* (supra) and *State of Orissa v Dr. Bina*

Pani Dei 1967 (2) SCR 625 and quashed the order passed by the Central Government for taking over the management of the industrial undertaking of the appellant on the ground that opportunity of hearing has not been given to the owner of the undertaking and remanded the matter for fresh consideration and compliance of the rule of *audi alteram partem*.

32. In *Munshi Singh v. Union of India* (1973) 2 SCC 337, the three Judge Bench of this Court emphasised the importance of Section 5A in the following words:

> "7. ……Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A: [See Section 17(4) of the Acquisition Act.]"

33. In *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, Krishna Iyer J. emphasized the necessity of reasonableness and fairness in the State action of invoking the urgency provision in the following words:

> "16…….it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness,

> and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

34. In *Shyam Nandan Prasad v. State of Bihar* (1993) 4 SCC 255, this Court reiterated that the compliance of Section 5A is mandatory and observed as under:

> "10……The decision of the Collector is supposedly final unless the appropriate Government chooses to interfere therein and cause affectation, suo motu or on the application of any person interested in the land. These requirements obviously lead to the positive conclusion that the proceeding before the Collector is a blend of public and individual enquiry. The person interested, or known to be interested, in the land is to be served personally of the notification, giving him the opportunity of objecting to the acquisition and awakening him to such right. That the objection is to be in writing, is indicative of the fact that the enquiry into the objection is to focus his individual cause as well as public cause. That at the time of the enquiry, for which prior notice shall be essential, the objector has the right to appear in person or through pleader and substantiate his objection by evidence and argument."

35. The ratio of *Munshi Singh v. Union of India* (supra) has been reiterated and followed in *Union of India v. Mukesh Hans* (2004) 8 SCC 14, *Hindustan Petroleum Corporation Limited v. Darius Shapur Chenai* (2005) 7 SCC 627 and *Anand Singh v. State of Uttar Pradesh* (supra).

36. The acquisition of land under Section 4 read with Section 17(1) and/or 17(4) has generated substantial litigation in last 50 years. One of the earliest judgments on the subject is *Nandeshwar Prasad v. The State of Uttar Pradesh* (1964) 3 SCR 425. In that case, the acquisition of land for construction of tenements for the 4th phase of subsidized industrial housing scheme sponsored by the State Government, as also for general improvement and street Scheme No.XX of Kanpur Development Board by issuing notification under Section 4 read with Section 17(1), (1-A) and 17(4) was challenged. The learned Single Judge and the Division Bench of the Allahabad High Court negatived the appellants' challenge by observing that once Section 17 is invoked, there was no necessity to hold enquiry under Section 5A. This Court set aside the order of the Division Bench of the High Court and held:

> "It will be seen that Section 17(1) gives power to the Government to direct the Collector, though no award has been made under Section11, to take possession of any waste or arable land needed for public purpose and such land thereupon vests absolutely in the Government free from all encumbrances. If action is taken under Section 17(1), taking possession and vesting which are provided in Section 16 after the award under Section 11 are accelerated and can take place fifteen days after the publication of the notice under Section 9. Then comes Section 17(4) which provides that in case of any land to which the provisions of sub-section (1) are applicable, the Government may direct that the provisions of Section 5-A shall not apply and if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Section 4(1). *It will be seen that it is not necessary even where the Government makes a direction under Section 17(1) that it should also make a direction under Section 17(4). If the Government makes a direction only under Section 17(1) the procedure under Section 5-A would still have to be followed before a notification under Section 6 is issued, though after that procedure has been followed and a notification under Section 6 is issued the Collector gets the power to take possession of the land after the notice under Section 9 without waiting for the award and on such taking possession the land shall vest absolutely in Government free from all encumbrances.* It is only when the Government also makes a declaration under Section 17 (4) that it becomes unnecessary to take action under Section 5-A and make a report thereunder. *It may be that generally where an order is made under Section 17(1), an order under Section 17(4) is also passed; but in law it is not necessary that this should be so. It will also be seen that under the Land Acquisition Act an order under Section 17(1) or Section 17(4) can only be passed with respect to waste or arable land and it cannot be passed with respect to land which is not waste or arable and on which buildings stand.*"

(emphasis supplied)

37. In *Raja Anand Brahma Shah v. State of Uttar Pradesh* (1967) 1 SCR 373, the Constitution Bench considered the legality of the acquisition of 409.6 acres of land in village Markundi Ghurma, Pargana Agori for a public purpose i.e. for limestone quarry. The State Government invoked Section 17(1) and 17(4), dispensed with requirement of hearing envisaged under Section 5-A and directed the Collector and District Magistrate, Mirzapur to take the possession of land. The Allahabad High Court dismissed the writ petition filed by the appellant by observing that the Court cannot interfere with the subjective satisfaction reached by the State Government on the issue of urgency. This Court agreed with the High Court that the acquisition was for a public purpose but held that the expression of opinion by the State Government on the issue of invoking urgency provision can be challenged on the ground of non application of mind or mala fides. The

Court relied upon the judgments in *King Emperor v. Shibnath Banerjee,* Criminal Appeal No.110 of 1966 decided on July 27, 1966; *Jaichand Lal Sethia v. State of West Bengal* (1958) 1 WLR 546; *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust* (1914) 1 Ch 438; *Ross Clunis v. Papadopoullos* 44 1A 117 and *R. v. Australian Stevedoring Industry Board* 39 1A 133 and observed:

> "It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17 (4) of the Act, is subjective and a court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under Section 17(4). The legal position has been explained by the Judicial Committee in *King Emperor v. Shibnath Banerjee* and by this Court in a recent case – *Jaichand Lal Sethia v. State of West Bengal*. But even though the power of the State Government has been formulated under Section 17(4) of the Act in subjective terms *the expression of opinion of the State Government can be challenged as ultra vires in a court of law if it could be shown that the State Government never applied it mind to the matter or that the action of the State Government is mala fide. If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-section (1) of Section 17 are applicable, the court may legitimately draw an inference that the State Government did not honestly form that opinion or that in forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue.* It follows therefore that the notification of the State Government under Section 17 (4) of the Act directing that the provisions of Section 5-A shall not apply to the land is ultra vires."
>
> (emphasis supplied)

38. In *Narayan Govind Gavate v. State of Maharashtra* (supra), this Court while approving the judgment of the Bombay High Court, which quashed the acquisition made under Section 4 read with Section 17(1) and 17(4) held as under:

> "38. Now, the purpose of Section 17(4) of the Act is, obviously, not merely to confine action under it to waste and arable land but also to situations in which an inquiry under Section 5-A will serve no useful purpose, or, for some overriding reason, it should be dispensed with. The mind of the officer or authority concerned has to be applied to the question whether there is an urgency of such a nature that even the summary proceedings under Section 5-A of the Act should be eliminated. It is not just the existence of an urgency but the need to dispense with an inquiry under Section 5-A which has to be considered.
>
> 40. In the case before us, the public purpose indicated is the development of an area for industrial and residential purposes. *This, in itself, on the face of it, does not call for any such action, barring exceptional circumstances, as to make immediate possession, without holding even a summary enquiry under Section 5-A of the Act, imperative. On the other hand, such schemes generally take sufficient period of time to enable at least summary inquiries under Section 5-A of the Act to be completed without any impediment whatsoever to the execution of the scheme. Therefore, the very statement of the public purpose for which the land was to be acquired indicated the absence of such urgency, on the apparent facts of the case, as to require the elimination of an enquiry under Section 5-A of the Act.*
>
> *42. All schemes relating to development of industrial and residential areas must be urgent in the context of the country's need for increased production and more residential accommodation. Yet, the very nature of such*

schemes of development does not appear to demand such emergent action as to eliminate summary enquiries under Section 5-A of the Act……..."

(emphasis supplied)

39. The next judgment which deserves to be mentioned is *Om Prakash v State of U.P.* (supra). In 1976, NOIDA acquired large tracts of land in different villages of Ghaziabad District including village Chhalera Banger for planned industrial development of Ghaziabad. On being approached by NOIDA, the State Government invoked Section 17 (1) and 17(4) on the ground that the land was urgently required. In 1987, more lands were acquired from the same village by issuing notification under Section 4. This time the land owners were given opportunity to file their objections and after considering the same, the State Government issued notification under Section 6 for the acquisition of 353 acres land. In 1988, NOIDA submitted fresh proposal for the acquisition of land belonging to the appellants and others (total land measuring 294.26 acres). The State Government issued notification under Section 4 read with Section 17(1) and 17(4) of the Act clearly indicating therein that Section 5-A was not applicable. The writ petitions filed by the land owners were dismissed by the High Court. After noticing the arguments of the learned counsel for the parties, this Court framed the following questions.

"1. Whether the State authorities were justified in invoking Section 17(4) of the Act for dispensing with inquiry under Section 5-A of the Act.

2. In any case, whether the appellants' lands have to be treated as immune from acquisition proceedings on the ground that they were having abadi thereon and were, therefore, governed by the policy decision of the State of U.P. not to acquire such lands.

3. Whether this Court should refuse to exercise its

discretionary jurisdiction under Article 136 of the Constitution of India in the facts and circumstances of the case.

4. What final orders."

While dealing with question No.1, the Court noticed the scheme of Section 17, referred to the pleadings of the parties, and the judgments in *State of U.P. v. Pista Devi* (supra), *Narayan Govind Gavate v. State of Maharashtra* (supra), *Rajasthan Housing Board v. Shri Kishan* (1993) 2 SCC 84, *State of Punjab v. Gurdial Singh* (supra), *Nandeshwar Prasad v. U.P. Govt.* (supra), *A.P. Sareen v. State of U.P.* (1997) 9 SCC 359, *Ghaziabad Development Authority v. Jan Kalyan Samiti* (1996) 2 SCC 365, *Jai Narain v. Union of India* (1996) 1 SCC 9 and held that the decision to dispense with the inquiry envisaged under Section 5-A was not based on any real and genuine subjective satisfaction. In the process, the Court noted that in 1989 the State Government had not resorted to Section 17 and the acquisition proceedings were finalized after holding inquiry under Section 5-A and observed:

"We were informed by Senior Counsel Shri Mohta for NOIDA that even though in the earlier acquisition of 1987 pursuant to Section 4 notification, inquiry under Section 5-A was not dispensed with, by the time Section 6 notification came to be issued, Section 17(1) was resorted to as urgency had developed at least by the end of December 1989. If that be so, it was expected that pursuant to the requisition of 14-12-1989 by NOIDA invoking urgency powers of the State Government, consequential notification under Section 4(1) would have seen the light of day at the earliest in connection with acquisition of the proposed 494.26 acres of land for the development of Sector 43 and other sectors. But curiously enough, nothing happened urgently and Section 4 notification which is impugned in the present case was issued on 5-1-1991. *Thus despite the invocation of*

urgency by NOIDA by its letter dated 14-12-1989, it appears that the State did not think the said proposal to be so urgent as to immediately respond and to issue notification under Section 4 read with Section 17 sub-section (4) till 5-1-1991. More than one year elapsed in the meantime. Why this delay took place and why the State did not think it fit to urgently respond to the proposal of NOIDA, has remained a question mark for which there is no answer furnished by the respondent-authorities in the present cases and nothing is brought on the record by them to explain the delay. It has, therefore, necessarily to be presumed that despite the emergency powers of the State Government being invoked by NOIDA, the State authorities in their wisdom did not think the matter to be so urgent as to immediately respond and promptly issue Section 4 notification read with Section 17(4).

... .

Even that apart, despite proposal to acquire this land was moved by NOIDA as early as on 14-6-1988, and even thereafter when the request was sent in this communication on 14-12-1989, the State authorities did not think the situation to be so urgent as to respond quickly and could wait for more than one year. When the appellants in the writ petitions before the High Court raised their grievances regarding dispensing with inquiry under Section 5-A being not backed up by relevant evidence and the subjective satisfaction of the State in this connection was brought in challenge, all that was stated by NOIDA in its counter in para 26 was to the effect that the contents of paras 25 and 26 of the writ petition were denied and that the petitioners were not able to point out any lacunae in the proceedings under the Land Acquisition Act. The position was no better so far as the counter of the State authorities was concerned. In para 24 of the counter before the High Court,

all that was stated was that paras 25 and 26 of the writ petition were denied. *When we turn to paras 25 and 26 of the writ petition, we find averments to the effect that the urgency of the acquisition was only for the purpose of depriving the petitioners of their rights to file objections under Section 5-A and their right to hold the possession till they got compensation for which the respondents had issued notification under Section 17(1) as well as notification Section 17(4) of the Act. But so far as the process of the acquisition was concerned, the respondents were taking their own time, which would be evident from the fact that the notification under Section 4 read with Section 17(4) was issued on 5-1-1991 but was published in the newspaper on 30-3-1991, whereas the declaration under Section 6 of the Act was made on 7-1-1992 and that on the one hand, the respondents had deprived the petitioners of filing their objections under Section 5-A of the Act on the ground of urgency of acquisition, but on the other hand, they themselves had taken more than nine months in issuing the declaration under Section 6 of the said Act. This conduct of the respondents falsified their claim of urgency of acquisition.*

... ...

The additional material which was produced before the High Court was by way of Annexures CA-3, CA-4 and CA-5. When we turn to these annexures, we find that AnnexureCA-3 is a letter dated 21-4-1990 written by the District Magistrate, Ghaziabad, to the Joint Secretary, Industries, Government of Uttar Pradesh. It recites that on examination, it was found that the land was immediately required in public interest so that the development work in the said land could be carried out smoothly. What was the nature of urgency is not mentioned in the said letter. Therefore, the position remains as vague as it was earlier. When we turn to Annexure CA-4 which is dated 12-6-1990,

we find that the District Magistrate, Ghaziabad wrote to the Joint Secretary, Industries, State of U.P., that as to how many farmers were going to be affected by the proposed acquisition. It does not even whisper about the urgency of the situation which requires dispensing with Section 5-A inquiry. The last, Annexure CA-5 is the letter dated 14-12-1989 written by NOIDA to the Land Acquisition Officer proposing urgent acquisition of the lands in question. We have already made a reference to the said letter. It recites that if immediate action for acquisition of the aforesaid lands adjacent to Sector 43 for development of which the acquisition was to be resorted to was not taken, then there was possibility of encroachment over the area cannot by any stretch of imagination be considered to be a germane ground for invoking urgency powers for dispensing with Section 5-A inquiry. Even if acquisition takes place urgently by dispensing with inquiry under Section 5-A and the possession is taken urgently after Section 6 notification within 15 days of issuance of notice under Section 9 sub-section (1), even then there is no guarantee that the acquired land would not be encroached upon by unruly persons. It is a law and order problem which has nothing to do with the acquisition and urgency for taking possession. Even that apart, it is easy to visualize that if objectors are heard in connection with Section 5-A inquiry they would be the best person to protect their properties against encroachers. Consequently, the ground put forward by NOIDA in its written request dated 14-12-1989 for invoking urgency powers must be held to be totally irrelevant."

(emphasis supplied)

40. We may now notice some recent decisions. In *Union of India vs. Mukesh Hans* (supra), this Court interpreted Sections 5-A and 17 and observed:

"32. *A careful perusal of this provision which is an*

exception to the normal mode of acquisition contemplated under the Act shows that mere existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4), that by itself is not sufficient to direct the dispensation of the Section 5-A inquiry. It requires an opinion to be formed by the Government concerned that along with the existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A inquiry which indicates that the legislature intended the appropriate Government to apply its mind before dispensing with Section 5-A inquiry. It also indicates that mere existence of an urgency under Section 17(1) or unforeseen emergency under Section 17(2) would not by itself be sufficient for dispensing with Section 5-A inquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Sections 17(1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A inquiry will be dispensed with. But then that is not the language of the section which in our opinion requires the appropriate Government to further consider the need for dispensing with Section 5-A inquiry in spite of the existence of unforeseen emergency.

33. An argument was sought to be advanced on behalf of the appellants that once the appropriate Government comes to the conclusion that there is an urgency or unforeseen emergency under Sections 17(1) and (2), the dispensation with inquiry under Section 5-A becomes automatic and the same can be done by a composite order meaning thereby that there is no need for the appropriate Government to separately apply its mind for any further emergency for dispensation with an inquiry under Section 5-A. *We are unable to agree with the above*

argument because sub-section (4) of Section 17 itself indicates that the "Government may direct that the provisions of Section 5-A shall not apply" (emphasis supplied) which makes it clear that not in every case where the appropriate Government has come to the conclusion that there is urgency and under sub-section (1) or unforeseen emergency under sub-section (2) of Section 17, the Government will ipso facto have to direct the dispensation of the inquiry."

(emphasis supplied)

41. In *Union of India v. Krishan Lal Arneja* (2004) 8 SCC 453, this Court approved quashing of the acquisition proceedings by the High Court and observed:

"16. Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down under Section 5-A of the Act in exceptional case of urgency. Such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. *A public purpose, however laudable it may be, by itself is not sufficient to take aid of Section 17 to use this extraordinary power as use of such power deprives a landowner of his right in relation to immovable property to file objections for the proposed acquisition and it also dispenses with the inquiry under Section 5-A of the Act.* The authority must have subjective satisfaction of the need for invoking urgency clause under Section 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the landowners and the inquiry under Section 5-A of the Act could be completed. In other words, if power under Section 17 is not exercised, the very purpose for which the land is

being acquired urgently would be frustrated or defeated. Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time-bound project where the delay is likely to render the purpose nugatory or infructuous. *A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority. While applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State administration.*

(emphasis supplied)

42. In *Esso Fabs Private Limited vs. State of Haryana* (supra), the Court again dealt with the question whether the State was justified in invoking Section 17(1) and 17(4) and dispensing with the inquiry under Section 5-A and held:

"53. Section 17, no doubt, deals with special situations and exceptional circumstances covering cases of "urgency" and "unforeseen emergency". In case of "urgency" falling under sub-section (1) of Section 17 or of "unforeseen emergency" covered by sub-section (2) of Section 17, special powers may be exercised by appropriate Government but as held by a three-Judge Bench decision before more than four decades in *Nandeshwar Prasad* and reiterated by a three-Judge Bench decision in *Mukesh Hans,* even in such cases, inquiry and hearing of objections under Section 5-A cannot ipso facto be dispensed with unless a notification under sub-section (4) of Section 17 of the Act is issued. *The legislative scheme*

is amply clear which merely enables the appropriate Government to issue such notification under sub-section (4) of Section 17 of the Act dispensing with inquiry under Section 5-A if the Government intends to exercise the said power. The use of the expression "may" in sub-section (4) of Section 17 leaves no room of doubt that it is a discretionary power of the government to direct that the provisions of Section 5-A would not apply to such cases covered by sub-section (1) or (2) of Section 17 of the Act.

54. In our opinion, therefore, the contention of learned counsel for the respondent authorities is not well founded and cannot be upheld that once a case is covered by sub-section (1) or (2) of Section 17 of the Act, sub-section (4) of Section 17 would necessarily apply and there is no question of holding inquiry or hearing objections under Section 5-A of the Act. Acceptance of such contention or upholding of this argument will make sub-section (4) of Section 17 totally otiose, redundant and nugatory."

(emphasis supplied)

43. In *Babu Ram v. State of Haryana* (2009) 10 SCC 115, this Court reversed the judgment of the High Court and quashed the notification issued by the State Government under Section 4 read with Section 17(1) and 17(4) for the acquisition of land for construction of sewage treatment plant. After noticing the judgments in *State of Punjab v. Gurdial Singh* (supra), *Om Prakash v. State of U.P.* (supra) and *Union of India v. Krishan Lal Arneja* (supra), the Court observed:

"As indicated hereinabove in the various cases cited by Mr.Pradip Ghosh and, in particular, the decision in Krishan Lal Arneja case, in which reference has been made to the observations made by this Court in Om Prakash case, it has been emphasized that a right under Section 5-A is not merely statutory but also has the flavour of fundamental

rights under Articles 14 and 19 of the Constitution. Such observations had been made in reference to an observation made in the earlier decision in Gurdial Singh case and keeping in mind the fact that right to property was no longer a fundamental right, an observation was made that even if the right to property was no longer a fundamental right, the observations relating to Article 14 would continue to apply in full force with regard to Section 5-A of the LA Act."

44. In *Anand Singh v. State of U.P.* (supra), the two-Judge Bench considered the question whether the State Government was justified in invoking Section 17(4) for the acquisition of land for residential colony to be constructed by Gorakhpur Development Authority, Gorakhpur. The Court noted that notifications under Section 4(1) read with Section 17(1) and 17(4) were issued on November 23, 2003 and February 20, 2004 and declaration under Section 6 was issued on December 24, 2004, referred to 16 judicial precedents including those noticed hereinabove and held:

"The exceptional and extraordinary power of doing away with an enquiry under Section 5-A in a case where possession of the land is required urgently or in an unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5-A. Exceptional the power, the more circumspect the Government must be in its exercise. The Government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5-A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A.

A repetition of the statutory phrase in the notification that

the State Government is satisfied that the land specified in the notification is urgently needed and the provision contained in Section 5-A shall not apply, though may initially raise a presumption in favour of the Government that prerequisite conditions for exercise of such power have been satisfied, but such presumption may be displaced by the circumstances themselves having no reasonable nexus with the purpose for which the power has been exercised. Upon challenge being made to the use of power under Section 17, the Government must produce appropriate material before the Court that the opinion for dispensing with the enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it.

It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary.

As to in what circumstances the power of emergency can be invoked are specified in Section 17(2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of landowners / persons interested may not be considered. In many cases, on general assumption likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being

taken away and with some effort enquiry could always be completed expeditiously.

The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The Government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed a few decisions of this Court viz. Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that the decision in Pista Devi must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree.

As regards the issue whether pre-notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate Government before the Court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."

(emphasis supplied)

45. In Civil Appeal No.2334 of 2011, *Dev Sharan v. State of U.P.*, decided on March 7, 2011, the acquisition of land for construction of district jails was quashed on the ground that there was no valid ground or justification to exclude the application of Section 5-A of the Act and it was observed:

"...Admittedly, the Land Acquisition Act, a pre-Constitutional legislation of colonial vintage is a drastic law,

being expropriatory in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory. This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State.

The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition. The said definition, having suffered several amendments, has assumed the character of an inclusive one. It must be accepted that in construing public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a pubic purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people especially of the common people defeats the very concept of public purpose. Even though the concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles.

In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part-III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in

acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country.

Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. The Courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the Courts especially the Higher Courts, cannot afford to act as mere umpires. "

46. To be fair to the respondents, we may also notice the judgments in which the decision of the State to invoke Section 17(1) and/or 17(4) has been upheld. In *State of U.P. v. Pista Devi* (supra), this Court examined the justification of invoking Section 17(1) and 17(4) of the Act for the acquisition of over 662 Bighas land situated in village Mukarrabpur, District Meerut for providing housing accommodation. The two-Judge Bench distinguished the three-Judge Bench judgment in *Narayan Govind Gavate v. State of Maharashtra* (supra), by observing that after that decision, population of India had gone up by hundreds of millions and it was no longer possible for the Court to take the view that the schemes of development of residential areas do not appear to demand such emergent action as to eliminate summary inquiries under Section 5-A of the Act.

47. In *Rajasthan Housing Board v. Shri Kishan* (supra), this Court set aside the judgment of the majority of Full Bench of the High Court, which had quashed the acquisition of 2570 bighas land by the State Government by invoking Sections 17(1) and 17(4) of the Act for the benefit of appellant Rajasthan Housing Board and observed:

> "The material placed before the Court disclosed that the Government found, on due verification, that there was an acute scarcity of land and there was heavy pressure for construction of houses for weaker sections and middle income group people; that the Housing Board had obtained a loan of Rs 16 crores under a time-bound programme to construct and utilise the said amount by March 31, 1983; that in the circumstances the Government was satisfied that unless possession was taken immediately, and the Housing Board permitted to proceed with the construction, the Board will not be able to adhere to the time-bound programme. In addition to the said fact, the Division Bench referred to certain other material also upon which the Government had formed the said satisfaction viz., that in view of the time-bound programme stipulated by the lender, HUDCO, the Board had already appointed a large number of engineers and other subordinate staff for carrying out the said work and that holding an inquiry under Section 5-A would have resulted in uncalled for delay endangering the entire scheme and time-schedule of the Housing Board. If must be remembered that the satisfaction under Section 17(4) is a subjective one and that so long as there is material upon which the Government could have formed the said satisfaction fairly, the Court would not interfere nor would it examine the material as an appellate authority. This is the principle affirmed by decisions of this Court not under Section 17(4) but also generally with respect to subjective satisfaction."

48. In *Chameli Singh v. State of U.P.* (supra), the three-Judge Bench upheld the acquisition of land under Sections 17 (1A) and 17(4) by observing that the problem of providing houses to the dalits, tribes and poor needed emergency measures and so long as the problem is not solved and the need of that segment of the society is not fulfilled, the urgency continues to subsist.

49. In *First Land Acquisition Collector v. Nirodhi Prakash Gangoli* (2002) 4 SCC 160, the Court upheld the acquisition of land for Calcutta Medical College under Section 17(1) and 17(4) and observed:

> "By no stretch of imagination, exercise of power for acquisition can be held to be mala fide, so long as the purpose of acquisition continues and as has already been stated, there existed emergency to acquire the premises in question. The premises which were under occupation of the students of National Medical College, Calcutta, were obviously badly needed for the College and the appropriate authority having failed in their attempt earlier twice, the orders having been quashed by the High Court, had taken the third attempt of issuing notification under Sections 4(1) and 17(4) of the Act, such acquisition cannot be held to be mala fide and, therefore, the conclusion of the Division Bench in the impugned judgment that the acquisition is mala fide, must be set aside and we accordingly set aside the same."

50. In *Tika Ram v. State of Uttar Pradesh* (2009) 10 SCC 689, the two-Judge Bench mainly considered the questions relating to constitutional validity of the Uttar Pradesh Act nos. 8 of 1974 and 5 of 1991 by which amendments were made in Section 17 of the Act. An ancillary question considered by the Court was whether the State Government was justified in invoking the urgency provision. The Bench referred to some of the precedents on the subject and refused to quash the acquisition by observing that the acquired land has already

been utilized for construction of houses by third parties.

51. In *Nand Kishore Gupta v. State of Uttar Pradesh* (2010) 10 SCC 282, the acquisition of land for construction of Yamuna Expressway was upheld and challenge to the decision of the State Government to dispense with the inquiry was negatived by making the following observations:

> "We have deliberately quoted the above part of the High Court judgment only to show the meticulous care taken by the High Court in examining as to whether there was material before the State Government to dispense with the enquiry under Section 5-A of the Act. We are completely convinced that there was necessity in this Project considering the various reasons like enormousness of the Project, likelihood of the encroachments, number of appellants who would have required to be heard and the time taken for that purpose, and the fact that the Project had lingered already from 2001 till 2008. We do not see any reason why we should take a different view than what is taken by the High Court."

52. What is important to be noted is that in none of the aforementioned judgments, the Court was called upon to examine the legality and/or justification of the exercise of power under Section 17(1) and/or 17(4) for the acquisition of land for residential, commercial or industrial purpose. In *State of U.P. v. Pista Devi* (supra), *Rajasthan Housing Board v. Shri Kishan* (supra) and *Chameli Singh v. State of U.P.* (supra), the invoking of urgency provision contained in Section 17(1) and exclusion of Section 5-A was approved by the Court keeping in view the acute problem of housing, which was perceived as a national problem and for the solution of which national housing policy was framed and the imperative of providing cheaper shelter to dalits, tribals and other disadvantaged sections of the society. In *First Land Acquisition Collector v. Nirodhi Prakash Gangoli* (supra), the exercise of power under Section 17 was found to be justified because the land was already in the

possession of the medical college and the earlier exercise undertaken by the State for the acquisition of land got frustrated due to intervention of the Court. The factor, which influenced this Court to approve the judgment of the High Court in *Tika Ram v. State of Uttar Pradesh* (supra) was that the acquired land had already been utilized for construction of houses by third parties to whom the plots had been allotted and they were not parties to the litigation. In *Nand Kishore Gupta v. State of U. P.* (supra), the acquisition was upheld because the land was urgently needed for construction of Yamuna Expressway and by the time the matter was decided by this Court, huge amount had been spent on the project. As against this, the exercise of power under Section 17(1) and/or 17(4) for the acquisition of land for residential, industrial and commercial purposes, construction of sewage treatment plant and district jails was held to be legally impermissible in *Raja Anand Brahma Shah v. State of Uttar Pradesh* (supra), *Narayan Govind Gavate v. State of Maharashtra* (supra), *Om Prakash v. State of U.P.* (supra), *Union of India v. Krishan Lal Arneja* (supra), *Esso Fabs Private Limited v. State of Haryana* (supra), *Babu Ram v. State of Haryana* (supra) and *Anand Singh v. State of Uttar Pradesh* (supra).

53. From the analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out:

> (i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good. – *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.,* AIR (1954) SC 119, *Chiranjit Lal Chowdhuri v. Union of India* AIR (1951) SC 41 and *Jilubhai Nanbhai Khachar v. State of Gujarat*

(1995) Supp. (1) SCC 596.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly – *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* (2003) 5 SCC 622; *State of Maharashtra v. B.E. Billimoria* (2003) 7 SCC 336 and *Dev Sharan v. State of U.P.*, Civil Appeal No.2334 of 2011 decided on 7.3.2011.

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the land owner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose

of acquisition cannot brook the delay of even few weeks or months. Therefore, before excluding the application of Section 5-A, the concerned authority must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The Court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years.

Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of *audi alteram partem* embodied in Section 5-A (1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition.

54. The stage is now set for consideration of the issue whether the State Government was justified in invoking the urgency provision contained in Section 17(1) and excluding the application of Section 5-A for the acquisition of land for planned industrial development of District Gautam Budh Nagar. A recapitulation of the facts shows that upon receipt of proposal from the Development Authority, the State Government issued directions to the concerned authorities to take action for the acquisition of land in different villages including village Makora. The comments/certificate signed by three officers, which was submitted in the context of Government Order dated 21.12.2006 was accompanied by several documents including proposal for the acquisition of land, preliminary inquiry report submitted by the Amin, Land Acquisition, copies of khasra khatauni and lay out plan, 10 per cent of the estimated compensation and a host of other documents. In the note dated nil jointly signed by Deputy Chief Executive Officer, Greater Noida, Collector, Gautam Budh Nagar and four other officers/officials, the following factors were cited in justification of invoking the urgency provisions:

(a) The area was notified under Uttar Pradesh Industrial Areas Development Act, 1976 for planned industrial development.

(b) If there is any delay in the acquisition of land then

the same is likely to be encroached and that will adversely affect the concept of planned industrial development of the district.

(c) Large tracts of land of the nearby villages have already been acquired and in respect of some villages, the acquisition proceedings are under progress.

(d) The Development Authority urgently requires land for overall development, i.e. construction of roads, laying of sewerages, providing electricity, etc. in the area.

(e) The development scheme has been duly approved by the State Government but the work has been stalled due to non-acquisition of land of village Makora.

(f) Numerous reputed and leading industrial units of the country want to invest in the State of Uttar Pradesh and, therefore, it is extremely urgent and necessary that land is acquired immediately.

(g) If land is not made available to the incoming leading and reputed industrial concerns of the country, then they will definitely establish their units in other States and if this happens, then it will adversely affect employment opportunities in the State and will also go against the investment policy of the Government.

(h) If written/oral objections are invited from the farmers and are scrutinized, then it will take unprecedented long time and disposal thereof will hamper planned development of the area.

(i) As per the provisions of the Act, there shall be at least one year's time gap between publication of

the notifications under Sections 4 and 17 and Section 6.

55. In our view, the above noted factors do not furnish legally acceptable justification for the exercise of power by the State Government under Section 17(1) because the acquisition is primarily meant to cater private interest in the name of industrial development of the district. It is neither the pleaded case of the respondents nor any evidence has been produced before the Court to show that the State Government and/or agencies/instrumentalities of the State are intending to establish industrial units on the acquired land either by itself or through its agencies/instrumentalities. The respondents have justified the invoking of urgency provisions by making assertions, which are usually made in such cases by the executive authorities i.e. the inflow of funds in the State in the form of investment by private entrepreneurs and availability of larger employment opportunities to the people of the area. However, we do not find any plausible reason to accept this tailor-made justification for approving the impugned action which has resulted in depriving the appellants' of their constitutional right to property. Even if planned industrial development of the district is treated as public purpose within the meaning of Section 4, there was no urgency which could justify the exercise of power by the State Government under Section 17(1) and 17(4). The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lot of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns. The private entrepreneurs, who are desirous of making investment in the State, take their own time in setting up the industrial units. Usually, the State Government and its agencies/ instrumentalities would give them two to three years' to put up their factories, establishments etc. Therefore, time required for ensuring compliance of the provisions contained in Section 5-A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition. In this context, it

is apposite to note that the time limit for filing objection under Section 5-A (1) is only 30 days from the date of publication of the notification under Section 4(1). Of course, in terms of sub-section (2), the Collector is required to give opportunity of hearing to the objector and submit report to the Government after making such further inquiry, as he thinks necessary. This procedure is likely to consume some time, but as has been well said, "Principles of natural justice are to some minds burdensome but this price-a small price indeed-has to be paid if we desire a society governed by the rule of law."

56. In this case, the Development Authority sent proposal some time in 2006. The authorities up to the level of the Commissioner completed the exercise of survey and preparation of documents by the end of December, 2006 but it took one year and almost three months to the State Government to issue notification under Section 4 read with Section 17(1) and 17(4). If this much time was consumed between the receipt of proposal for the acquisition of land and issue of notification, it is not possible to accept the argument that four to five weeks within which the objections could be filed under sub-section (1) of Section 5-A and the time spent by the Collector in making inquiry under sub-section (2) of Section 5-A would have defeated the object of acquisition.

57. The apprehension of the respondents that delay in the acquisition of land will lead to enormous encroachment is totally unfounded. It is beyond the comprehension of any person of ordinary prudence to think that the land owners would encroach their own land with a view to frustrate the concept of planned industrial development of the district.

58. The perception of the respondents that there should be atleast one year's time gap between the issue of notifications under Sections 4 and 6 is clearly misconceived. The time limit of one year specified in clause (ii)) of the proviso to Section 6(1) is the outer limit for issue of declaration. This necessarily means that the State Government can complete the

exercise under Sections 5-A and 6 in a shorter period.

59. The only possible conclusion which can be drawn from the above discussion is that there was no real and substantive urgency which could justify invoking of the urgency provision under Section 17(1) and in any case, there was no warrant to exclude the application of Section 5-A which, as mentioned above, represent the statutory embodiment of the rule of *audi alteram partem*.

60. We also find merit in the appellants' plea that the acquisition of their land is vitiated due to violation of the doctrine of equality enshrined in Article 14 of the Constitution. A reading of the survey report shows that the committee constituted by the State Government had recommended release of land measuring 18.9725 hectares. Many parcels of land were released from acquisition because the land owners had already raised constructions and were using the same as dwelling units. A large chunk of land measuring 4.3840 hectares was not acquired apparently because the same belong to an ex-member of the legislative assembly. The appellants had also raised constructions on their land and were using the same for residential and agricultural purposes. Why their land was not left out from acquisition has not been explained in the counter affidavit filed by the respondents. The High Court should have treated this as sufficient for recording a finding that the respondents had adopted the policy of pick and choose in acquiring some parcels of land and this amounted to violation of Article 14 of the Constitution. Indeed it has not been pleaded by the respondents that the appellants cannot invoke the doctrine of equality because the other parcels of land were illegally left out from acquisition.

61. The argument of the learned senior counsel for the respondents that the Court may not annul the impugned acquisition because land of other villages had already been acquired and other land owners of village Makora have not come forward to challenge the acquisition of their land cannot

be entertained and the Court cannot refuse to protect the legal and constitutional rights of the appellants merely because the others have not come forward to challenge the illegitimate exercise of power by the State Government. It is quite possible that others may have, due to sheer poverty, ignorance and similar handicaps not been able to avail legal remedies for protection of their rights, but that cannot be made basis to deny what is due to the appellants.

62. In the result, the appeal is allowed. The impugned order is set aside and the writ petition filed by the appellants is allowed. Respondent No.1 is directed to pay cost of Rs. 5,00,000/- to the appellants for forcing unwarranted litigation on them. It is, however, made clear that the respondents shall be free to proceed from the stage of Section 4 notification and take appropriate action after complying with Section 5-A(1) and (2) of the Act. It is needless to say if the appellants feel aggrieved by the fresh exercise undertaken by the State Government then they shall be free to avail appropriate legal remedy.

B.B.B. Appeal allowed.

A.C. MUTHIAH
v.
BOARD OF CONTROL FOR CRICKET IN INDIA AND ANR.
(Civil Appeal No. 3753 of 2011)

APRIL 28, 2011

[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]*

Memorandum and Rules and Regulations of BCCI, 2008: *Clauses 1(n), 6.2.4 – Complaints filed by appellant-past president of BCCI before the BCCI President alleging that second respondent being the office bearer of BCCI and also the Chairman and M.D. of India Cements Limited was disqualified to participate in the auction held for owning Indian Premier League (IPL) in which he was declared successful bidder and thus came to own Chennai Super King – No response to the complaint – Suit filed by appellant – Just a few days after filing of the said suit, the BCCI on 27.9.2008 introduced an amendment to Clause 6.2.4 carving out an Exception – After the amendment, the said clause read "No Administrator shall have directly or indirectly any commercial interest in any of the events of the BCCI excluding IPL, Champions League and Twenty 20." – The amendment to Clause 6.2.4 was challenged by the appellant by filing a second suit wherein the appellant also filed two applications seeking temporary injunction restraining the BCCI from permitting the second respondent to participate in the General Body Meeting and injunction against the amendment introduced by pleading to put it under suspension – High Court dismissed the applications on the ground that appellant had no locus standi to question the Regulations and the court*

*. There being difference of opinion, the matter has been referred to larger bench and the dissenting opinion of Hon'ble Mrs. Justice Gyan Sudha Misra is reported herein.

also cannot interfere with the internal management of the society – On appeal, Held: ***Per Gyan Sudha Misra, J.*** *- Past President of BCCI is also an Administrator and has locus standi to file suit challenging amendment to the Memorandum – Plea that the past President has to be nominated on any of the sub-committees of BCCI to be treated as an Administrator is not tenable – In order to decide whether the plaintiff has a right to file a civil suit or not, locus standi or competence of the plaintiff alone is to be established and not the question whether the BCCI is a State within the meaning of Article 12 of the Constitution which is a condition to be fulfilled for invoking the jurisdiction u/Articles 226 and/or 227 of the Constitution as also Article 32 of the Constitution but surely not for filing a civil suit or injunction application – Once, it is held that the plaintiff/appellant was also an Administrator of the BCCI in view of the definition of Administrator, his competence to challenge the amendment introduced in the regulation of BCCI cannot be held as not maintainable on the ground that BCCI is not a 'State' within the meaning of Article 12 of the Constitution – Conflict of interest does not require actual proof of any actual pecuniary gain or pecuniary loss – Second respondent necessarily was privy to highly sensitive information about the bidding process, the design of the tender, the rules of the game, the future plans of BCCI in respect of IPL and, therefore, it was inconceivable that such insider information to which any major office bearer of BCCI would necessarily be privy, would not have used and misused both potential and actual materials in the capacity of a bidder – Appellant fully succeeded in making out a prima facie case that this amendment smacked of arbitrariness and bias in favour of the second respondent and hence it was a fit case for grant of injunction keeping the impugned amendment under suspension or abeyance – However, since second respondent has already participated and succeeded in the bid and is also owning Chennai Super King, it is left open to him to exercise his option whether he wishes to continue as an office bearer of the BCCI or own IPL Chennai Super King –*

*High Court was not justified in not granting the temporary injunction claimed by appellant – **Per Panchal, J**: High Court was justified in not granting the temporary injunction claimed by appellant – **In view of difference of opinion, matter referred to larger bench** – Reference to larger bench – Constitution of India, 1950 – Articles 12, 32, 226, 227.*

The first respondent, the Board of Control for Cricket in India (BCCI) is a society registered under the Societies Registration Act which has its own Memorandum of Association, Rules and Regulations. The Regulations of the BCCI incorporated rules for Players, Team Officials, Managers, Umpires and Administrators. In the Regulation, Clause 6.2.4 stated "No Administrator shall have directly or indirectly any commercial interest in any events of the BCCI." The Regulation further stated that an office bearer of BCCI is an Administrator.

The appellant who was the past President of the BCCI filed two complaints before the President of the BCCI in his capacity as past President alleging disqualification suffered by the second respondent on the ground that he being the office bearer of BCCI and also the Chairman and M.D. of India Cements Limited should not have been allowed to participate in the auction held for owning Indian Premier League (IPL) in which he was declared a successful bidder and thus owned Chennai Super King. The appellant's complaints did not receive any response which prompted him to file a suit before the High Court. The appellant sought to enforce Clause 6.2.4 against the second respondent. Just after a few days of filing of the said suit, the BCCI on 27.9.2008 introduced an amendment to Clause 6.2.4 carving out an Exception. After the amendment, the said clause read "No Administrator shall have directly or indirectly any commercial interest in any of the events of the BCCI excluding IPL, Champions League and Twenty 20." The

said amendment was challenged by the appellant by filing a second suit wherein the appellant also filed two applications for injunction. In the first application, he sought a temporary injunction restraining the BCCI from permitting the second respondent to participate in the General Body Meeting but in the second application, he sought injunction against the amendment introduced by pleading to put it under suspension.

The Single Judge of the High Court dismissed the interim applications on the ground that no outsider can question the regulations of the society and the courts also cannot interfere in the internal management of the society. The Single Judge, however, did not consider the main issue and the amendment introduced in Clause 6.2.4. The Division Bench upheld the order of the Single Judge.

The question which arose for consideration in the instant appeal was whether the appellant had locus standi to file a civil suit challenging the amendment introduced by the BCCI in Clause 6.2.4 of the Regulations as he is merely the past president of the BCCI and whether the same can confer any right on him as an Administrator so as to challenge the amendment introduced by the BCCI diluting the bar of commercial interest of the Administrator in the activities of the BCCI thus generating 'conflict of interest', and in case the answers were in the affirmative, then whether the amendment introduced by the BCCI in Clause 6.2.4 was fit to be injuncted by keeping the same in abeyance/ suspension as it clearly gave rise to conflict of interest between the BCCI and the second respondent since he indulged in promoting his commercial interest while functioning as an office bearer/Administrator of the BCCI who participated and succeeded in the auction for owning IPL Chennai Super King.

Referring the matter to larger bench (in view of difference of opinion), the Court

Per J.M. Panchal, J: **[Judgment made non-reportable]**

Per Gyan Sudha Misra, ***J*** **(Dissenting)**

HELD: 1.1. Clause 1(n) of the Memorandum and Rules & Regulations of BCCI, 2008 defines the term 'Administrator' to mean and include present and former Presidents, Vice Presidents, Hony. Secretaries, Hony. Treasurers, Hony. Jt. Secretaries of the Board of Control for Cricket in India (BCCI), past and present Presidents and Secretaries of Members affiliated to BCCI and any person nominated in any of the sub committee appointed by the BCCI as defined in the Memorandum and Rules and Regulations of the BCCI. The appellant was admittedly a past President of the BCCI and, therefore, in view of the unambiguous definition of the 'Administrator' which includes past and present Presidents and Secretaries and Members affiliated to the BCCI, it is difficult to accept the position that the appellant had no locus standi to file a civil suit challenging the amendment introduced by the BCCI. [Para 12] [468-H; 469-A-B]

1.2. The view taken by Justice Panchal that only if a past President is nominated on any of the sub-committees of the BCCI, he would be deemed to be an 'Administrator' and not otherwise is not approved. This view is clearly contrary to the express definition of an 'Administrator' given out in the Regulations of the BCCI 2008. Clause 32 of the Regulation, no doubt, deals with misconduct and procedure required to deal with complaint received from any quarter or based on any report published or circulated or on its own motion in the subject matter of indiscipline or misconduct. Clause 32(v) of the Regulation also deals with a provision regarding

expulsion of any Member, Associate Member, Administrator, Player, Umpire, Team Official, Referee or the Selector, as the case may be, and in case any of them is found guilty and expelled by the BCCI, he shall not in future be entitled to hold any position or office or be admitted in any Committee or any Member or Associate Member of the Board. Clause 32 thus clearly deals with the misconduct and procedure to deal with office bearers including all its constituents of the BCCI and for this purpose it also lays down as to who will be the competent persons as member of the sub committee to deal with misconduct. But to hold that in spite of the definition of an 'Administrator' given out in Clause 1 (n) of the Regulation which specifically includes President and past President of the BCCI, the same would not include an Administrator unless he is a member of the sub committee of the disciplinary committee which is constituted for dealing with the misconduct of any office bearer including all its constituents as envisaged under Clause 32, would be a far fetched interpretation. The appellant in the capacity of past president of the BCCI was, therefore, an Administrator within the meaning of the said definition enumerated in Clause 1(n) of the Regulation and as such, he was competent to institute a suit in his individual capacity. Clause 1(n) of the Regulation cannot be allowed to result into a provision rendering it nugatory by overlooking the express provision of the definition of Administrator which unambiguously includes past President, by extracting or attributing interpretation to it with the aid of Clause 32 of the Regulation, which is not even remotely connected with the definition and meaning of the expression 'past President' but is a separate and specific provision to deal with merely the consequence of misconduct and its procedure to deal with the cases of alleged misconduct which does not envisage dealing with cases wherein the legality and efficacy of any

amendment to the Regulation of the BCCI is under challenge. [Paras 12, 13] [469-A-G; 470-B-E]

1.3. In the instant matter while dealing with the question of 'locus standi' as to whether the appellant was legally entitled to institute a suit for challenging the amendment or not, Clause 1(n) of the Regulation which includes 'past President' within the definition of 'Administrator' is the only relevant provision and to dilute its effect, reliance cannot be placed on Clause 32 of the Regulation. When Clause 1(n) clearly and explicitly defines the term "Administrator' and declares expressly that an 'Administrator' shall mean and include present and former Presidents, Vice Presidents, Hony. Secretaries, Hony. Treasurers, Hony. Jt. Secretaries of the BCCI, and includes even past and present Presidents and Secretaries of Members affiliated to BCCI so much so that even a representative of Member or an Associate Member of Affiliated Member of the BCCI and any person connected with any of the sub committee appointed by the Board defined in the Regulation of the BCCI has been included within the definition of Administrator, it would be difficult to hold that such Administrator also has to be a member of a sub committee which is constituted for dealing with misconduct in order to challenge the amendment introduced in the Regulation completely missing that the power to challenge amendment of BCCI is altogether different from dealing with cases of misconduct against players, umpires or administrator. A plain and literal interpretation of the Rule clearly indicates that the past presidents also have been unequivocally included within the meaning of 'Administrator' and while an Administrator can also be included as a member of the sub-committee for the Disciplinary Committee, it cannot be interpreted so as to infer that former president stands excluded from the definition of Administrator until and unless he is a member of the Sub-Committee for

disciplinary proceedings. It is difficult to accept that this would be so in order to give it a purposive interpretation as no purpose can possibly be inferred from his, on the contrary, the purpose is writ large that it amounts to grant exemption to the second respondent from getting trapped into the bar imposed by Clause 6.2.4 of the Regulation of the BCCI. It is explicitly clear and not even remotely ambiguous that the object and purpose of Clause 32 is merely to lay down the procedure for dealing with misconduct of any player, umpire, administrator etc. and it is not even vaguely connected with the procedure, object or efficacy of the amendment in the Regulation nor the mode and manner of introducing amendment in the Regulation so as to infer that unless an Administrator whether past or present is member of the disciplinary committee or sub-committee, he cannot be held competent to initiate action against any illegality of the BCCI introduced by way of amendment into the Regulation or otherwise, is clearly an argument which is out of context and has absolutely no relevance to the question of *locus standi* of an administrator to challenge an amendment introduced in the Regulation. [Paras 14-16] [470-E-H; 471-A-F; 472-B-D]

1.4. The instant matter is not even remotely connected with any disciplinary action to be taken against any member, as the specific issue in the suit is whether the amendment could have been introduced by the BCCI in Clause 6.2.4 ignoring and overlooking the fact that the existing office bearer of the BCCI cannot be allowed to participate in the auction for owning IPL or Twenty 20 matches as it would clash and conflict with the interest of the BCCI. It is well-settled principle of interpretation that when the language in a statute is plain and admits of one meaning, the task of interpretation can hardly be said to arise, as in the instant matter, where the definition of 'Administrator' has been clearly given out in the

Regulation of the BCCI. But in order to oust the past President and his competence to challenge the action of BCCI from questioning the speedy and hurried amendment introduced by the BCCI in order to assist the second respondent from participating in the bidding process for owning Chennai Super King and then to interpret the definition of 'Administrator' so as to hold that he was not competent to file a suit, can hardly be held to be giving effect to a purposive and meaningful interpretation to the expression 'Administrator' as the purpose or object to serve some just cause is totally missing. The safer and more correct course of dealing with a question of construction is to take the words themselves and again if possible at their meaning without any first instance reference to cases. Literal construction of a provision cannot be allowed to assume a restrictive construction without considering its effect or consequence which would result from it for they often point out the real meaning of the words. It is no doubt true that if the application of the words literally would defeat the obvious intention of the legislation and produced a wholly unreasonable result, some violence may be done to achieve that obvious intention and produce a rational construction. But the question of inconvenience and unreasonableness must be looked at in the light of specific events. It would also be difficult to overlook the well settled position that if a particular construction does not give rise to anomalies and the words used are plain, arguments regarding inconvenience is of little weight. It is also equally well settled rule of construction of statutes that in the first instance the grammatical sense of the words is to be adhered to and the words of statute must prima facie be given their ordinary meaning. Where the grammatical construction of a statute is clear and manifest, that construction ought to prevail unless there be strong and obvious reason to the contrary but when there is no ambiguity in the words, there is no room for

construction. If the language of a statute is clear and unambiguous, the court must give effect to it and it has no right to extend its operation in order to carry out the real or supposed intention of the Legislature/Law maker. When the language is not only plain but admits of just one meaning, the task of interpretation can hardly be said to arise. What is not included by the Legislature (law maker), the same cannot be undone by the court by principle of purposive interpretation. Taking into consideration the said salutary principles of interpretation, the definition of the term 'Administrator' does not exclude the past president from the meaning of Administrator so as to hold that the action taken by the Administrator by filing a civil suit and questioning the amendment introduced by the BCCI in Clause 6.2.4 was not fit to be entertained on the ground that the appellant had no *locus standi* to challenge the amendment on the ground of his competence or *locus standi.* **[Paras 18-22] [472-G-H; 473-A-D; F-H; 474-A-B-C-G; 475-A-C]**

Dental Council of India and Anr. v. Hari Parkash and Ors. **(2001) 8SCC 61: 2001 (2) Suppl. SCR 310 – referred to.**

The Attorney General v. The Mutual Tontine West Minster Chambers Association, Limited **(1876) 1 Ex.D. 469;** *Charles Bradlaugh v. Henry Lewis Clarke,* **(1883) VIII A.C. 354;** *Attorney General v. Prince Ernest Augustus of Hanover* **(1957) A.C. 436 – referred to.**

1.5. As the BCCI discharges important public functions such as the selection of Indian Team and the control on the players and has to discharge important public function, it cannot be expected to act arbitrarily whimsically and capriciously so as to hold that the two suits are not maintainable at the instance of the appellant who although, admittedly, is the past president of the BCCI and hence an Administrator, had no *locus standi* **to file even a civil suit and seek order of injunction for**

suspending the effect of amendment on the plea that as he was not a member of the sub-committee, he was not competent to challenge the amendment introduced in the BCCI Regulation. [Paras 22, 23] [475-D-F]

M/s. Zee Tele Films Ltd. and Anr. v. Union of India and Ors. **(2005) 1 SCR 913 – held inapplicable**

2.1. The appellant had not moved the High Court under its writ jurisdiction under Article 226 or Article 32 of the Constitution before this Court so as to offer a plank to the respondents to contend that as the BCCI is not a 'State' within the meaning of Article 12, an Administrator under the Regulation cannot file even a civil suit in the capacity as former past President and hence as an 'Administrator' so as to challenge an unconstitutional amendment in the Regulation of the BCCI. This is an appeal under Article 136 of the Constitution arising out of an order passed in a civil suit refusing to grant injunction which was filed in two regular civil suits. Therefore, it is difficult to accept the contention for the respondents and as accepted by Justice Panchal that merely because the BCCI cannot be regarded as an instrumentality of the State, it will have to be held that the two suits filed by the appellant are not maintainable. In order to decide whether the plaintiff has a right to file a civil suit or not, *locus standi* **or competence of the plaintiff alone is to be established and not the question whether the BCCI is a State within the meaning of Article 12 of the Constitution which is a condition to be fulfilled for invoking the jurisdiction under Article 226 and/or 227 of the Constitution as also Article 32 of the Constitution but surely not for filing a civil suit or injunction application. [Paras 24, 25] [476-A-C-F-H; 477-A-B]**

2.2. When a civil suit is filed, the question as to whether a party comes under the purview of instrumentality of a State does not arise at all and the

whole and sole consideration would be as to whether the plaintiff had a cause of action to file a civil suit, whether he is competent to file a suit and whether the suit is maintainable at his instance. If the civil suit is maintainable on the basis of existence of a cause of action, there is no room for assailing it by raising a constitutional issue that the suit is not maintainable since the BCCI is not an instrumentality of the State, as the said question is not relevant for adjudication of a civil suit under the provisions of the Code of Civil Procedure nor the civil courts are the Constitutional Courts to enter into that question. Once, it is held that the plaintiff/appellant is also an Administrator of the BCCI in view of the definition of Administrator, his competence to challenge the amendment introduced in the regulation of BCCI cannot be held as not maintainable on the ground that BCCI is not a 'State' within the meaning of Article 12 of the Constitution as civil suits can surely be filed and can be held maintainable if the plaintiff is able to make out a case that cause of action has arisen for filing a suit and if he is able to sustain the cause of action and he also is able to establish that he is the proper party to the suit, the same will have to be tried by the Court and cannot be dismissed on the ground of its maintainability. In fact, when a civil suit is filed for seeking civil remedy, the question whether the contesting party satisfies the condition that it is an instrumentality of the State is of no relevance as the civil courts do not have to discharge constitutional function so as to enter into this question. If it does, it would be traversing beyond the boundaries of its jurisdiction. Hence, this question is clearly irrelevant for the purpose of the controversy raised in this petition. [Paras 25, 27] [477-D-G; 479-A-D]

T.C. Mathew vs. K. Balaji Iyengar and Ors. **SLP(Crl.) No.10107 of 2010 – referred to.**

3.1. Conflict of interest does not require actual proof

of any actual pecuniary gain or pecuniary loss as the principle of 'conflict of interest' is a much wider, equitable, legal and moral principle which seeks to prevent even the coming into existence of a future and/or potential situation which would inhibit benefit or promise through any commercial interest in which the principal actors are involved. The entire purpose of 'conflict of interest' rule is to prevent and not merely to cure situations where the fair and valid discharge of one's duty can be affected by commercial interests which do not allow the fair and fearless discharge of such duties. On this aspect, it has been substantiated that the second respondent necessarily was privy to highly sensitive information about the bidding process, the design of the tender, the rules of the game, the future plans of BCCI in respect of IPL and so on and so forth. It is inconceivable that such insider information to which any major office bearer of BCCI would necessarily be privy, would not have used and misused both potential and actual materials by the second respondent in the capacity of a bidder through his company India Cements Ltd. Thus, no artificial Chinese walls can be assumed to exist between the multiple personalities and activities of respondent No.2 both as tender issuer and as a bidder. It is for this reason that courts have levied and lined the principle of 'conflict of interest' both with the fiduciary character of a person who should not put himself in a conflict situation and with the principles of a trustee dealing with a *cestui que trust*. **[Para 28.1] [480-C-H; 481-A]**

Pierce Leslie Peter & Co. Ltd. v. Violet Ouchterlony Wapshare & Ors. **(1969) 3 SCR 203 – referred to.**

3.2. Although anyone might not have indulged in creating actual loss to the BCCI by any of his actions, the fact would remain that by virtue of his position as a Chairman of a company who participated in the bid to own IPL tournament and at the same time holding the

position of an office bearer of the BCCI, is clearly bound to result into conflict of interest of the BCCI. The fact remains that the second respondent by virtue of his position as Vice-Chairman and Managing Director of India Cements Ltd. and ex-officio Member of the Governing Council of IPL clearly came in his way to participate in the auction held by the BCCI for IPL matches and it is for this very purpose that the amendment was hurriedly introduced so that the second respondent may not be held disqualified from owning IPL Chennai Super King. In fact, the concept of 'conflict of interest management' has increasingly drawn the attention of governments and citizens alike in all advanced countries including United States of America over the last several years as has been the case in much of the rest of the world. [Para 28.2] [481-C-D-E-H]

Bray v. Bradford **(1896) A.C. 44 – referred to.**

3.3. It is an inflexible rule of a court of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. The BCCI itself took care to ensure this principle by incorporating clause 6.2.4. But thereafter, the BCCI without any deliberation and discussion introduced an amendment into this clause by making Twenty -20 IPL or Champions League Matches an exception to this rule for which the respondent could not come out with any plausible explanation. Thus the appellant clearly came out with a strong prima facie case that the amendment was introduced with an oblique motive to benefit the second respondent so that he could not be held disqualified from participating in the auction and own Chennai Super King while continuing as Treasurer and thereafter as Secretary of the BCCI and hence an Administrator and thus the appellant succeeded in establishing his plea that the amendment introduced by

the BCCI in Clause 6.2.4 was an abuse of the amending power exercised by the BCCI in so far as the power of amendment was introduced not to promote the game of cricket but to promote the interest of the second respondent as it is more than clear that without the amendment, he would not have been entitled to participate in the bid as he was a Treasurer of the BCCI and hence without the amendment he was not eligible even to participate in the bid and enjoy dual status of that of an office bearer of the BCCI as Treasurer and also own Chennai Super King. [Paras 28, 29] [482-C-D-E-H; 483-A-C]

3.4. The appellant and the perception based on consideration of the concept of conflict of interest and its implication surely succeeded in making out a *prima facie* case that this resulted in serving commercial interest of the second respondent which gave rise to conflict of interest with the activities of the BCCI since he as Administrator/office bearer was able to influence the decision of the BCCI by being a treasurer and simultaneously also participated in the IPL auction, clearly giving rise to commercial interest which is barred if the amendment had not been introduced. If the Administrator is clearly barred as per Regulation from having any commercial interest in the events of BCCI, it is beyond comprehension as to how only one class of matches which was IPL, Twenty-20 and Champions League could be treated an exception by allowing an office bearer to participate in the bid but preventing him from other matches including Test Matches. The appellant thus, fully succeeded in making out a prima facie case that this amendment smacks of arbitrariness and bias in favour of the second Respondent and hence it was a fit case for grant of injunction keeping the impugned amendment introduced in Clause 6.2.4 of the BCCI Regulation under suspension or abeyance. However,

since the second Respondent has already participated and succeeded in the bid and is also owning the Chennai Super King, it may be appropriate to leave it open to him to exercise his option whether he wishes to continue as an office bearer of the BCCI or own IPL Chennai Super King. The appellant succeeded in making out his case to the extent that the amendment was fit to be kept under suspension by granting an injunction against the amendment at least until the suit was finally decided. The courts below while considering the application for injunction was fully competent to mould the relief in a given circumstance or situation which they have miserably failed to do. Hence, the impugned amendment dated 27.9.2008 was fit to be suspended by granting injunction against the same. This is clearly so as it would be difficult to overlook that multiple loyalties can create commercial interest with the activities of BCCI thus resulting in conflict of interest since the financial or personal interest of the Board would clearly be inconsistent with the commercial and personal interest of the Administrator of the Board. In addition, the rule of equity and fairness provides that no one who stands in a position of trust towards another can in matters affected by that position, advance his own interests for example, by trading and making a profit at that other's expense as the rule of legal prudence mandates that once a fiduciary is shown to be in breach of his duty of loyalty, he must disgorge any benefit gained even though he might have acted honestly and in his principal's best interest. In the instant matter, when the BCCI held auction for owning IPL Team and an Administrator the second respondent participated in the bid, variety of real and/or perceived conflict of interest cannot be ruled out. These included access to insider information, possible undue influence on the decision makers who held the auction and the like. The injunction is granted by directing suspension of operation of the impugned

amendment dated 27.9.2008 introduced in Regulation 6.2.4 of the BCCI. In case, the second Respondent opts to continue owning and operating IPL Chennai Super King, he shall be at liberty to do so but in that event he shall be restrained from holding any office in the BCCI in any capacity. [Paras 30-32] [483-D-F-G-H; 484-A-B-D-E; 485-A-F]

Case Law Reference:

Per Gyan Sudha Misra, J

(1876) 1 Ex.D. 469	**referred to**	**Para 20**
(1883) VIII A.C. 354	**referred to**	**Para 20**
(1957) A.C. 436	**referred to**	**Para 20**
2001 (2) Suppl. SCR 310	**referred to**	**Para 21**
(2005) 1 SCR 913	**held inapplicable**	**Para 24**
(1969) 3 SCR 203	**referred to**	**Para 28.1**
(1896) A.C. 44	**referred to**	**Para 28.2**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3753 of 2011.

From the Judgment & Order dated 24.03.2010 of the High Court of Judicature at Madras in OSA Nos. 227 to 229 of 2009.

WITH

C.A. No. 3754-3756 of 2011.

Dr. Abhishek Manu Singhvi, Nalini Chidambaram, Rohit Bhat, Vikas Mehta, Amit Bhandari, Narhari Singh for the Appellant.

G.E. Vahanvati, AG, R.F. Nariman, P.R. Raman, Radha Rangaswamy, Akhila Kaushik, A. Poorv Kurup, Amit Sibal, Mihir Chatterjee, Hari Shankar K., K. Harishankar, Vikas Singh Jangra for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

When the world at large is endeavouring to eradicate conflict of interest in public life as also in private venture and the respondent - Board of Control for Cricket in India (shortly referred to as the 'BCCI'), which enjoys monopoly status as regards regulation of the sport of Cricket in India, and is perceived to follow the doctrine of "fairness" and "good faith" in all its activities, has itself recognized its value and importance by incorporating in its Regulation that

> "No administrator shall have directly or indirectly any commercial interest in any events of the BCCI,"

then whether any exception diluting its effect could be carved out of that without any just cause by introducing an amendment into the same, is the question which essentially falls for consideration in these appeals. Consequently, the question also arises whether the amendment was fit to be kept under suspension by grant of an order of injunction against the same as a result of which the respondent No. 2 would be restrained from functioning as an office bearer of the BCCI in any capacity as his commercial interest comes in conflict with the activities of the BCCI. In this context the question of locus standi and legal competence of an 'Administrator' of the BCCI to file a suit for assailing the amendment introduced in the BCCI Regulation, also arose for determination in the event of which only, the challenge could be sustained at his instance. While the suits are still pending in the High Court of Madras, the applications for injunction have been rejected against which these appeals arise wherein extensive arguments have been advanced by learned counsel for the contesting parties in support of their respective pleas.

2. Having deliberated and meticulously considered the

same in the light of the background, facts and circumstances giving rise to these appeals as also having the benefit of the views expressed in the judgment and order of my learned Brother Panchal, J., I find it hard to subscribe to the view expressed therein and hence record reasons respectfully dissenting from the view on the issues raised in these appeals. For this purpose as also to test the relative strength and weaknesses of the arguments advanced and to have an overall view of the controversy involved, I deem it essential to relate the genesis and background of the matter under which these appeals arise.

3. The 1st respondent in these appeals which is the Board of Control for Cricket in India (for short 'BCCI') is a society registered under the Societies Registration Act which has its own Memorandum of Association, Rules and Regulations. Apart from these, BCCI also has regulations for Players, Team Officials, Managers, Umpires and Administrators which controls the game of Cricket in India and discharges public functions which enjoys monopoly status as regards regulation of the sport of Cricket. It thus earns huge revenues and is perceived to follow the doctrine of "fairness" and "good faith" in all its activities. Fortunately, the Regulations of the BCCI which incorporates rules for Players, Team Officials, Managers, Umpires and Administrators itself has incorporated a clause which is Clause 6.2.4 stating that

> "No Administrator shall have directly or indirectly any commercial interest in any events of the BCCI",

thus prohibiting conflict of interest of an Administrator with that of the BCCI. The Regulation further incorporates the definition which states that an office bearer of BCCI is an administrator and Regulation of the BCCI also elaborately defines as to who is an 'Administrator'.

4. However, putting laws and regulations on paper, does not mark the end of fight against 'conflict of interest' in public

service and more so in private venture. More appropriately, this step has to be viewed as a beginning. Effective implementation and execution is absolutely crucial if these laws and regulations are to be meaningful. Managing 'conflict of interest' is a relatively young system, but these young systems require maturing in the form of sincerity, will and dedication and they must be effective in all spheres if they are to survive and become engrained in the institutional structures of governance by public as well as private bodies. In absence of this, even better established programmes for conflict of interest management could wither quickly, if ignored.

5. Bearing the aforesaid principle in mind, it may be relevant to record the essential details and background of the matter which indicate that the appellant herein - Sri Muthiah who is the past president of the BCCI initially filed two complaints on 5.9.2008 and 19.9.2008 before the President of the BCCI in his capacity as past President and hence an Administrator alleging disqualification suffered by the second respondent Sri N. Srinivasan who being the Chairman and M.D. of India Cements Limited should not have been allowed to participate in the auction held for owning Indian Premier League ('IPL' for short - a separate sub-committee unit of BCCI) in which he was declared a successful bidder and thus owned Chennai Super King. The Complainant/Appellant therefore sought action against him as he brought to the notice of the BCCI-President that the second respondent - Sri N. Srinivasan being an office bearer of the BCCI who is also heading a company named 'India Cements' had commercial interest giving rise to a "conflict of interest" with the Indian Premier League (for short 'IPL') Tournament for which an auction was conducted by the BCCI, in so far as he was in substantial control of the India Cements Ltd. which became the successful franchisee of the Chennai Super King and at the same time is also in the governing council of the IPL Tournament which disqualified him to participate in the bid for owning Chennai Super King.

6. The appellant's complaint did not meet with any

response whatsoever from the BCCI which prompted him to file a suit in the Madras High Court on 24.9.2008 bearing C.S.No.No.930/2008 wherein the plaintiff-appellant herein sought to enforce Clause 6.2.4 against the second respondent - Sri N. Srinivasan as in the year 2008, respondent No.2 - Sri N. Srinivasan who is the Managing Director of India Cements Ltd. became the successful bidder for the Chennai Super King in the IPL auction held by the BCCI and also held the office of the Vice Chairman and Managing Director of India Cements Ltd. which derived commercial interest in the events of the BCCI. Hence, the Plaintiff/Appellant herein raised an issue in the suit that the respondent No.2 - Sri. N. Srinivasan being the Vice-Chairman and Managing Director of India Cements Ltd. and also being Office Bearer in BCCI, violated the Regulation 6.2.4 which specifically lays down that no 'Administrator' shall have direct or indirect commercial interest in any of the events of the BCCI.

7. Just after a few days of filing of the suit by the Plaintiff/ Appellant herein - Sri Muthiah, wherein he sought to enforce the policy in Clause 6.2.4 against the second respondent - Sri N. Srinivasan, the BCCI met on 27.9.2008 and introduced an amendment to Clause 6.2.4 carving out an exception therein which reads as follows:

> "No Administrator shall have directly or indirectly any commercial interest in any of the events of the BCCI excluding IPL, Champions League and Twenty 20."

Thus, by one stroke of an amendment, which was introduced with racing speed, without any deliberation by the BCCI, and without notice of 21 days to the members on this agenda which was required under the Regulation, the most commercial event of BCCI namely IPL, Champions League and Twenty 20 matches were excluded from Clause 6.2.4 diluting the entire effect of Clause 6.2.4, reducing this salutary clause into a dead letter.

8. The amendment introduced by the BCCI to Clause 6.2.4 was, therefore, challenged by the appellant by filing a second suit bearing C.S.No. 1167/2008 wherein the appellant also filed an interim application seeking an order of injunction in both the suits for restraining the BCCI from giving effect to the new amendment by keeping the same under suspension which according to the appellant, had been introduced surreptitiously merely to benefit respondent No.2 - Sri N. Srinivasan who had participated in the auction in pursuance to the tender issued by the BCCI for persons and corporates to own and operate a team for IPL matches wherein respondent No.2 - Sri N. Srinivasan who is the Vice-Chairman and Managing Director of a company known as India Cements Ltd., became the successful bidder for the Chennai Super King in the IPL auction which according to the case of appellant, could not have been permitted in view of Clause 6.2.4 as it stood prior to the amendment. But in order to obviate the bar imposed by Clause 6.2.4 which came in the way of Respondent No. 2 from participating in the auction for IPL, an amendment was hurriedly and most expeditiously introduced in Clause 6.2.4 in order to permit second respondent-Sri N. Srinivasan to participate in the bid in which he was a successful bidder and consequently owned Chennai Super King in spite of the bar of clause 6.2.4 which was operating against him prior to its amendment and was introduced subsequent to the auction which was held for owning Chennai Super King, in absence of which he would have been ineligible to participate in the bid and hence disqualified. The appellant, therefore, filed two applications for injunction and in the first application bearing No. 1041/2008 he had sought a temporary injunction restraining the BCCI from permitting Respondent No.2 - Sri N. Srinivasan to participate in the General Body Meeting but in the second application he sought injunction against the amendment introduced by pleading to put it under suspension.

9. However, the main thrust of the argument of learned counsel for the plaintiff/appellant all through in the suit and in

the appeal before the High Court as also in the injunction application was to the effect that the amendment introduced by the BCCI in Clause 6.2.4 was an abuse of the amending power exercised by the BCCI, in so far as the power of amendment had been used not to promote Cricket, but to promote the interest of the second respondent. But the learned single Judge before whom the applications for injunction were filed in the suit was pleased to dismiss the interim applications for injunction as the single Judge compared the BCCI to private clubs and held that no outsider can question the regulations of the society and the courts also cannot interfere in the internal management of the society. The learned single Judge, however, did not consider the main issue in the two suits in the context of the amended Clause 6.2.4 and the amendment introduced in Clause 6.2.4 due to which the plaintiff-petitioner filed an appeal before the Division Bench against the rejection of the applications seeking injunction. But even on appeal, the Division Bench dismissed the appeals against which these appeals by special leave have been filed and were heard at length.

10. The first and foremost question that requires consideration in this appeal by special leave is whether the plaintiff/appellant herein can be held to be having any locus standi to file a civil suit challenging the amendment introduced by the BCCI in Clause 6.2.4 of the Regulations as he is merely the past president of the BCCI and whether the same can confer any right on him as an Administrator so as to challenge the amendment introduced by the BCCI diluting the bar of commercial interest of the Administrator in the activities of the BCCI thus generating 'conflict of interest', and in case the answers were to be held in the affirmative, then whether the amendment introduced by the BCCI in Clause 6.2.4 was fit to be injuncted by keeping the same in abeyance/suspension as it clearly gave rise to conflict of interest between the BCCI and respondent No.2 since he indulged in promoting his commercial interest while functioning as an office bearer/Administrator of

the BCCI who participated and succeeded in the auction for owning IPL Chennai Super King. To clarify it further, it may be reiterated that if the petitioner/appellant can be held to be having the competence or locus to file a suit against the BCCI, then whether the suit can be held to be maintainable at his instance so as to enter into further question whether the alleged amendment introduced in Clause 6.2.4 can be held to be having any conflict of interest with the interest of BCCI as in that event it would permit respondent No. 2 to hold the field by functioning as office bearer of the BCCI and thus participate in all its policy decisions as well as deliberations, while continuing also as Vice Chairman/ Managing Director of his firm India Cements Ltd. and simultaneously also own Chennai Super King as successful bidder in the IPL auction.

11. The preliminary question on which the entire edifice of the case rests which will have the effect of making the entire case stand or crumble down, is the question as to whether the plaintiff/appellant has the locus standi to file a civil suit in the High Court of Madras so as to challenge the amendment introduced by the BCCI under Clause 6.2.4. In this context, it is extremely relevant to record the definition of the term 'Administrator' in the BCCI Regulations. Clause 1(n) defines the term 'Administrator' as under:-

> "Administrator: An Administrator shall mean and include present and former Presidents, Vice Presidents, Hony. Secretaries, Hony. Treasurers, Hony. Jt. Secretaries of the Board of Control for Cricket in India ("the Board"), *past and present Presidents and Secretaries of Members affiliated to BCCI and any person nominated in any of the sub committee* appointed by the Board as defined in the Memorandum and Rules and Regulations of the Board."

12. The plaintiff/appellant is admittedly a past President of the BCCI and hence in view of the unambiguous definition of the 'Administrator' which include past and present Presidents and Secretaries and Members affiliated to BCCI, it is difficult

to accept the position that the petitioner/appellant had no locus standi to file a civil suit challenging the amendment introduced by the BCCI. I find it hard to approve of the view taken by learned Brother Panchal, J. that only if a past President is nominated on any of the sub-committees of the BCCI, he would be deemed to be an 'Administrator' and not otherwise as it is clearly contrary to the express definition of an 'Administrator' given out in the Regulations of the BCCI 2008. Clause 32 of the Regulation no doubt deals with misconduct and procedure required to deal with complaint received from any quarter or based on any report published or circulated or on its own motion in the subject matter of indiscipline or misconduct. Clause 32 (v) of the Regulation also deals with a provision regarding expulsion of any Member, Associate Member, Administrator, Player, Umpire, Team Official, Referee or the Selector, as the case may be, and in case any of them is found guilty and expelled by the Board, he shall not in future be entitled to hold any position or office or be admitted in any Committee or any Member or Associate Member of the Board. Clause 32 thus clearly deals with the misconduct and procedure to deal with office bearers including all its constituents referred to hereinbefore of the BCCI and for this purpose it also lays down as to who will be the competent persons as member of the sub committee to deal with misconduct. But to hold that in spite of the definition of an 'Administrator' given out in Clause 1 (n) of the Regulation which specifically includes President and past President of the BCCI, the same would not include an Administrator unless he is a member of the sub committee of the disciplinary committee which is constituted for dealing with the misconduct of any office bearer including all its constituents as envisaged under Clause 32, would be a far fetched interpretation so as to hold that unless an Administrator is appointed on a sub committee for the purpose of constituting a disciplinary committee under Clause 32 of the Regulation, he cannot be treated as an 'Administrator' within the meaning of Clause 1(n) of the Regulation and that it would not clothe him with any legal right to maintain an action in law against the BCCI

even for challenging the arbitrary amendment, is difficult to agree and accept.

13. On the contrary, I find sufficient force and substance in the contention of the counsel for the appellant that the suits were filed by the appellant in the capacity of past president of the BCCI since he was an Administrator within the meaning of the said definition enumerated in Clause 1(n) of the Regulation. As such, he was competent to institute a suit in his individual capacity since Clause 1(n) of the Regulation cannot be allowed to result into a provision rendering it nugatory by overlooking the express provision of the definition of Administrator which unambiguously includes past President, by extracting or attributing interpretation to it with the aid of Clause 32 of the Regulation, which is not even remotely connected with the definition and meaning of the expression 'past President' but is a separate and specific provision to deal with merely the consequence of misconduct and its procedure to deal with the cases of alleged misconduct which does not envisage dealing with cases wherein the legality and efficacy of any amendment to the Regulation of the BCCI is under challenge.

14. In the instant matter while dealing with the question of 'locus standi' as to whether the petitioner/appellant was legally entitled to institute a suit for challenging the amendment or not, Clause 1(n) of the Regulation which includes 'past President' within the definition of 'Administrator' is the only relevant provision in my view and to dilute its effect, reliance cannot be placed on Clause 32 of the Regulation as it deals exclusively with the procedure for dealing with the cases of misconduct of the office bearers of the BCCI and its other constituents like Player, Umpire etc. In my view, this interpretation on the ground that the same would lead to a purposive interpretation of the expression 'Administrator' is neither literal nor purposive. When Clause 1(n) clearly and explicitly defines the term 'Administrator' and declares expressly that an 'Administrator' shall mean and include present and former Presidents, Vice

Presidents, Hony. Secretaries, Hony. Treasurers, Hony. Jt. Secretaries of the Board, *and includes even past and present Presidents and Secretaries of Members affiliated to BCCI so much so that even a representative of Member or an Associate Member of Affiliated Member of the Board and any person connected with any of the sub committee appointed by the Board as defined in the Regulation of the BCCI has been included within the definition of Administrator, it would be difficult to hold that such Administrator also has to be a member of a sub committee which is constituted for dealing with misconduct in order to challenge the amendment introduced in the Regulation* completely missing that the power to challenge amendment of BCCI is altogether different from dealing with cases of misconduct against players, umpires or administrator.

15. A plain and literal interpretation of the Rule clearly indicates that the past presidents also have been unequivocally included within the meaning of 'Administrator' and while an Administrator can also be included as a Member of the Sub-Committee for the Disciplinary Committee, it cannot be interpreted so as to infer that former president stands excluded from the definition of Administrator until and unless he is a member of the Sub-Committee for disciplinary proceedings. It is difficult to accept that this would be so in order to give it a purposive interpretation as no purpose in my opinion can possibly be inferred from this, on the contrary, the purpose is writ large that it amounts to grant exemption to Respondent No.2 from getting trapped into the bar imposed by Clause 6.2.4 of the Regulation of the BCCI which laid down that "Administrator shall have no direct or indirect commercial interest in any event of the BCCI." With utmost respect, to hold it to be a purposive interpretation would amount to overlooking the express provision of the definition of Administrator given out in Clause 1(n) of the Regulation which lays down that the Administrator will include not only existing presidents of the BCCI but also past president, so much so that even a representative of

member or an associate member have been included within the definition of Administrator.

16. It is explicitly clear and not even remotely ambiguous that the object and purpose of Clause 32 is merely to lay down the procedure for dealing with misconduct of any player, umpire, administrator etc. and it is not even vaguely connected with the procedure, object or efficacy of the amendment in the Regulation nor the mode and manner of introducing amendment in the Regulation so as to infer that unless an Administrator whether past or present is member of the disciplinary committee or sub-committee, he cannot be held competent to initiate action against any illegality of the BCCI introduced by way of amendment into the Regulation or otherwise, is clearly an argument which is out of context and has absolutely no relevance to the question of locus standi of an administrator to challenge an amendment introduced in the Regulation.

17. To say that past president would mean to infer only those past president who are members of the sub committee of a disciplinary proceeding, in my view, amounts to deviating from the express meaning and intention of the Rule so as to oust the past president from the affairs of the BCCI, contrary to the express provision of the Regulation which cannot be held to be a correct or purposive interpretation of the Rule as this does not give effect to any purpose or laudable object which can be held to be serving the cause of justice, fair play and interest of the BCCI. On the contrary, it results into a restraint or hindrance to guarding the interest of the BCCI from indulging in any malpractice obstructing the course of justice and fair play.

18. We have also to bear in mind at this stage that the instant matter is not even remotely connected with any disciplinary action to be taken against any member, as the specific issue in the suit is whether the amendment could have been introduced by the BCCI in Clause 6.2.4 ignoring and overlooking the fact that the existing office bearer of the BCCI cannot be allowed to participate in the auction for owning IPL

or Twenty 20 matches as it would clash and conflict with the interest of the BCCI.

19. We have to remind ourselves the well-settled principle of interpretation that when the language in a statute is plain and admits of one meaning, the task of interpretation can hardly be said to arise, as in the instant matter, where the definition of 'Administrator' has been clearly given out in the Regulation of the BCCI. But in order to oust the past President and his competence to challenge the action of BCCI from questioning the speedy and hurried amendment introduced by the BCCI in order to assist respondent No.2 from participating in the bidding process for owning Chennai Super King and then to interpret the definition of 'Administrator' so as to hold that he was not competent to file a suit, can hardly be held to be giving effect to a purposive and meaningful interpretation to the expression 'Administrator' as the purpose or object to serve some just cause is totally missing.

20. If we were to dig at the labyrinth of the archives of judicial precedents, we may take note of the case of *The Attorney General vs. The Mutual Tontine West Minster Chambers Association, Limited* (1876) 1 Ex.D. 469 as also *Charles Bradlaugh vs. Henry Lewis Clarke,* (1883) VIII A.C. 354, wherein it was held that "if there is nothing to modify, alter or clarify the language which the statute contains, it must be construed in the ordinary, natural meaning of the words and sentences". The safer and more correct course of dealing with a question of construction is to take the words themselves and again if possible at their meaning without any first instance reference to cases. Literal construction of a provision cannot be allowed to assume a restrictive construction without considering its effect or consequence which would result from it for they often point out the real meaning of the words. It is no doubt true that if the application of the words literally would defeat the obvious intention of the legislation and produced a wholly unreasonable result, we must "do some violence" and

so achieve that obvious intention and produce a rational construction. But the question of inconvenience and unreasonableness must be looked at in the light of specific events as was held in the case of *Attorney General vs. Prince Ernest Augustus of Hanover,* (1957) A.C. 436, wherein the question was whether the words used in the statute were capable of a more limited construction. If not, the well settled rules of interpretation lays down that we must apply them as they stand, however unreasonable or unjust the consequence and however strongly we may suspect that this was not the real intention of the law maker.

21. It would also be difficult to overlook the well settled position that if a particular construction does not give rise to anomalies and the words used are plain, arguments regarding inconvenience is of little weight. It is also equally well settled rule of construction of statutes that in the first instance the grammatical sense of the words is to be adhered to and the words of statute must prima facie be given their ordinary meaning. Where the grammatical construction of a statute is clear and manifest, that construction ought to prevail unless there be strong and obvious reason to the contrary but when there is no ambiguity in the words, there is no room for construction. If the language of a statute is clear and unambiguous, the court must give effect to it and it has no right to extend its operation in order to carry out the real or supposed intention of the Legislature/Law maker. When the language is not only plain but admits of just one meaning, the task of interpretation can hardly be said to arise. What is not included by the Legislature (law maker), the same cannot be undone by the court by principle of purposive interpretation. This was the view expressed by this Court also in the matter of *Dental Council of India and Anr. Vs. Hari Parkash and Ors.,* (2001) 8 SCC 61 wherein it was held that *it cannot ignore the obvious (provision) and object and the intention of the Legislature apparent from the context and so interpret and construe it, so as to enlarge the scope of its application by imparting into it,*

meaning by implication, which do not necessarily arise.

22. Taking into consideration the aforesaid salutary principles of interpretation, I am clearly of the view that the definition of the term 'Administrator' does not exclude the past president from the meaning of Administrator so as to hold that the action taken by the Administrator by filing a civil suit and questioning the amendment introduced by the BCCI in Clause 6.2.4 was not fit to be entertained on the ground that the appellant had no locus standi to challenge the amendment on the ground of his competence or locus standi. I, therefore, find it hard to subscribe and agree with the view that only if a past President is nominated on any of the sub-committees of disciplinary committee of the BCCI, he would be deemed to be an Administrator and not otherwise, is a difficult proposition to accept.

23. I also find sufficient force and substance in the contention of learned counsel for the appellant that as the BCCI discharges important public functions such as the selection of Indian Team and the control on the players and has to discharge important public function, it cannot be expected to act arbitrarily whimsically and capriciously so as to hold that the two suits are not maintainable at the instance of the appellant who although admittedly is the past president of the BCCI and hence an Administrator, had no locus standi to file even a civil suit and seek order of injunction for suspending the effect of amendment on the plea that as he was not a member of the sub-committee, he was not competent to challenge the amendment introduced in the BCCI Regulation.

24. However, extensive arguments have been advanced by learned counsel for the respondents that assuming there is violation of any fundamental right by the Board, that will not make the Board a 'State' for the purpose of Article 12 of the Constitution. This submission although may be correct in view of the ratio of the judgment delivered in the matter of *M/s. Zee Tele Films Ltd. And Anr. Vs. Union of India And Ors.* (2005)

1 SCR 913, what is missed by the counsel for the respondents is that the appellant herein has not moved the High Court under its writ jurisdiction under Article 226 or Article 32 of the Constitution before this Court so as to offer a plank to the respondents to contend that as the Board is not a 'State' within the meaning of Article 12, an Administrator under the Regulation cannot file even a civil suit in the capacity as former past President and hence an 'Administrator' so as to challenge an unconstitutional amendment in the Regulation of the BCCI. The counsel for the respondents has ignored while dealing with this question that the appellant had not moved the High Court for enforcement of his fundamental right under Articles 226 and 227 of the Constitution nor a writ petition in this Court under Article 32 of the Constitution has been filed alleging infringement of his fundamental right, but has moved the High Court by taking recourse to the civil remedy of filing civil suits in the capacity as former president of the BCCI merely to ensure suspension of the amendment by way of seeking injunction which was introduced as the same was not in the interest of the BCCI, since it gave rise to direct or indirect commercial interest of respondent No.2 with the events of BCCI and is barred under Regulation 6.2.4 which is sought to be diluted by introducing the amendment in the same.

25. It may be reiterated that this appeal by special leave is not a petition under Article 32 of the Constitution but is an appeal under Article 136 of the Constitution arising out of an order passed in a civil suit refusing to grant injunction which was filed in two regular civil suits. I, therefore, find it difficult to accept the contention of the counsel for the respondents and accepted by brother Panchal, J. that merely because the BCCI cannot be regarded as an instrumentality of the State, it will have to be held that the two suits filed by the appellant are not maintainable. In order to decide whether the plaintiff has a right to file a civil suit or not, locus standi or competence of the plaintiff alone is to be established and not the question whether the Board is a State within the meaning of Article 12 of the

Constitution which is a condition to be fulfilled for invoking the jurisdiction under Article 226 and/or 227 of the Constitution as also Article 32 of the Constitution but surely not for filing a civil suit or injunction application. It is perhaps in view of the Constitution Bench judgment delivered in the matter of *Zee Tele Films* (supra) due to which the appellant herein had to file a civil suit in the capacity as an Administrator that he has neither filed a writ petition under Article 226 and 227 of the Constitution before the High Court nor any writ petition under Article 32 of the Constitution before this Court so as to hold that he had no locus standi to file even a civil suit although he comes clearly within the meaning of definition of an 'Administrator'. Hence, the ratio of the decision in *Zee Tele Films* (supra) is wholly inapplicable and irrelevant to the issue involved in this appeal which arises out of civil suits and injunctions and the question of locus standi as to who can file a suit or whether the suit filed by the appellant could be held maintainable is the only relevant issue for the purpose of maintainability of the suit and the injunction applications. When a civil suit is filed, the question as to whether a party comes under the purview of instrumentality of a State does not arise at all and the whole and sole consideration would be as to whether the plaintiff had a cause of action to file a civil suit, whether he is competent to file a suit and whether the suit is maintainable at his instance. If the civil suit is maintainable on the basis of existence of a cause of action, there is no room for assailing it by raising a constitutional issue that the suit is not maintainable since the BCCI is not an instrumentality of the State, as the said question is not relevant for adjudication of a civil suit under the provisions of the Code of Civil Procedure nor the civil courts are the Constitutional Courts to enter into that question.

26. In fact, it may be relevant by way of assistance to mention regarding one latest order dated 31.1.2011 of the Supreme Court passed in Special Leave Petition (Crl.) No. 10107 of 2010 wherein a coordinate Bench of this Court upheld the judgment and order of the Kerala High Court whereby it was

held that the elected honorary office bearers of the Kerala Cricket Association and others like players, coaches, managers, members of various committees etc. are public servants within the meaning of Section 2 (C) of the Prevention of Corruption Act 1988 and the High Court of Kerala had reversed the judgment of the Special Court at Kerala which had held that they are not public servants. To elaborate it slightly, it may be stated that Special Leave Petition (Crl.) No. 10107/ 2010 titled *T.C. Mathew vs. K.Balaji Iyengar and Ors.* was filed challenging the judgment of the Kerala High Court wherein the substantial question of law which was raised before the Supreme Court in the aforesaid special leave petition was whether the elected office bearers of Kerala Cricket Association could be prosecuted under the Prevention of Corruption Act alleging offences under Section 13(1) (c) and (d) read with Section 13(2) of the Prevention of Corruption Act and whether Section 409, 420, 468, 471, 427 (a) and 201 of the Indian Penal Code was rightly initiated against elected honorary office bearers of the Kerala Cricket Association viz. honorary members of various committees, players, coaches, manager, boys team members etc. A Bench of this Court was pleased to dismiss the special leave petition in limine by order dated 31.01.2011 and thus upheld the judgment and order of the Kerala High Court which had held that the aforesaid elected officer bearers of the Kerala Cricket Association could be prosecuted under the Prevention of Corruption Act and hence the prosecution had rightly been launched. This judgment although is not on the point as to whether the past President is an Administrator or he has locus standi to challenge any illegal action of the Kerala Cricket Association, it surely has a pursuasive impact on the larger issue that the action of the BCCI and its state units are open to challenge even under the Prevention of Corruption Act at the instance of anyone who is concerned with its activities, more so an office-bearer/ Administrator who is a past President in view of the definition of Administrator incorporated in the BCCI Regulation.

27. Thus once, it is held that the Plaintiff/Appellant is also an Administrator of the BCCI in view of the definition of Administrator, his competence to challenge the amendment introduced in the regulation of BCCI cannot be held as not maintainable on the ground that BCCI is not a 'State' within the meaning of Article 12 of the Constitution as civil suits can surely be filed and can be held maintainable if the plaintiff is able to make out a case that cause of action has arisen for filing a suit and if he is able to sustain the cause of action and he also is able to establish that he is the proper party to the suit, the same will have to be tried by the Court and cannot be dismissed on the ground of its maintainability. In fact, when a civil suit is filed for seeking civil remedy, the question whether the contesting party satisfies the condition that it is an instrumentality of the State is of no relevance as the civil courts do not have to discharge constitutional function so as to enter into this question. If it does, it would be traversing beyond the boundaries of its jurisdiction. Hence, in my opinion, this question is clearly irrelevant for the purpose of the controversy raised in this petition.

28. The next question that needs to be addressed in this appeal is whether the High Court was justified in rejecting the application for injunction at least to the extent of keeping the amendment introduced in Clause 6.2.4 of the Regulation of the BCCI in abeyance specially when the appellant succeeded in making out a prima facie case to the effect that participation of respondent No.2 in the bid held for IPL matches and thus own Chennai Super King directly or indirectly came in conflict with the interest of BCCI as respondent No.2 during and after bidding process for the IPL Team admittedly held positions in four capacities which are as follows:-

(i) Treasurer of BCCI;

(ii) Vice-Chairman and Managing Director of India Cements Ltd.

(e) Chairman, Managing Committee, Chennai Super King; and

(f) Ex-officio Member of the Governing Council of IPL.

Additionally, with effect from September 2008, respondent No.2 became the Secretary of BCCI and, therefore, the Ex-officio Chief Executive of BCCI and also Convener of the Meetings of the Committees of BCCI including IPL and Champions League. In this context, I find substance in the plea of learned counsel appearing for the appellant that conflict of interest does not require actual proof of any actual pecuniary gain or pecuniary loss as the principle of 'conflict of interest' is a much wider, equitable, legal and moral principle which seeks to prevent even the coming into existence of a future and/or potential situation which would inhibit benefit or promise through any commercial interest in which the principal actors are involved. I also equally find substance in the contention that the entire purpose of 'conflict of interest' rule is to prevent and not merely to cure situations where the fair and valid discharge of one's duty can be affected by commercial interests which do not allow the fair and fearless discharge of such duties. On this aspect, it has been substantiated that respondent No.2 necessarily was privy to highly sensitive information about the bidding process, the design of the tender, the rules of the game, the future plans of BCCI in respect of IPL and so on and so forth. It is contended that it is inconceivable that such insider information to which any major office bearer of BCCI would necessarily be privy, would not have used and misused both potential and actual materials by respondent No.2 in the capacity of a bidder through his company India Cements Ltd. Thus, I find it is correct to submit that no artificial Chinese walls can be assumed to exist between the multiple personalities and activities of respondent No.2 both as tender issuer and as a bidder. It is for this reason that courts have levied and lined the principle of 'conflict of interest' both with the fiduciary character of a person who should not put himself in a conflict situation and with the principles of a trustee dealing with a cestui que

trust. In support of this submission, learned counsel has relied on *Pierce Leslie Peter & Co. Ltd. vs. Violet Ouchterlony Wapshare & Ors.* (1969) 3 SCR 203 paras 3 and 4. In this context, the reasoning to the effect that there was no clear case of 'conflict of interest' which could be cited by the appellant with adequate proof has no force in view of Clause 6.2.4 as it clearly incorporates that no Administrator shall have any direct or indirect commercial interest in the events of the BCCI and amendment was introduced in this clause making IPL Champions League and Twenty -20 the international matches an exception to the same. Thus although anyone might not have indulged in creating actual loss to the BCCI by any of his actions, the fact remains that by virtue of his position as a Chairman of a company which participated in the bid to own IPL tournament and at the same time holding the position of an office bearer of the BCCI, is clearly bound to result into conflict of interest of the BCCI. It is altogether a different matter that the appellant has also tried to cite example that the respondent No.2 as franchise holder for Chennai Super King was compensated approximately for Rs.47 crores by respondent No.2 on account of cancellation of a match. However, this is not the stage to rely on this part of the allegation even if it is by way of an example as the suit is still pending before the High Court, but the fact remains that the respondent No.2 by virtue of his position as Vice-Chairman and Managing Director of India Cements Ltd. and ex-officio Member of the Governing Council of IPL clearly came in his way to participate in the auction held by the BCCI for IPL matches and it is for this very purpose that the amendment was hurriedly introduced so that the respondent No.2 may not be held disqualified from owning IPL Chennai Super King.

28. In fact, the concept of 'conflict of interest management' has increasingly drawn the attention of governments and citizens alike in all advanced countries including United States of America over the last several years as has been the case in much of the rest of the world. Even a century ago in the case

of *Bray vs. Bradford* (1896) A.C. 44, it was held that the directors as fiduciaries must not place themselves in a position in which there is conflict of interest between the duties to the company and their personal interests or duties to others. The courts have adopted a severe method of ensuring that the trust and confidence reposed in a fiduciary such as a director are not abused and the fundamental principle was stated by Lord Herschell in the aforesaid case (supra) when it was held as follows:-

> "it is an inflexible rule of a court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principle of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus, prejudicing those whom he was bound to protect. It was therefore deemed expedient to lay down this positive rule".

In fact, the BCCI itself took care to ensure this principle by incorporating clause 6.2.4 wherein it laid down that "no administrator shall have directly or indirectly any commercial interest in any of the events of the BCCI". But thereafter, the BCCI without any deliberation and discussion introduced an amendment into this clause by making Twenty -20 IPL or Champions League Matches an exception to this rule for which the respondent could not come out with any plausible explanation.

29. Thus in my view, the appellant clearly came out with a strong prima facie case that the amendment was introduced with an oblique motive to benefit respondent No.2 so that he could not be held disqualified from participating in the auction and own Chennai Super King while continuing as Treasurer and

thereafter as Secretary of the BCCI and hence an Administrator and thus the appellant in my considered opinion, succeeded in establishing his plea that the amendment introduced by the BCCI in Clause 6.2.4 was an abuse of the amending power exercised by the BCCI in so far as the power of amendment was introduced not to promote the game of cricket but to promote the interest of the 2nd respondent as it is more than clear that without the amendment, Respondent No. 2 would not have been entitled to participate in the bid as he was a Treasurer of the BCCI and hence without the amendment he was not eligible even to participate in the bid and enjoy dual status of that of an office bearer of the BCCI as Treasurer and also own Chennai Super King.

30. The plaintiff/appellant in my view and perception based on consideration of the concept of conflict of interest and its implication surely succeeded in making out a prima facie case that this resulted in serving commercial interest of respondent No. 2 which gave rise to conflict of interest with the activities of the BCCI since Respondent No.2 as Administrator/office bearer was able to influence the decision of the BCCI by being a treasurer and simultaneously also participated in the IPL auction, clearly giving rise to commercial interest which is barred if the amendment had not been introduced. Even at the risk of repetition, it is essential to highlight that the BCCI regulation itself acknowledges this position when it lays down in clause 6.2.4 that "no Administrator shall have direct or indirect commercial interest in any events of the BCCI", but dilutes its effect by amending it and making IPL, Champions League and Twenty-20 matches as an exception which is the most lucrative and revenue generating event. If the Administrator is clearly barred as per Regulation from having any commercial interest in the events of BCCI, it is beyond my comprehension as to how only one class of matches which was IPL, Twenty-20 and Champions League could be treated an exception by allowing an office bearer to participate in the bid but preventing him from other matches including Test Matches. The plaintiff/appellant,

in my opinion thus, fully succeeded in making out a prima facie case that this amendment smacks of arbitrariness and bias in favour of the Respondent No.2 and hence it was a fit case for grant of injunction keeping the impugned amendment introduced in Clause 6.2.4 of the BCCI Regulation under suspension or abeyance.

31. However, since the Respondent No.2 has already participated and succeeded in the bid and is also owning the Chennai Super King, it may be appropriate to leave it open to him to exercise his option whether he wishes to continue as an office bearer of the BCCI or own IPL Chennai Super King since in view of Regulation 6.2.4, bereft of amendment, he was not eligible even to participate in the IPL auction as it clearly generated commercial interest of an office bearer/ Administrator in the events of BCCI, directly or indirectly. In my considered view, the plaintiff/appellant succeed in making out his case to the extent that the amendment was fit to be kept under suspension by granting an injunction against the amendment at least until the suit was finally decided. The Courts below while considering the application for injunction was fully competent to mould the relief in a given circumstance or situation which it has miserably failed to do. But as the event of bidding has already taken place even before the amendment was introduced in the BCCI Regulation and the amendment was fit to be suspended, the respondent No. 2, in my opinion, will have to exercise his option whether he wishes to continue owning IPL and operate Chennai Super King or is more interested in managing the affairs of BCCI as an Administrator with fairness, probity and rectitude by divesting himself from commercial interest which directly or indirectly results in conflict of interest with the activities of the BCCI which was clearly barred under Regulation 6.2.4 but has been diluted by introducing an amendment after the IPL auction had already been held when Respondent No.2 was ineligible even to participate in the auction. Hence, the impugned amendment dated 27.9.2008 was fit to be suspended by granting injunction

against the same. This is clearly so as it would be difficult to overlook that multiple loyalties can create commercial interest with the activities of BCCI thus resulting in conflict of interest since the financial or personal interest of the Board would clearly be inconsistent with the commercial and personal interest of the Administrator of the Board. In addition, the rule of equity and fairness provides that no one who stands in a position of trust towards another can in matters affected by that position, advance his own interests for example, by trading and making a profit at that other's expense as the rule of legal prudence mandates that once a fiduciary is shown to be in breach of his duty of loyalty, he must disgorge any benefit gained even though he might have acted honestly and in his principal's best interest. In the instant matter, when the BCCI held auction for owning IPL Team and an Administrator - the respondent No.2 participated in the bid, variety of real and/or perceived conflict of interest cannot be ruled out. These included access to insider information, possible undue influence on the decision makers who held the auction and the like.

32. Hence, I deem it appropriate to allow these appeals and grant injunction by directing suspension of operation of the impugned amendment dated 27.9.2008 introduced in Regulation 6.2.4 of the BCCI. In case, the Respondent No. 2 - Sri. N. Srinivasan opts to continue owning and operating IPL Chennai Super King, he shall be at liberty to do so but in that event he shall be restrained from holding any office in the BCCI in any capacity whatsoever in view of the reasons assigned hereinabove.

ORDER

Since there is difference of opinion, let the papers of these matters be placed before the Hon'ble the Chief Justice of India for being assigned to appropriate Bench.

D.G. Matter referred to larger Bench.

M/S. J.G. ENGINEERS PVT. LTD.
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 3349 of 2005)

APRIL 28, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

Arbitration and Conciliation Act, 1996 – ss.34 and 28 – Respondents had awarded works contract to the appellant – On ground of slow progress of the appellant-contractor, the respondents terminated the contract – Dispute –Appointment of sole arbitrator as per arbitration agreement contained in contract – Appellant filed statement of claims before the arbitrator – Respondents filed reply and also filed counter claims – Arbitrator awarded sum with interest and costs in favour of the appellant and rejected the counter claims of the respondents – Respondents filed application u/s.34 for setting aside the award – District Judge affirmed the award – Order reversed by the High Court in arbitration appeal filed by the respondents – The respondents' contention that the arbitrator had considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the contract, and that the counter-claims of respondents were erroneously rejected, found favour with the High Court – Held: On facts, the Arbitrator had the jurisdiction to try and decide all the claims of the appellant-contractor as also the claims of the respondents – Award of the Arbitrator on claims 1, 3 and 11 of the appellant-contractor has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained – Judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the

appellant also cannot be sustained since the award on those claims was upheld by the civil court and the High Court in appeal did not find any infirmity in regard thereto – Claim No.5 was for payment of escalation under clause 10(cc) of the contract – The High Court erred in setting aside the award in regard to claim No.5 also – Once the Arbitrator recorded the finding that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the counter-claims from the contractor does not arise – Award of the Arbitrator rejecting the counter claims, therefore, upheld – Government Contract – Works Contract.

Arbitration and Conciliation Act, 1996 – ss. 34 and 28 – Arbitral award – Interference with – Jurisdiction of civil court to examine validity of arbitral award – Held: A Civil Court examining the validity of an arbitral award u/s.34 exercises supervisory and not appellate jurisdiction – A court can set aside an arbitral award, only if any of the grounds mentioned in ss.34(2)(a)(i) to (v) or s.34(2)(b)(i) and (ii), or s.28(1)(a) or 28(3) read with s.34(2)(b)(ii), are made out – An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate s.34(2)(a)(iv) and 34(2)(b) – Making an award allowing or granting a claim, contrary to any provision of the contract, would violate s.34(2)(b)(ii) read with s.28(3).

Arbitration – Arbitral award dealing with and deciding several claims – Challenge to – Held: If an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent.

Contract – Breach of a condition of contract – Right to adjudication – Held: The question whether the other party committed breach cannot be decided by the party alleging

breach – A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach – That question can only be decided by an adjudicatory forum, that is, a court or an Arbitral Tribunal – Arbitration.

The respondents had awarded the works contract of "extension of terminal building" at Guwahati airport to the appellant. On ground of slow progress of the appellant-contractor, the respondents terminated the contract.

The appellant filed writ petition. The High Court referred the parties to arbitration as per the arbitration clause contained in the works contract. The appellant filed its statement of claims before the arbitrator. The respondents filed reply and also filed four counter claims. By award dated 5.9.2001 (as amended on 22.9.2001) the Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and costs in favour of the appellant and rejected the counter claims of the respondents.

The respondents filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 in the District Court for setting aside the aforesaid arbitral award. The District Judge dismissed the petition holding that none of the grounds under section 34(2) were made out. This order was reversed by the High Court in arbitration appeal filed by the respondents. The respondents' contention that the arbitrator had considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the contract, and that the counter-claims of respondents were erroneously rejected, found favour with the High Court.

In the instant appeal, the appellant contended that the respondents had committed breach and its counter-

claims were rightly rejected and further that the arbitral award was legal and not open to challenge under any of the grounds under section 34 of the Act.

On the contentions urged in the instant appeal, the following questions arose for consideration :

(i) Whether the High Court was justified in setting aside the award in respect of claims 1, 3, and 11 on the ground that they related to 'excepted matters'?

(ii) Whether the High Court was justified in setting aside the award in regard to Claim Nos. 2, 4, 6, 7, 8 and 9?

(iii) Whether High Court was justified in holding that claim 5 for escalation was barred by clause 10(cc) of the contract?

(iv) Whether the High Court was justified in setting aside the award rejecting counter-claims 1 to 4?

Allowing the appeal, the Court

HELD:1. A Civil Court examining the validity of an arbitral award under section 34 of the Arbitration and Conciliation Act, 1996 exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a)(i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii)

read with section 28(3) of the Act. [Para 7] [501-E-G]

Re: Question (i)

2.1. As per the arbitration agreement (contained in Clause 25 of the contract) all questions and disputes relating to the contract, execution or failure to execute the work, whether arising during the progress of the work or after the completion or abandonment thereof, "except where otherwise provided in the contract", had to be referred to and settled by arbitration. The High Court held that claims 1, 3 and 11 of the contractor were not arbitrable as they related to excepted matters in regard to which the decisions of the Superintending Engineer or the Engineer-in-Charge had been made final and binding under clauses (2) and (3) of the contract. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/ final and conclusive, in regard to certain matters. But what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the

delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract. [Paras 11, 13 and 14] [503-D-E; 507-F-G; 510-D-G]

2.2. The question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. The question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator examined the said issue and recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed

as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained. [Paras 15, 17] [510-H; 511-A; 513-G-H; 514-A-F]

State of Karnataka vs. Shree Rameshwara Rice Mills **(1987 (2) SCC160l: 1987 (2) SCR 398;** *Bharat Sanchar Nigam Ltd. vs. Motorola India Ltd.* **(2009 (2) SCC 337: 2008 (13) SCR 445 – referred to.**

Re : Question (ii)

3. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well-settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items

is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9. [Para 18] [514-G-H; 515-A-D]

Re : Question (iii)

4.1. Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. [Para 18] [515-E-F]

4.2. Where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under section 34(2)(b) of the Act. Claim No.(5) is for payment of escalation under clause 10(cc) of the contract for work done beyond July, 1995 till the date of termination. However, escalation in price shall be available only for the work done during the stipulated period of contract including such period for which the contract was validly extended under the provisions of clause (5) of the contract, without any action under clause (2) of the contract. The respondents contend that as the Superintending Engineer levied penalty (at 10% of the estimated cost of the work) for the period 10.1.1995

to 14.3.1996 under clause (2) of the contract, the contractor was not entitled to payment of escalation under clause 10(cc). The arbitrator held that the contractor was not responsible for the delay and the respondents were responsible for the delay. If so, the contractor will be entitled to a valid extension under the provisions of the contract, without levy of any liquidated damages. If the contractor is entitled to such extension without levy of penalty, then it follows that under clause 10(cc), the contractor would be entitled to escalation, in terms of the contract for the work done during the period of extension. [Para 20] [516-B-H; 517-A-B]

4.3. The stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after the contractor had submitted its statement of claim on 17.4.1997, the respondents chose to levy liquidated damages for the period 1.10.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1.8.1995 also without levy of penalty. In fact, having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. The High Court committed an error in setting aside the award in regard to claim No.5 on the ground that it violates clause 10(cc) of the contract. [Paras 21, 22] [517-B-E; 518-A-B]

Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. **2003 (5) SCC 705: 2003 (3) SCR 691 – referred to.**

7Re : Question (iv)

5.1. Once the Arbitrator recorded the finding on consideration of the evidence/material, that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the counter-claims from the contractor does not arise. [Para 23] [518-C]

5.2. The High Court proceeded on the erroneous assumption that when clauses (2) and (3) of the contract made the decisions of the Superintending Engineer/ Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No.2) and the arbitration costs (counter claim No.4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld. Consequently, the order of the High Court is set aside and the order of the District Court is restored. [Para 23 and 24] [519-A-F]

Case Law Reference:

1987 (2) SCR 398	**referred to**	**Para 15**
2008 (13) SCR 445	**referred to**	**Para 16**
2003 (3) SCR 691	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3349 of 2005.

From the Judgment and Order dated 08.02.2005 of the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh in Arbitration Appeal No. 1 of 2004.

A.K. Ganguly, Pranab Kumar Mullick for the Appellant.

T.S. Doabia, Kiran Bhardwaj, Sushma Suri and V.K. Verma for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. This appeal is directed against the judgment dated 8.2.2005 of the Guwahati High Court allowing Arbitration Appeal No.1/2004 filed by the respondents and setting aside the judgment dated 12.12.2003 passed by Additional District Judge, Kamrup, Guwahati (by which the District court had dismissed the petition filed by respondents filed under section 34 of Arbitration & Conciliation Act, 1996 and affirmed the Award passed by the Arbitrator dated 5.9.2001, with clerical corrections made on 22.9.2001).

2. On 26.3.1993 the respondents awarded the work of "extension of terminal building" at Guwahati airport to the appellant. As per the contract, the date of commencement of work was 10.4.1993 and the period of completion of the work was 21 months, to be completed in different stages. As the appellant (also referred to as the 'contractor') did not complete the first phase of the work within the stipulated time, the

respondents terminated the contract by order dated 29.8.1994. The termination was challenged by the appellant in a writ petition filed before the Gawahati High Court. By judgment dated 27.9.1994, the High Court set aside the termination and directed the respondents to grant time to the appellant till the end of January 1995 for completion of the first phase reserving liberty to the appellant to apply for further extension of time. As the work was not completed, the respondents granted an extension upto 31.7.1995 by letter dated 24.8.1995, without levying any liquidated damages. The contractor proceeded with the work even thereafter. However, as the progress was slow, the respondents terminated the contract on 14.3.1996 on the ground of non-completion even after 35 months. The appellant filed a writ petition, challenging the cancellation. The High Court by order dated 25.6.1996, noticed the existence of the arbitration agreement and referred the parties to arbitration. In pursuance of it, on a request by the appellant, the respondents appointed Mr. C.Vaswani as the sole arbitrator on 14.2.1997.

3. On 17.4.1997, the appellant filed its statement of claims. Claims 1 to 11 aggregated to Rs.2,38,86,198.31 (subsequently, reduced to Rs.2,06,70,495/-). Claim 12 was for interest at 18% per annum on the total claim amount from 20.5.1996 to date of realization. Claim 13 was for Rs.2,13,729/- as cost of arbitration. On 3.2.1999, the respondents filed their reply and also filed their four counter claims before the arbitrator aggregating to Rs. 279,54,225/-.

4. By award dated 5.9.2001 (as amended on 22.9.2001) the Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and costs in favour of the appellant and rejected the counter claims of the respondents. The particulars of the amounts claimed and the awards thereon are as under:

Claims by appellant

Claim No.	Particulars of Claim	Amount claimed by appellant	Amoun awarded by Arbitrator
1	Claim for the balance payment of 34th Running account	Rs.11,26,518	Rs.11,26,518
2,4,5	2) Claim for the payment due under 35th Running Account bill	Rs.65,64,544	Rs.8,70,517
	4) Claim for the payment for Extra items of work executed		Rs.3,27,335
	5) Claim for escalation in rates for works executed after July 1995 till the date of termination		Rs.14,59,320
3	Claim for the refund of Security Deposit	Rs.1,00,000	Rs. 1,00,000
6	Claim for the difference in scale weight and sectional weight of steel	Rs. 37,608	Rs. 37,608
7 & 8	7) Claim for “on site’ overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.	Rs.25,57,295	Rs.17,50,000
	8) Claim for ‘off-site’ overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.		
9	Claim for loss of hire charges of machinery, shuttering materials etc. engaged for execution of the work for the period beyond the stipulated date of completion.	Rs.30,79,160	Rs.8,75,000
10	Claim for compensation for the unutilized proportionate expenses	Rs.18,01,701	Nil

	incurred for establishing the site, and setting-up of infrastructure required for performance of full value of work.		
11	Claim for the loss of anticipatory profit @ 15% on the value of balance work which could not be executed due to termination of Contract	Rs.54,03,669	Rs.39,12,000
	Total	Rs.2,06,70,495	Rs.104,58,298

Counter Claims by respondents

Counter Claim No	Particulars of Counter Claim	Amount claimed by Respondents	Amount awarded by Arbitrator
1.	Excess cost of getting the work executed through an alternative agency - recoverable as per clause (3) of the agreement	Rs.1,46,69,227	Nil
2.	Liquidated damages levied under clause (2) of the agreement	Rs.56,84,998	Nil
3.	Escalation that would be payable to the alternative agency in regard to execution of remaining work (tentative).	Rs.75,00,000	Nil
4.	Cost of Arbitration	Rs.1,00,000	Nil
	Total	Rs.2,79,54,225	Nil

The Arbitrator awarded to the contractor, simple interest @ 9% per annum on Rs.38,21,298 for the period 14.9.1996 to 31.3.1997 and simple interest @ 15% per annum on Rs.1,04,58,298 for the period 1.4.1997 to date of payment (under Claim No.12). The Arbitrator also awarded Rs.39,610/-

towards costs (under Claim No. 13). All the counter claims of respondents were rejected.

5. On 12.12.2001, the respondents filed an application (Misc. Arbn. Case No.590/2001) under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') in the District Court, Guwahati for setting aside the aforesaid award. The respondents filed an additional petition in the said proceedings, under section 34 of the Act on 27.1.2003, raising additional grounds of challenge. The learned District Judge, Guwahati dismissed the petition vide order dated 12.12.2003, holding that none of the grounds under section 34(2) were made out. This order was reversed by the Guwahati High Court, by the impugned judgment dated 8.2.2005, in Arbitration Appeal No.1/2004 filed by the respondents, recording the following findings: (i) The award on claim Nos.1, 3 and 11 related to 'excepted matters' which were beyond the scope of the arbitration agreement and could not be adjudicated by the Arbitrator. (ii) The award on Claim No.5 was contrary to the terms of price escalation clause (clause 10(cc) of the contract) and being patently illegal, required to be set aside. (iii) The rejection of the counter claims of respondent, by ignoring the agreed terms of contract and the legal provisions, was also patently illegal. As a consequence, the award was liable to be set aside fully, as the respondents would have been entitled to adjust the amounts found due and payable against claims 2, 4, 6, 7, 8, 9 against their counter-claims, if allowed. In view of the said findings the High Court directed as follows :

> "In view of the above, the appeal filed by the appellants is allowed. The award passed by the Arbitrator on 5.9.2001 and corrected on 22.9.2001 as well as the order dated 12.12.2003 passed by the learned Adhoc Additional District Judge No.2, Kamrup, Guwahati in Misc. (Arbitration) Case No.590/2001, are set aside. The arbitration proceeding is remitted back to the learned arbitrator for reconsideration of the counter claims of the

respondents and for passing an award by making necessary adjustment of the amount payable to the contractor/claimant against his claim nos. 2,4,6,7,8,9 and 13 in terms of the finding recorded by this Court."

6. The respondents' contention that the arbitrator has considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the agreement, and that the counter- claims of respondents have been erroneously rejected, have found favour with the High Court. The appellant contends that the award does not violate clauses (2) and (3) of the agreement making certain decisions of Superintending Engineer/Engineer-in-Charge final, nor clause 10(cc) of the agreement relating to escalations. It is also contended that respondents committed breach and the counter-claims were rightly rejected. The appellant contends the award is legal and not open to challenge under any of the grounds under section 34 of the Act.

Questions for consideration

7. A Civil Court examining the validity of an arbitral award under section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a) (i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii) read with section 28(3) of the Act. On the contentions urged, the following questions arise for our consideration :

(i) Whether the High Court was justified in setting aside the award in respect of claims 1, 3, and 11 on the ground that they related to 'excepted matters'?

(ii) Whether the High Court was justified in setting aside the award in regard to Claim Nos. 2, 4, 6, 7, 8 and 9?

(iii) Whether High Court was justified in holding that claim 5 for escalation was barred by clause 10(cc) of the contract?

(iv) Whether the High Court was justified in setting aside the award rejecting counter-claims 1 to 4?

Re : Question (i):

8. Claim No. (1) for Rs.11,26,518 relates to the payment due in regard to the 34th running bill withheld by the respondent. It comprises Rs.5,90,000/- levied as compensation under clause (2) of the agreement, Rs.3,17,468 withheld towards alleged risk cost in getting the work executed by an alternative agency and Rs.2,19,050 being the escalation in regard to the period January 1995 to July 1995 which was admitted by the respondents to be due. The Arbitrator allowed the entire claim holding that the appellant was not responsible for the delay and consequently the rescission/termination was illegal and levy of liquidated damages and recovery of excess cost in getting the work completed through an alternative agency was not permissible, was bad.

9. Claim No.3 was for refund of security deposit of Rs.100,000/-. The respondents had encashed the bank guarantee for Rs.1 lakh which had been issued in lieu of security deposit and forfeited the same on the ground that the contractor was in breach. The arbitrator held the contractor was not in breach and the forfeiture was illegal and directed that the said sum of Rupees one lakh should be refunded to the contractor.

10. Claim No.11 was for Rs.54,03,669 being the loss of

anticipated profit in regard to the value of the unexecuted work which would have been executed by the contractor if the contract had not been rescinded by the respondents. The contractor contended that the termination was in breach of the contract and but for such termination the contractor would have legitimately completed the work and earned a profit of 15%. The arbitrator held that the respondents were responsible for the delay, that the contractor was not in breach and the termination was therefore illegal. He held that the value of the work which could not be executed by the contractor due to wrongful termination, was Rs.3,91,21,589 and 10% thereof would be the standard estimate of the loss of profits and consequently awarded Rs.39,12,000/- towards the loss of profits, which the contractor would have earned but for the wrongful termination of the contract by the respondents.

11. As per the arbitration agreement (contained in Clause 25 of the contract) all questions and disputes relating to the contract, execution or failure to execute the work, whether arising during the progress of the work or after the completion or abandonment thereof, "except where otherwise provided in the contract", had to be referred to and settled by arbitration. The High Court held that claims 1, 3 and 11 of the contractor were not arbitrable as they related to excepted matters in regard to which the decisions of the Superintending Engineer or the Engineer-in-Charge had been made final and binding under clauses (2) and (3) of the agreement.

12. We may refer to the relevant provisions of the said contract document, that is, clauses 2, 3(Part) and 25 (Part) to decide whether the claims 1, 3 and 11 were excepted matters, excluded from Arbitration:

Clause (2):

"The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be essence of the contract and shall

be reckoned from the tenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as *compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide* on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three eighths of the works, before one-half of such time has elapsed and three-fourths of the work; before three-fourths of such time has elapsed. However for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge. The contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an *amount equal to one percent or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide* on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent, on the estimated cost of the work as shown in the tender."

Clause 3 :

"The Engineering-in-charge may without prejudice to his right against the contractor in respect of any delay or

inferior workmanship or otherwise or to any claims for damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any of the provisions of this contract or otherwise and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases:

(i) If the contractor having been given by the Engineer-in-charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in any inefficient or other improper or unworkmanlike manner, shall omit to comply with the requirements of such notice for a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work so that either *in the judgment of the Engineer-in-charge (whose decision shall be final and binding) he will be unable to secure completion of the work by the date of completion* or he has already failed to complete the work by that date…

(ii) *x x x x* (not relevant)

(iii) If the contractor commits breach of any of the terms and conditions of this contract.

(iv) If the contractor commits any acts mentioned in Clause 21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers:

(a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under hand of the Engineer-in-Charge shall be conclusive evidence) upon such determination or rescission the security deposit of the contractor shall be

liable to be forfeited and shall be absolutely at the disposal of Government.

(b) x x x x (not relevant)

(c) After giving notice to the contractor to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (*of the amount of which excess the certificate in writing of the Engineer-in-Charge shall be final and conclusive*) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under this contract or on any other account whatsoever or from his security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be."

In the event of any one or more of the above courses being adopted by the Engineer-in-Charge the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case action is taken under any of provisions aforesaid. The contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.

Clause 25:

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution of failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, C.P.W.D. in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said C.P.W.D. at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference."

(emphasis supplied)

13. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject matter of arbitration. We will refer to and analyse each of the 'excepted matters' in clauses (2) and (3) of the agreement to find their true scope and ambit :

(i) Clause (2) provides that if the work remains

uncommenced or unfinished after proper dates, the contractor shall pay as compensation for everyday's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. W*hat is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for everyday's delay that is whether it should be 1% or lesser*. *His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for everyday the due quantity of the work remains incomplete, subject to a ceiling of ten percent. *This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.*

(iii) The first part of clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has

already failed to complete the work by that date, certain consequences as stated therein, will follow. W*hat is made final by this provision is the decision of the Engineer-in-Charge as to whether the contractor will be able to secure the completion of the work by the due date of completion*, *which could lead to the termination of the contract or other consequences*. *The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of Engineer-in-Charge is made final.*

(iv) The second part of clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-Charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence of such termination or rescission. *This does not make the decision of the Engineer-in-Charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of Engineer-in-Charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-Charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined*.

(v) After determination or rescission of the contract, if the Engineer-in-Charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-Charge in regard to such excess shall be final

and conclusive, shall be borne and paid by the original contractor. *What is made final is the actual calculation of the difference or the excess, that is if the value of the unexecuted work as per the contract with the original contractor was Rs.1 lakh and the cost of getting it executed by an alternative contractor was Rs.1,50,000/- what is made final is the certificate in writing issued by the Engineer-in-Charge that Rs.50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-Charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-Charge is made final.*

14. Thus what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

15. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A

contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. In *State of Karnataka vs. Shree Rameshwara Rice Mills* (1987 (2) SCC 160) this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This court held :

> "Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the other officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.
>
> We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for

> assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed."

16. The question whether the issue of breach and liability are excluded from arbitration, when quantification of liquidated damages are excluded from arbitration was considered by this Court in *Bharat Sanchar Nigam Ltd. vs. Motorola India Ltd.* (2009 (2) SCC 337). This court held :

> "The question to be decided in this case is whether the liability of the respondent to pay liquidated damages and the entitlement of the appellant, to collect the same from the respondent is an excepted matter for the purpose of Clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the liquidated damages payable by the supplier Motorolla arises once it is found that the supplier is liable to pay the damages claimed. *The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.*
>
> It is clear from the reading of Clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under Clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in Clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant/ BSNL or by anybody who has been authorized on the terms of the agreement. Reading Clause 15 and 16 together, it is apparent that Clause 16.2 will come into

operation only after a finding is entered in terms of Clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Dmages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.

Quantification of liquidated damages may be an excepted matter as argued by the appellant, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellant under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages."

(emphasis supplied)

17. In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach

and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.

Re : Question (ii)

18. The arbitrator had considered and dealt with claims (1), (2, 4 and 5), (6), (7 and 8), (9) and (11) separately and distinctly. The High Court found that the award in regard to items 1, 3, 5 and 11 were liable to be set aside. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in

regard to these six items, only on the ground that in the event of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well-settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.

Re : Question (iii)

19. Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. Interpreting the said provisions, this court in *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd*. [2003 (5) SCC 705] held that a court can set aside an award under section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to

be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

20. It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under section 34(2)(b) of the Act. Claim No.(5) is for payment of escalation under clause 10(cc) of the contract for work done beyond July, 1995 till the date of termination. Clause 10(cc) of the agreement reads thus:

Clause 10(cc)

"… subject to the condition that such compensation for the escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less".

Thus, escalation in price shall be available only for the work done during the stipulated period of contract including such period for which the contract was validly extended under the provisions of clause (5) of the contract, without any action under clause (2) of the contract. The respondents contend that as the Superintending Engineer levied penalty (at 10% of the estimated cost of the work) for the period 10.1.1995 to 14.3.1996 under clause (2) of the contract, the contractor was not entitled to payment of escalation under clause 10(cc). The arbitrator held that the contractor was not responsible for the delay and the respondents were responsible for the delay. If so,

the contractor will be entitled to a valid extension under the provisions of the contract, without levy of any liquidated damages. If the contractor is entitled to such extension without levy of penalty, then it follows that under clause 10(cc), the contractor would be entitled to escalation, in terms of the contract for the work done during the period of extension.

21. As noticed above, the stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after the contractor had submitted its statement of claim on 17.4.1997, the respondents chose to levy liquidated damages for the period 1.10.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1.8.1995 also without levy of penalty. In fact, having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. Be that as it may.

22. We extract below the reasoning of the Arbitrator for grant of escalation for the work done from 1.8.1995 to 14.3.1996 under clause 10(cc) of the contract :

> "The escalation upto July'95 has been covered under claim no.1. The respondent has not paid any further escalation beyond July, 95, since the extension thereafter has not been granted and the contract was rescinded…….. The respondent has denied the claim as the escalation is payable only for the stipulated period and period extended without levy of penalty. As I have already decided that the action of rescission of the contract and the action of levying the compensation/penalty under Clause 2 by the respondent is incorrect and the claimant was not responsible for the delay, the escalation for the total work done, automatically becomes payable."

The High Court therefore committed an error in setting aside the award in regard to claim No.5 on the ground that it violates clause 10(cc) of the contract.

Re : Question (iv)

23. Once the Arbitrator recorded the finding on consideration of the evidence/material, that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the following from the contractor does not arise:

(i) Extra expenditure incurred in getting the balance of work completed through another contractor under clause 3 of the agreement [counter claim (1) for Rs.1,46,69,277].

(ii) Levy of liquidated damages under clause 2 of the agreement at 10% of estimated cost of work for the delay between 10.1.1995 to 14.3.1996 [counter claim No.(2) for Rs.56,84,998].

(iii) Claim on account of expected demand for escalation in rates payable to the alternative contractor in getting the work completed, in addition to the extra expenditure claimed under counter claim No.1 [counter claim No.(3) for tentative sum of Rs.75 lakhs to be ascertained after the work was actually completed and the bill of the new agency is settled].

(iv) Claim for cost of arbitration [counter claim No.(4)

for Rs.100,000/-].

The High Court proceeded on the erroneous assumption that when clauses (2) and (3) of the agreement made the decisions of the Superintending Engineer/Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No.2) and the arbitration costs (counter claim No.4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld.

Conclusion

24. No part of the decision of the High Court is sustainable. The appeal is therefore allowed, the impugned order of the High Court is set aside and the order of the District Court dated 12.12.2003, is restored.

B.B.B. Appeal allowed.

TRISHALA JAIN AND ANR.

v.

STATE OF UTTARANCHAL AND ANR.

(Civil Appeal Nos.7496-7497 of 2005 etc.)

MAY 05, 2011

[ASOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894 – ss.23 and 24:

Fair market value of the acquired land – Determination of – Land Acquisition Officer applied the belting system and categorizing the land into three different categories awarded the compensation accordingly – However, Reference Court held that the land as a whole was similarly placed and was to be used for one purpose, thus there was no question of applying the belting system and accordingly awarded uniform compensation to all the claimants – This finding of Reference Court upheld by the High Court – Correctness of this concurrent view not questioned by any of the parties before the Supreme Court – Held: The concurrent finding recorded by the Courts below having remained unchallenged before the Supreme Court need not be interfered with.

Fair market value of the acquired land – Determination of – Sale instances (exemplars) – Claimants placed reliance upon two sale instances and sought compensation on that basis – Reference Court declined to consider the two sale instances produced by the claimants – Justification of – Held: Justified – Both the seller and the purchaser in the sale instances relied upon by the claimants were either claimants in different claim petitions or belonged to the same family – The claimants had full knowledge of acquisition of land as well

as the purpose for which the said land was sought to be acquired – Circumstances and evidence clearly indicate that there was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation – The said two sale instances were sham, collusive, lacked bona fides and were executed with the intention to raise the price of the land in question with the pretence of it being actual market value – Decision of Reference Court rightly upheld by the High Court.

Determination of market value of acquired land – Principle of deduction in land value covered by a comparable sale instance – Applicability of –Deduction on account of expenses of development of the site – Held: Normally deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects – It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land – In addition thereto, deduction can also be applied on account of wastage of land – The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction' – Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of 'no deduction' may be applied – In the instant case, there is evidence on record to show that plotting was done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities – It may

be a case where less deduction may be applied but certainly it is not a case of 'no deduction' – It also cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land – Under the circumstances, no infirmity in the approach of the High Court in applying the principle of deduction – In the facts and circumstances of the present case, deduction of 10% from the market value on account of development charges and other possible expenditures was justifiable and called for.

Determination of Compensation – Application of principle of guesstimate for determining the amount of compensation – Held: More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy – Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land – 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data – 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself – 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se – However, principle of some guesswork would have hardly any application in a case of no evidence – Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence – Further, this entire exercise has to be within the limitations specified under ss.23 and 24 of the Act and cannot be made in detriment thereto – On facts, it is a case of acquisition of land which is situated on a reasonably good location surrounded by developed areas having civic amenities and facilities and further development activity was going on in nearby areas – The land acquired had the potential of being developed for

residential or institutional purposes and the same was acquired for construction of a Government Polytechnic Institute – Therefore, it is a case where the Court should apply minimal deduction which will meet the ends of justice and would help in determining just and fair compensation for the land in question – 10% deduction from the market value of the acquired land would meet the ends of justice.

The instant appeals came up before this Court as a result of a common Notification issued under Section 4(1) of the Land Acquisition Act, 1894. The following common questions arose for consideration:

I. Whether or not the belting system ought to have been applied for determination of fair market value of the acquired land?

II. What should be the just and fair market value of the acquired land on the date of issuance of notification under Section 4 of the Act?

III. Whether there ought to have been any deduction after determining the fair market value of the land?

IV. What compensation and benefits are the claimants entitled to?

Disposing of the appeals, the Court

HELD:

Question No. 1.

1. The Special Land Acquisition Officer (SLAO), while giving its award had applied the belting system and categorizing the land into three different categories had awarded the compensation accordingly. However, the Reference Court had held that the land as a whole was

similarly placed and was surrounded by developed areas and it was to be used for one purpose, i.e. construction of Government Polytechnic Institute, thus there was no question of applying the belting system. Keeping in view the documentary and oral evidence on record, the Reference Court set aside the belting system and awarded uniform compensation to all the claimants. This finding of the Reference Court was upheld by the High Court in the impugned judgments. The correctness of this concurrent view has also not been questioned by any of the parties in the present appeals. Therefore, concurrent finding recorded by the Courts below which remained unchallenged before this Court need not be disturbed by this Court. [Para 10] [543-F-H; 544-A-B]

Question No. II

2.1. The principal evidence relied upon by the claimants in all these cases are the two sale instances shown at serial Nos. 109 and 110. According to the claimants, they were entitled to compensation on the basis of these two sale instances. From the factual matrix the question that requires consideration of this Court is whether the Reference Court was justified in law with reference to the facts on record in declining to consider the two sale instances produced by the claimants at serial Nos. 109 and 110 or in other words, was it justified on part of the Reference Court to keep them outside the zone of consideration while determining the market value of the acquired land. It cannot be disputed that both the seller and the purchaser in sale instances at serial Nos. 109 and 110 are either claimants in different claim petitions or belong to the same family. The claimants had full knowledge of acquisition of land and as well as the purpose for which the said land was sought to be acquired. [Paras 11, 12 and 13] [544 -C-D; 546-E-G; 547-B]

2.2. A fraudulent move or design is not capable of direct proof in most cases; it can only be inferred. Under such circumstances, the Court has to take a general view keeping in mind the facts and circumstances of the case with particular reference to the intent of parties, their action in furtherance thereto and the object sought to be achieved by them. In the instant case, it is not in dispute that these sale deeds have been executed in favour of the family members or persons known to the claimants. These are circumstances and evidence which clearly indicate that the sale instances relied upon by the claimants are result of collusion between these parties. There was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation. These two sale instances which have been executed just about two months prior to the issuance of the notification under Section 4(1) stand out as transactions which are sham, collusive, lack bona fide and have been executed with the intention to raise the price of the land in question with the pretence of it being actual market value. There is no infirmity in this view of the Reference Court which was rightly upheld by the High Court. [Paras 13 and 14] [547-C-G]

Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari **(1950) 1 SCR 852 – relied on.**

A.P. State Road Transport Corporation, Hyderabad v. P. Venkaiah **(1997) 10 SCC 128: 1997 (3) SCR 1054;** *Cement Corporation of India v. Purya* **(2004) 8 SCC 270;** *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531 and** *State of Haryana v. Ram Singh* **(2001) 6 SCC 254: 2001 (3) SCR 1178 – referred to.**

Question No. III

3.1. The law with regard to applying the principle of deduction to the determined market value of the acquired land is quite consistent, though, of course, the extent of deduction has varied very widely depending on the facts and circumstances of a given case. It is not possible to state precisely the exact deduction which could be made uniformly applicable to all the cases. Normally the rule is that deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects. It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land. In addition thereto, deduction can also be applied on account of wastage of land. [Para 18] [549-H; 550-A-C]

3.2. It is also neither possible nor appropriate to stricto sensu define a class of cases where the Court would not apply any deduction. This again would be dependant upon the facts and circumstances of a given case. The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction'. Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of 'no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are exceptional and/or rare as normally the lands which are proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly

developed lands at the time of issuance of notification under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question. [Para 19] [550-E-H; 551-A-B]

3.3. It is evident that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits. This Court, depending on the facts and circumstances of each given case, has taken the view that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development [Paras 20, 21] [552-H; 553-A-D]

3.4. In the present case, there is evidence on record to show that plotting has been done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities. It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction'. It also cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land. The claimants, on whom the onus lies to prove inadequacy of compensation have not even stated that whether

under the relevant laws they are expected to leave any part of their land open when they are permitted to raise construction on the land in question. Under these circumstances, there is no infirmity in the approach of the High Court in applying the principle of deduction. A deduction of 10% from the market value on account of development charges and other possible expenditures would be justifiable and called for in the facts and circumstances of the present case. [Para 25] [556-C-F]

Land Acquisition Officer, Kammarapally Village v. Nookala Rajamallu **(2003) 12 SCC 334: 2003 (6) Suppl. SCR 67;** *Bhagwathula Samanna & Ors v. Special Tahsildar & Land Acquisition Officer* **(1991) 4 SCC 506: 1991(1) Suppl. SCR 172;** *K.S. Shivadevamma v. Assistant Commissioner and Land Acqusition Officer* **(1996) 2 SCC 62: 1995(6) Suppl. SCR 364;** *Ram Piari v. Land Acquisition Collector, Solan* **(1996) 8 SCC 338: 1996 (3) SCR 307;** *Hasanali Walimchand (Dead) by L v. State of Maharashtra* **(1998) 2 SCC 388: 1998 (1) SCR 1;** *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531;** *V. Hanumantha Reddy (Deceased) by L v. Land Acquisition Officer & Mandal R. Officer* **(2003) 12 SCC 642;** *Atma Singh v. State of Haryana* **(2008) 2 SCC 568: 2007 (12) SCR 1120 and** *Charan Dass v. Himachal Pradesh Housing & Urban Development Authority* **(2010) 13 SCC 398: 2009 (14) SCR 163 – referred to.**

Question No. IV:

Determination of Compensation – Application of principle of guesstimate for determining the amount of compensation to be awarded for the land acquired under the Act

4.1. Acquisition of land is an act falling in the purview of eminent domain of the State. It essentially relates to the concept of compulsory acquisition as opposed to

voluntary sale. It is trite that no person can be deprived of his property save by authority of law in terms of Article 300A of the Constitution of India. The provisions of the Act provide a complete mechanism for 'deprivation of property in accordance with the law' as stated under the Act. Justifiability and fairness of such compensation is subject to judicial review within the confines of the four corners of the Act. Once the lands are acquired under the Act, the persons interested therein are entitled to compensation as per the provisions of the Act. Thus, in the present case the land in question has been acquired under the provisions of a law which specifically provide that acquisition can only be for a public purpose and upon payment of compensation to the claimants in accordance with law. The compensation payable to the claimants has to be computed in terms of Sections 23 and 24 of the Act. The market value of the land has to be determined at the date of the publication of the notification under Section 4(1) of the Act, after taking into consideration what is stated under Sections 23(1), 23(1A), 23(2) and excluding the considerations stated under Section 24 of the Act. More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy. Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land. [Para 26] [557-A-F]

4.2. 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data. 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time 'guess' cannot be treated synonymous

to 'conjecture'. 'Guess' by itself may be a statement or result based on unknown factors while 'conjecture' is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se. The concept of 'guesswork' is not unknown to various fields of law. It has been applied in cases relating to insurance, taxation, compensation under the Motor Vehicles Act as well as under the Labour Laws. All that is required from a Court is that such guesswork has to be used with greater element of caution and within the determinants of law declared by the Legislature or by the Courts from time to time. [Paras 27, 28] [557-G-H; 558-A-C]

4.3. Under the Act, as settled by various judgments of this Court, there are different methods of computation of compensation payable to the claimants, for example it can be based upon comparable sale instances, awards and judgments relating to the similar or comparable lands, method of averages, yearly yields with reference to the revenue earned by the land etc. Whatever method of determining the compensation is applied by the court, its result should always be reasonable, just and fair as that is the purpose sought to be achieved under the scheme of the Act. For attaining that purpose, application of some guesswork may be necessary but this principle would have hardly any application in a case of no evidence. In other words, where the parties have not brought on record any evidence, then the court will not be in a position to award compensation merely on the basis of imagination, conjecture etc. [Para 32] [561-C-F]

4.4. The Court may apply some guesswork before it could arrive at a final determination, which is in consonance with the statutory law as well as the principles stated in the judicial pronouncements. The

guesswork has to be used for determination of compensation with greater element of caution and the principle of guesstimation will have no application to the case of 'no evidence'. This principle is only intended to bridge the gap between the calculated compensation and the actual compensation that the claimants may be entitled to receive as per the facts of a given case to meet the ends of justice. It will be appropriate to state certain principles controlling the application of 'guesstimate: (a) Wherever the evidence produced by the parties is not sufficient to determine the compensation with exactitude, this principle can be resorted to and b) Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence. Further, this entire exercise has to be within the limitations specified under Sections 23 and 24 of the Act and cannot be made in detriment thereto. Applying these principles to the facts of the present case, this Court has to take recourse to the 'principle of guesstimation' inasmuch as it is essential for fixation of fair market value of the land which shall be the basis for determining the compensation payable to the claimants. [Paras 33, 34] [561-F-H; 562-A-E]

4.5. All the claimants in the present appeals have primarily relied upon the sale instances shown at serial Nos. 109 and 110. These sale instances have rightly been ignored by the Courts below. Besides the fact that these sale deeds are executed between the members of the family, the claimants had full knowledge of the Government's intention to acquire these lands, for the purpose specified, even prior to issuance of notification under Section 4(1) of the Act. These are reasons enough to doubt the consideration paid in these sale deeds. The SLAO, in his Award, has taken note of 140 sale instances immediately preceding the issuance of Notification under

Section 4(1) of the Act. The Reference Court specifically recorded that the highest value reflected in these 140 sale instances is Rs. 12,55,550.50 per acre, except in sale instances at serial Nos. 109 and 110 produced by the claimants. The claimants did not produce any other evidence except these two sale instances which had been executed between the members of the family and contained unreasonably high price of the land. There is tremendous gap between the prices of the land fetched in all other sale deeds on one hand, the highest being Rs. 12,55,550.50 per acre and that in sale deeds executed by the claimants between themselves on the other hand which is Rs. 34,87,648 per acre, for sales effected within a span of 2-3 days for similarly situated lands in the same village. It certainly arouses suspicion in the mind of the Court as to the intention behind execution of these sale deeds. Ex facie they appear to have been executed to hike up the price of the land just before the issuance of Notification under Section 4(1) of the Act. If considered from the point of view of a reasonable man, all these circumstances clearly fall beyond the ambit of coincidence and appear to have been 'managed' to achieve the end of receiving higher compensation. The sale instances at serial Nos. 109 and 110 produced by the claimants are liable to be ignored for the purposes of fixation of market value of the acquired land as these transactions are sham and lack bona fide. The two exhibits produced by the claimants offend the very essence of the parameters stated under Section 23 of the Act. Thus, the view taken by the Reference Court and the High Court, rejecting these instances as collusive and sham is liable to be sustained. The sale instance shown at serial No. 108 is certainly an exemplar which can be taken into consideration. This is a sale deed executed on 29th November, 1991 where a land admeasuring 0.90 acres has been sold at a rate of Rs.12,55,550.50 per acre. As far as the location and potential of this land is

concerned, it is situated at a distance of 1½ furlong of the acquired land in the same village. It is the case of the claimants in all these appeals that the acquired land is surrounded by developed areas like ITBP Colony on the North and there was a 20 feet wide passage ending on the acquired land. Facilities of post office, electricity, hospital, schools etc. were available in those colonies which are very close to the acquired land. The Reference Courts, in their respective awards, also noticed that heavy construction activity was going on nearby Shimla Road and the value of this land is continuously rising. Another relevant piece of evidence with reference to potential and location of the land is the statement of PW-4, an Architect by profession. He claims to have visited the site and made plans to divide the land in question into plots after making provision for civic amenities, children park etc. In these circumstances, it is difficult to doubt that the land in question has substantial potential and is located adjacent to developed areas. According to this witness, there has been a decreasing trend in the value of the land in that area. The declaration under Section 6 was issued in April, 1992 itself at a time when the prices had started falling. The cumulative effect of the documentary and oral evidence on record is that it is a case of acquisition of land which is situated on a reasonably good location surrounded by developed areas having civic amenities and facilities and further development activity was going on in nearby areas. It was also submitted by the claimants that plotting has already been done on the acquired land and some plots of land have been sold immediately prior to the issuance of the Notification under Section 4(1) of the Act. It is evident that the land acquired had the potential of being developed for residential or institutional purposes and the same was acquired for construction of a Government Polytechnic Institute. Therefore, it is a case where the Court should apply minimal deduction which will meet the ends of

justice and would help in determining just and fair compensation for the land in question. This Court is of the considered view that 10% deduction from the market value of the acquired land would meet the ends of justice. The sale instance at serial No. 108 falls in the Revenue Estate of the same Village and is situated at a distance of 1½ furlong from the acquired land. The acquired land belonging to the claimants forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in absolute terms, is certainly comparable for the purposes of determining market value of the land in question. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. Keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made from the estimated market value of the acquired land. The comparable sale instance under serial No. 108 depicted the fair value of land in that area at the time of issuance of Notification under Section 4(1) of the Act which is Rs.12,55,550.50 per acre. The time gap between this sale instance and issuance of said Notification is merely two months which would hardly call for any increase in the said value but to balance the equities between the parties we would round off the figure to Rs. 13,00,000 per acre. By applying the principle of guesstimate, thus, the market

value of the acquired land is determined at Rs. 13,00,000 per acre as on the date of the issuance of the Notification under Section 4(1) of the Act. Deducting 10% therefrom, it would come to Rs.11,70,000 per acre which will be the compensation payable to the claimants with statutory benefits and interests thereupon in accordance with law. [Paras 35 to 44] [562-F; 563-A-H; 564-A, F-G; 565-C-H; 566-A-H; 567-A-H]

Charan Dass v. Himachal Pradesh Housing & Urban Development Authority **(2010) 13 SCC 398: 2009 (14) SCR 163;** *Thakur Kamta Prasad Singh (Dead) through LRs v. State of Bihar* **(1976) 3 SCC 772: 1976 (3) SCR 585;** *Special Land Acquisition Officer v. Karigowda* **(2010) 5 SCC 708: 2010 (5) SCR 164 and** *Commissioner of Central Excise, Jaipur v. Rajasthan Spinning and Weaving Mills Ltd.* **2007 (12) SCR 703 – referred to.**

Case Law Reference:

(1950) 1 SCR 852	**relied on**	**Para 13**
1997 (3) SCR 1054	**referred to**	**Para 16**
(2004) 8 SCC 270	**referred to**	**Para 16**
2001 (3) SCR 1178	**referred to**	**Para 17, 38**
2003 (6) Suppl. SCR 67	**referred to**	**Para 18, 21**
1991 (1) Suppl. SCR 172	**referred to**	**Para 20, 23**
1995 (6) Suppl. SCR 364	**referred to**	**Para 21**
1996 (3) SCR 307	**referred to**	**Para 21**
1988 (1) Suppl. SCR 531	**referred to**	**Para 21**
1998 (1) SCR 1	**referred to**	**Para 21**
(2003) 12 SCC 642	**referred to**	**Para 22**
2007 (12) SCR 1120	**referred to**	**Para 24**
2009 (14) SCR 163	**referred to**	**Para 24, 28**

1976 (3) SCR 585	**referred to**	**Para 29**
2010 (5) SCR 164	**referred to**	**Para 30**
2007 (12) SCR 703	**referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7496-7497 of 2005 etc.

From the Judgment & Order dated 20.07.2005 of the High Court of Uttaranchal at Nainital in First Appeal No. 920 & 921 of 2001.

WITH

C.A. Nos. 7498-7499 of 2005, 1122 of 2011 & 3613 of 2008.

R.S. Hegde, Girish Ananthamurthy, P.P. Singh, Braj Kishore Mishra, Aparna Jha, Abhishek Yadav, Vikram Patralekh, Satyajit A. Desai, Som Nath Padhan for the Appellants.

Rachna Srivastava, Jitendra Mohan Sharma, Vijay K. Jain for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. By this common judgment, we propose to dispose of the afore-noticed six Civil Appeals as they arise from different judgments of the High Court of Uttaranchal but are result of a common Notification issued under Section 4(1) of the Land Acquisition Act, 1894 (in short the 'Act') and thus are based upon similar facts and documentary and oral evidence.

FACTS:

C. A. Nos.7496-7497 of 2005 and 7498-7499 of 2005

2. On 30th January, 1992, the Government of Uttar Pradesh (now the State of Uttaranchal) issued a Notification

under Section 4(1) of the Act for acquiring some land for a public purpose, namely the construction of Government Polytechnic Institute in the District of Dehradun. This Notification came to be published in the Official Gazette on 22nd February, 1992. On 18th April 1992, declaration under Section 6(1) of the Act was issued which was published in the Official Gazette on 12th May, 1992 identifying the land admeasuring 12.85 acres for acquisition for the said purpose in village Sewala Kalan, Pargana Kendriya Doon, District Dehradun, out of which lands admeasuring 4.58 acres and 3.031 acres belonged to the first and the second claimant respectively. In furtherance to this Notification, possession of the acquired land was taken on 7th July, 1992. The Special Land Acquisition Officer (in short the 'SLAO') pronounced his award on 8th June, 1993. While determining compensation, the SLAO applied belting system to the acquired land and assessed the market value of the first belt admeasuring 0.56 acres at the rate of Rs. 9,78,223.40 per acre, second belt admeasuring 1.38 acres at the rate of Rs. 6,52,482.27 per acre and for the third belt admeasuring 10.91 acres at the rate of Rs. 4,39,362.70 per acre. However, the claimants, being dissatisfied with the award of the SLAO, filed applications under Section 18 of the Act which in turn came to be referred to the Court of competent jurisdiction (hereinafter referred to as the 'Reference Court').

3. The Reference Court, in LA Case No. 386 of 1993, considered the list of 140 sale instances attached with the award of the SLAO. It noticed that the SLAO had relied on sale instance at serial no. 43 related to land admeasuring 0.094 acre for a total consideration of Rs. 92,000 and assessed the market value of acquired land at the rate of Rs. 9,78,723 per acre before applying the belting system. This sale deed was executed on 10th June, 1991 and the land was from the revenue estate of the same village but at some distance from the acquired land. The Reference Court also noticed the evidence of DW 1, Ram Singh, who had stated

that ITBP quarters are located to the north of the acquired land; and to the east of ITBP Colony, is a 20 feet wide passage which ends on the acquired land. A high tension line of 1100 K.V. also runs near the acquired land. This witness admitted that the land in question was full of residential potentialities. Reliance was also placed upon the statements of PW7 and PW8 in regard to the urbanization of the surrounding areas and the potential of the land in question for building construction and residential purposes.

4. Out of those 140 sale instances, sale instance at serial Nos. 109 and 110 are stated to be the sale deeds executed on 26th November, 1991 and 27th November, 1991, which were heavily relied upon by the Reference Court. The Reference Court vide its judgment-cum-award dated 12th May, 1995 held application of belting system improper as entire land was acquired for one purpose, i.e. construction of Government Polytechnic Institute. It determined the market value of the land at the rate of Rs. 6,40,000 per bigha and after applying 20% deduction, enhanced compensation to flat rate of Rs. 5,12,000 per bigha along with other statutory benefits.

5. The State, aggrieved by the enhancement of compensation awarded to the claimants by the Reference Court, preferred appeals being First Appeal Nos. 920-921 of 2001, before the concerned High Court. The High Court vide its judgment dated 20th July, 2005, primarily accepted the findings recorded by the Reference Court on merits and merely raised the deduction from 20% to 33.33% thus awarding the compensation at the rate of ` 4,26,667 per bigha. The High Court recorded a definite finding that the Reference Court was fully justified in setting aside the order of the SLAO applying belting system for determination of compensation in relation to the acquired land. It also did not consider it appropriate to rely upon the sale instances placed on record by the State and practically affirmed the findings of

the Reference Court including finding based upon sale instances at serial Nos. 109 and 110 for determining the market value of the acquired land. The High Court modified the order of the Reference Court only by raising the deduction on account of development charges and fixing of the final amount of compensation as afore-indicated.

6. Against the above judgment of the High Court, Civil Appeal Nos.7498-7499 of 2005 have been preferred by the State of Uttaranchal while Civil Appeal Nos. 7496-7497 of 2005 have been preferred by the claimants.

C.A. No. 1122 OF 2011

7. Civil Appeal No. 1122 of 2011 has been preferred by the State of Uttaranchal against the judgment of the Uttaranchal High Court dated 9th March, 2006 passed in First Appeal Nos. 918 and 919 of 2001. Vide that order the Court had primarily relied upon another judgment of the Division Bench of that Court passed in First Appeal Nos. 920-921 of 2001 (in the case of *State of U.P. through Collector, Dehradun v. Smt. Trishla Jain*) and awarded compensation at the rate of Rs. 4,26,667 per bigha reducing the compensation of Rs. 5,12,000 per bigha as awarded by the Reference Court. The High Court in this case had echoed in entirety the reasoning and compensation awarded by the other Bench in the case of *Trishala Jain* (supra). This judgment of the High Court, impugned in Civil Appeal No. 1122 of 2011, therefore has to be treated at parity for all intents and purposes with the impugned judgment in Civil Appeal Nos. 7496-7497 of 2005 and Civil Appeal Nos. 7498-7499 of 2005.

C.A. No. 3613 of 2008

8. Civil Appeal No. 3613 of 2008 is directed against the judgment of the Uttaranchal High Court dated 11th May, 2006 passed in First Appeal Nos. 60-63 of 2001. It is necessary

for us to notice the facts giving rise to this appeal separately because there are certain distinguishing features with regard to factual matrix as well as evidence of this case. The land in question in this case also forms part of the land admeasuring 12.85 acres sought to be acquired by the Notification dated 30th January, 1992 issued under Section 4(1) of the Act and is covered by the common award passed by the SLAO on 8th June, 1993 awarding the compensation at the same rate as in other cases. The claimants herein made a separate reference under Section 18 of the Act and the Reference Court, in LA Case No. 121 of 1994, awarded compensation at the rate of Rs. 12,50,000 per acre (i.e. Rs. 2,38,095.24 per bigha approximately) in addition to granting other statutory benefits and interests. It needs to be noticed that the two sale instances at serial Nos. 109 and 110, which were the foundation of the judgment pronounced by the Reference Court in other cases, i.e. sale deeds dated 26th November, 1991, and 27th November,1991, had been rejected on the ground that they were not admissible in evidence as neither the vendor nor the vendee had been produced to prove the sale instances in Court. The Reference Court also noticed the contention raised on behalf of the State, i.e. these sale instances were collusive. It will be useful to refer to the relevant part of the judgment of the Reference Court which reads as under:

> "The respondent No.2 have (sic) taken a special stand in his written statement that the sale deed executed by Sri Viresh Jain was forged and fictitious and collusive and no reliance can be placed on such a sale deed. He has further argued that the judgment passed in L.A. Case No. 386 of 1993 *Smt. Trishla Jain vs. Collector and another* in such circumstances cannot be made the basis for awarding compensation in the present case. The rtno. 2 has filed voluminous documents in support of their case that the sale deed executed by Sri Viresh Jain were collusive and were made only to create evidence of hither

compensation. He has further filed various documents, which supports the contention of the respondent no. 2 that Sri Dinesh Jain and Sri Viresh Jain themselves offered their 100 bigha of land in village phoolsani for the purpose of Government polytechnic. He has also filed documents and the copy of the Selection Committee in which Sri Manoj Kumar Jain, Upkhand Adhikari, U.S.E.B. was a member, Sri Manoj Kumar Jain was examined as a witness. He was admitted that he is the brother in law of Sri Dinesh Jain and Sri Viresh Jain. He has also admitted that he was member of the selection committee which was to select the land for Government polytechnic. Various other documents were also filed by the respondent no. 2 vide which the signatures of Jinendra Kumar Jain and Smt. Veena Kumar Jain were identified by Sri Dinesh Jain. His sole concentration was that the sale deed executed by Sri Viresh Jain was collusive and since Sri Manoj Kumar Jain was one of the member of the selection committee appointed for the acquisition of land for Government Polytechnic, the information was leaked to Sri Viresh Jain and, therefore, they manipulated these two sale deeds by transferring the land to their near relations say the sister and the son of his BUA without passing valid consideration. The learned counsel for the respondent no. 2 has placed reliance on the law laid down by the Hon'ble Supreme Court in AIR 1951 page (sic) 16 *Yashvant Deoro vs. Jai Chand Ram Chand*. It is correct that the fraudulent motive or design is not capable of direct proof in most of the cases. Such intention could only be inferred. It is worthy to point out that the two sale deeds relied upon by the claimants executed by Sri Viresh Jain in favour of Sri Jinendra Kumar Jain and Smt. Veena Kumar Jain have not been proved in accordance with law as laid down by the Hon'ble Supreme Court in as much as vendee or vendor of these sale deeds or any attesting witnesses have not been produced in evidence. Therefore, they cannot be

made the basis of awarding of compensation in the present case. The judgment in L.A. Case No. 386 of 1993 *Smt. Trishala Jain v. Collector and another* is under appeal and the entire matter with regard to the alleged collusive sale deed is yet to be thrashed out. Therefore, it is not fair and justified for this court to comment upon these sale deeds. For the purpose of decision of this case it is only sufficient, if these two sale deeds are discarded and if they are not considered and not made the basis for awarding compensation in these cases. Therefore, it is held that these two sale deeds cannot be made basis for awarding any compensation, in the present case and the argument of the claimants fails in this respect."

Having held thus, the Reference Court relied upon the sale instance at serial No. 108, out of 140 sale instances, of the list produced and proved by the SLAO. As per the sale instance at serial No. 108, a land admeasuring 0.90 acre was sold at the rate of Rs. 12,55,550.50 per acre on 29th November, 1991. Examining this document with other evidence on record, particularly statement of DW2, the Reference Court finally awarded compensation at the rate of Rs. 12,50,000 per acre without applying any deduction.

The claimants, aggrieved by the above judgment of the Reference Court dated 6th February, 2001, preferred an appeal before the Uttaranchal High Court. The High Court, vide its judgment dated 11th May, 2006, while referring to the different judgments of this Court as well as of different High Courts, opined that the Reference Court had fallen in error of law in not applying, to a certain extent, deduction from the market value determined by that court in accordance with law. The High Court did not interfere with the determination of the market value of the acquired land but applied a deduction of 33.33% on such value and finally awarded compensation to the claimants at the rate of Rs. 8,33,334 per acre with other

statutory benefits and interests thereupon. Dissatisfied with this judgment of the High Court reducing the compensation awarded by the Reference Court, the claimants-Krishna Devi and others have filed the present appeal before this Court.

Questions of Fact and Law that fall for Determination:

9. On examination of the present appeals, the following common questions arise for consideration of this Court:

I. Whether or not the belting system ought to have been applied for determination of fair market value of the acquired land?

II. What should be the just and fair market value of the acquired land on the date of issuance of notification under Section 4 of the Act?

III. Whether in the facts and circumstances of the present case there ought to be any deduction after determining the fair market value of the land?

IV. What compensation and benefits are the claimants entitled to?

Question No. 1.

10. As already noticed, the SLAO, in all cases, while giving its award had applied the belting system and categorizing the land into three different categories had awarded the compensation accordingly. However, the Reference Court had held that the land as a whole was similarly placed and was surrounded by developed areas and it was to be used for one purpose, i.e. construction of Government Polytechnic Institute, thus there was no question of applying the belting system. Keeping in view the documentary and oral evidence on record, the Reference Court set aside the belting system and awarded uniform compensation to all the claimants. This finding of the

Reference Court was upheld by the High Court in the impugned judgments. The correctness of this concurrent view has also not been questioned by any of the parties in the present appeals before us. Therefore, concurrent finding recorded by the Courts below which remained unchallenged before this Court need not be disturbed by this Court.

Question No. II

11. Now, we have to examine the most important question arising in the present appeal as to how this Court should determine the fair market value of the acquired land in the given facts and circumstances. First of all, we need to refer to the evidence that was produced by the parties in support of their respective claims. The principal evidence relied upon by the claimants in all these cases are the two sale instances shown at serial Nos. 109 and 110. These were executed by Shri Viresh Jain, in favour of Jitendra Kumar and Smt. Veena Kumari, on 26th November, 1991 and 27th November, 1991 respectively. These lands are situated in Khasra No. 39/2, a part of which was acquired under the same Notification. Under these sale deeds areas of 440.8 sq. yards and 283.3 sq. yards were sold at the rate of Rs. 32,72,603.49 and Rs. 34,87,648.30 per acre respectively. The claimants in different cases examined themselves to prove these sale instances as a whole, as they are the main witnesses and the sale instances were also executed between themselves. It needs to be noticed that one of the purchasers and the seller are the claimants in the present appeals and the other purchaser is their close relative. According to the claimants, they were entitled to compensation on the basis of these two sale instances. The claimants have also brought on record documents, viz., Exh.11 and Exh.12, which are the agreements signed between Trishala Jain and one Vikram Singh Bangari, executed on 23rd April, 1991 for the purpose of leveling of the land in question. Shri Bangari was examined as PW 6 who submitted that he had completed the leveling work on or

before 3rd February, 1992. Further, the testimony of PW7, according to the claimants, clearly shows that there was urbanization all over the periphery of municipal limits and building activities were increased even beyond the municipal limits. Claimants have also relied upon other evidence including the cross examination of DW 1, Ram Singh, who admitted that these sale deeds were unlikely to have been executed at higher rate for enhancing the rate of compensation of the acquired land. As we have already noticed, this witness also gave the statement that towards the North of the acquired land, there were several quarters of ITBP and there was 20 feet wide passage which ended on the acquired land. He further stated that some shops are located in the South of the acquired land across the road and facilities of schools and post office are also available near the acquired land. On the backdrop of this entire evidence, the claimants contended that the deduction applied by the High Court is not justified and their claim for compensation in line with the two sale instances proved by them on record is to be upheld. According to them, the sale instances produced by the SLAO were far away from the acquired land and were not relevant or comparable instances.

12. On the other hand, the SLAO, in his award, had considered details of 140 sale instances executed over a period from the Revenue Estate of the same Village. Most of these sale instances were found to be not relevant by the Reference Court. The SLAO had relied upon the sale deed at Serial No.43 in which the land admeasuring 0.094 acres had been sold by a registered sale deed on 10th June, 1991 for a sum of `92,000 giving the value of the land at the rate of Rs. 9,78,732.40 per acre, and determined the market value of the land acquired at that rate. When the matter came up before the Reference Court for consideration, in all other references except Reference No. 121 of 1994 titled as *Chamel Singh v. Collector, Dehradun,* the Reference Court had relied upon the two sale instances produced by the

claimants and awarded compensation at the rate of Rs. 5,12,000 per bigha which was later reduced by the High Court to Rs. 4,26,667 per bigha. In the case of *Chamel Singh* (supra), the Reference Court rejected these two sale instances at serial Nos. 109 and 110 as vendor or vendee had not been examined. It also noticed the allegation of the State that those sale deeds were not bona fide and have been executed only with the intention to enhance the value of the acquired land and as such declined to rely on them in its judgment. The Reference Court in that case also rejected the reliance placed by SLAO upon sale deed at serial No. 43 for determining the market value of acquired land and instead relied upon the sale instance at serial No. 108 where the land admeasuring about 0.90 acres was sold on 29th November, 1991 at the rate of Rs. 12,55,550.50 per acre. After discussing the evidence at some detail, the Reference Court awarded the compensation to the claimants at the rate of Rs.12,50,000 per acre without making any deduction from such market value. In appeal the High Court, however, applied a deduction of 33.33% and awarded compensation to the claimants at the rate of Rs. 8,33,334 per acre. From the above factual matrix the first question that requires consideration of this Court is whether the Reference Court was justified in law with reference to the facts on record in declining to consider the two sale instances produced by the claimants at serial Nos. 109 and 110. In other words, was it justified on part of the Reference Court to keep them outside the zone of consideration while determining the market value of the acquired land?

13. Firstly, it cannot be disputed that both the seller and the purchaser in sale instances at serial Nos. 109 and 110 are either claimants in different claim petitions or belong to the same family. The sale deed is stated to be executed by Sh. Viresh Jain in favour of Jitender Kumar Jain and Smt. Veena Kumari Jain (sister of Sh. Viresh Jain). Veena Kumari Jain has described herself as wife of M. Kumar who appears to be Sh. Manoj Kumar Jain, who was examined as a witness

as he was a Member of the Selection Committee dealing with the acquisition of the land for the purpose of construction of Government Polytechnic Institute. In his examination he admitted that he was brother-in-law of Sh. Viresh Jain. As a member of that Committee he had a definite role to play in selection of the land for that purpose. In other words, the claimants had full knowledge of acquisition of land and as well as the purpose for which the said land was sought to be acquired. With respect we reiterate the view expressed by this Court in the case of *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* [(1950) 1 SCR 852] that a fraudulent move or design is not capable of direct proof in most cases; it can only be inferred. Under such circumstances, the Court has to take a general view keeping in mind the facts and circumstances of the case with particular reference to the intent of parties, their action in furtherance thereto and the object sought to be achieved by them.

14. It is not in dispute that these sale deeds have been executed in favour of the family members or persons known to the claimants. These are circumstances and evidence which clearly indicate that the sale instances relied upon by the claimants are result of collusion between these parties. There was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation. These two sale instances which have been executed just about two months prior to the issuance of the notification under Section 4(1) stand out as transactions which are sham, collusive, lack bona fide and have been executed with the intention to raise the price of the land in question with the pretence of it being actual market value. We are unable to find any infirmity in this view of the Reference Court in LA Case No. 121 of 1994 which has rightly been upheld by the High Court.

15. It will be appropriate at this stage to notice that in C.A. Nos. 7498-99 of 2005 a specific ground has been taken by

the State that the High Court erred in not considering the application of State filed under Order XLI Rule 27 of the Code of Civil Procedure, 1908 during pendency of First Appeal Nos. 920 and 921 of 2000 to lead additional evidence to show that the sale deeds relied upon by the Reference Court in LA Case No. 386 of 1993 and accepted by the High Court were collusive and the claimants had prior knowledge of the impending acquisition proceedings. This additional evidence is basically related to the facts which have already been mentioned by us while discussing the facts of C.A No. 3613 of 2008. In that application, it was specifically stated that Smt. Veena Kumari is sister of one of the claimants, i.e. Viresh Jain and she is wife of Manoj Kumar Jain, who was member of the Selection Committee aforereferred and these facts had duly been verified from the local police station vide letter dated 11th September, 1996. However, this application appears to have been rejected by the High Court without recording any appropriate reasons in support thereof. In view of the peculiar fact that the Reference Court, in its award in L.A. Case No. 121 of 1994 which is subject matter before us in C.A. No. 3613 of 2008, has noticed this entire evidence in great detail, it can hardly be contended that the application has rightly been rejected by the High Court. In our opinion, the High Court should have allowed this application particularly when the entire evidence sought to be produced by way of additional evidence challenged the very basis of the judgment of the High Court. In view of these peculiar facts we need not discuss this issue at any greater length and according to us the facts stated in that application can be examined by this Court as they are already part of the judicial record in C.A. No. 3613 of 2008, which has been listed for hearing along with other appeals and all these appeals have been heard together.

16. Corollary to the discussion under this head is the question that whether the Reference Court, in LA Case No. 121 of 1994, was right in law in rejecting the two sale instances for the reason that vendor or vendee had not been

examined to prove them in Court and thus these sale instances were inadmissible in evidence. While recording such a finding the Reference Court had relied upon the judgment of this Court in the case of *A.P. State Road Transport Corporation, Hyderabad v. P. Venkaiah,* [(1997) 10 SCC 128]. This issue need not detain us any further as it is no longer res integra that the judgment of this Court in the above case has been overruled by a Constitution Bench of this Court in the case of *Cement Corporation of India v. Purya,* [(2004) 8 SCC 270]. Thus, in our view, these two sale instances cannot be rejected on that ground after the dictum of the Constitution Bench in the above case. Though, this observation is subject to the other findings recorded by us in this judgment.

17. A Bench of this Court in the case of Chimanlal Hargovinddas (supra) stated that the Court while tackling the problem of valuation of the land under acquisition should necessarily make some general observations. Explaining the factors, which must be etched on the mental screen while performing such exercise, this Court specifically held, "only genuine instances have to be taken into consideration (sometimes instances are rigged up in anticipation of acquisition of land)". Further, this Court in the case of State of Haryana v. Ram Singh [(2001) 6 SCC 254], has reiterated this principle and held, "It is open to the Court to accept the certified copy as the reliable evidence and without examining parties to the documents. This does not however, preclude the Court from rejecting the transaction itself as being malafide or sham provided such a challenge is already before the Court".

Question No. III

18. The law with regard to applying the principle of deduction to the determined market value of the acquired land is quite consistent, though, of course, the extent of deduction

has varied very widely depending on the facts and circumstances of a given case. In other words, it is not possible to state precisely the exact deduction which could be made uniformly applicable to all the cases. Normally the rule stated by this Court consistently, in its different judgments, is that deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects. It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land. In addition thereto, deduction can also be applied on account of wastage of land. This Court in the case of *Land Acquisition Officer, Kammarapally Village v. Nookala Rajamallu* [(2003) 12 SCC 334], had also observed that it is advisable to apply some deduction on account of exemplars of plots of smaller size relied upon by way of evidence by the parties. This is the normal rule stated by the Court but is not free of exceptions.

19. Similarly, it is neither possible nor appropriate to stricto sensu define a class of cases where the Court would not apply any deduction. This again would be dependant upon the facts and circumstances of a given case. The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction'. Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of 'no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are exceptional and/or rare as normally the lands which are

proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly developed lands at the time of issuance of notification under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question.

20. This Court in the case of *Bhagwathula Samanna & Ors v. Special Tahsildar & Land Acquisition Officer,* [(1991) 4 SCC 506], stated that it is permissible to take into account of exemplars of even small developed plots for determining value of a large tract of land acquired, if the latter is also fully developed with all facilities requiring little or no further development. In the facts and circumstances of that case the Court felt that it was not appropriate to resort to deduction of 1/3rd value of the comparable sale instances as development charges. The Court reiterated the general rule that if market value of a large property is to be fixed on the basis of a sale transaction for smaller property, a deduction is to be made taking into consideration the expenses required for development of that larger tract and make smaller plots within that area and held as under :

> "8. In awarding compensation in acquisition proceedings, the Court has necessarily to determine the market value of the land as on the date of the relevant Notification. It is useful to consider the value paid for similar land at the material time under genuine transactions. The market value envisages the price which a willing purchaser may pay under bona fide transfer to a willing seller. The land value can differ depending upon the extent and nature of the land sold. A fully developed small plot in an important locality may fetch a higher value than a larger area in an undeveloped condition and situated in a remote locality. By comparing the price shown in the transactions all variables have to be taken into consideration. The transaction in regard to smaller property cannot, therefore,

> be taken as a real basis for fixing the compensation for larger tracts of property. In fixing the market value of a large property on the basis of a sale transaction for smaller property, generally a deduction is given taking into consideration the expenses required for development of the larger tract to make smaller plots within that area in order to compare with the small plots dealt with under the sale transaction. This principle has been stated by this Court in *Tribeni Devi's* case (supra).
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> 11. The principle of deduction in the land value covered by the comparable sale is thus adopted in order to arrive at the market value of the acquired land. In applying the principle it is necessary to consider all relevant facts. It is not the extent of the area covered under the acquisition, the only relevant factor. Even in the vast area there may be land which is fully developed having all amenities and situated in an advantageous position. If smaller area within the large tract is already developed and suitable for building purposes and have in its vicinity roads, drainage, electricity, communications etc. then the principle of deduction simply for the reason that it is part of the large tract acquired, may not be justified.
>
> 13. The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and in given circumstances it would be permissible to take into account the price fetched by the small plots of land. If the larger tract of land because of advantageous position is capable of being used for the purpose for which the smaller plots are used and is also situated in a developed area with little or no requirement of further development, the principle of deduction of the value for purpose of comparison is not warranted."

It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as

its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits.

21. This Court, depending on the facts and circumstances of each given case, has taken the view that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development. Reference can be made to the cases of *K.S. Shivadevamma v. Assistant Commissioner and Land Acqusition Officer* [(1996) 2 SCC 62], *Ram Piari v. Land Acquisition Collector, Solan* [(1996) 8 SCC 338], *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* [(1988) 3 SCC 751], *Hasanali Walimchand (Dead) by L` v. State of Maharashtra* [(1998) 2 SCC 388].

In *K.S. Shivadevamma* (supra), this Court held as under:

> "10. It is then contended that 53% is not automatic but depends upon the nature of the development and the stage of development. We are inclined to agree with the learned counsel that the extent of deduction depends upon development need in each case. Under the Building Rules 53% of land is required to be left out. This Court has laid as a general rule that for laying the roads and other amenities 33-1/3% is required to be deducted. Where the development has already taken place, appropriate deduction needs to be made. In this case, we do not find any development had taken place as on that

> date. When we are determining compensation under Section 23(1), as on the date of notification under Section 4(1), we have to consider the situation of the land development, if already made, and other relevant facts as on that date. No doubt, the land possessed potential value, but no development had taken place as on the date, In view of the obligation on the part of the owner to hand over the land to the City Improvement Trust for roads and for other amenities and his requirement to expend money for laying the roads, water supply mains, electricity etc., the deduction of 53% and further deduction towards development charges @ 33-1/3%, ordered by the High Court, was not illegal."

Thus, a deduction of 53% was given on account of Building Rules and a further deduction of 33.33% on account of development charges on the fact of that case, amounting to a total of 86.33% deduction. The above view was reiterated in the case of *Nookala Rajamallu* (supra).

22. On similar lines, this Court in the case of *V. Hanumantha Reddy (Deceased) by LRS v. Land Acquisition Officer & Mandal R. Officer* [(2003) 12 SCC 642], while considering that the acquired land was adjacent to developed land, held that neither its high potentiality nor its proximity to a developed land can be a ground for not deducting the development charges and that normally 1/3rd deduction could be allowed.

23. Though in the case of *Bhagwathula Samanna* (supra) referring to the peculiar facts of the case, this Court observed that it was not necessary to make any deduction, the consistent view taken by this Court is that normally deduction has to be made. In the cases above mentioned this Court has directed to make deduction ranging from 20% to 86.33%.

24. The learned Counsel for the claimants relied upon the judgment of this Court in the case of *Atma Singh v. State of*

Haryana [(2008) 2 SCC 568], to contend that even if exemplars of small plots are tendered in evidence, the deduction cannot be more than 10%. He contended that the Reference Court as well as the High Court both have fallen in error of law in applying the deduction of 20% and 33.33% respectively. In this judgment, this Court clearly observed that the price fetched for small plots cannot form safe basis for valuation of large tracts of land as substantial area is used for development of sites by providing various facilities for which expenses are also incurred; such amount, which normally would vary from 20% onwards depending upon the facts of each case, should be deducted. However, in that case the land had been acquired for setting up a sugar factory which, for its efficient running, may also require part of the land to be used for construction of residential colonies for the staff working in the factory. The sugar factory that was sought to be constructed on the acquired land was to carry on its business to make profits. The Court noticed that earlier the by-products of a sugar factory like molasses were treated as waste and its disposal itself was a problem. However, with the passage of time and scientific developments, such by-products are being used for production of Alcohol and Ethanol which added to the profits. It was in these circumstances that Court was of the view that it was not a case for higher deduction and discounted only 10% from the determined market value of the acquired land. Thus the claimants cannot derive any advantage to contend that there should not be any deduction in this case. Reliance by them was also placed upon the judgment of this Court in the case of Charan Dass v. Himachal Pradesh Housing & Urban Development Authority [(2010) 13 SCC 398]. In that case the Court was concerned with the question that whether deduction of 40% from the market value determined by the High Court towards development charges was justified or not. This Court held that where the acquired land falls in the amidst of an already developed land with amenities of roads, electricity etc., deduction on this account may not be warranted. At the same

time it also held that where all civic and other amenities are yet to be provided to make the land suitable for building purposes or when under the local building regulations setting apart some portion of the lands for sanctioning common facilities is mandatory, an appropriate deduction may be justified. Referring to the facts of that case, this Court permitted deduction of 30% as development charges from the market value of the land.

25. In the present case, there is evidence on record to show that plotting has been done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities. It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction'. It also cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land. The claimants, on whom the onus lies to prove inadequacy of compensation have not even stated that whether under the relevant laws they are expected to leave any part of their land open when they are permitted to raise construction on the land in question. Under these circumstances, we are unable to find any infirmity in the approach of the High Court in applying the principle of deduction. In our opinion a deduction of 10% from the market value on account of development charges and other possible expenditures would be justifiable and called for in the facts and circumstances of the present case.

Question No. IV:

Determination of Compensation

Application of principle of guesstimate for determining the amount of compensation to be awarded for the land acquired under the Act

26. Acquisition of land is an act falling in the purview of eminent domain of the State. It essentially relates to the concept of compulsory acquisition as opposed to voluntary sale. It is trite that no person can be deprived of his property save by authority of law in terms of Article 300A of the Constitution of India. The provisions of the Act provide a complete mechanism for 'deprivation of property in accordance with the law' as stated under the Act. Justifiability and fairness of such compensation is subject to judicial review within the confines of the four corners of the Act. Once the lands are acquired under the Act, the persons interested therein are entitled to compensation as per the provisions of the Act. Thus, in the present case the land in question has been acquired under the provisions of a law which specifically provide that acquisition can only be for a public purpose and upon payment of compensation to the claimants in accordance with law. The compensation payable to the claimants has to be computed in terms of Sections 23 and 24 of the Act. The market value of the land has to be determined at the date of the publication of the notification under Section 4(1) of the Act, after taking into consideration what is stated under Sections 23(1), 23(1A), 23(2) and excluding the considerations stated under Section 24 of the Act. More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy. Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land.

27. 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data. 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time 'guess' cannot be treated synonymous to 'conjecture'. 'Guess'

by itself may be a statement or result based on unknown factors while 'conjecture' is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se.

28. The concept of 'guesswork' is not unknown to various fields of law. It has been applied in cases relating to insurance, taxation, compensation under the Motor Vehicles Act as well as under the Labour Laws. All that is required from a Court is that such guesswork has to be used with greater element of caution and within the determinants of law declared by the Legislature or by the Courts from time to time. In the case of *Charan Dass* (supra) this Court on the use of guesswork for determining compensation, has held as under:-

> "10. Section 15 of the Act mandates that in determining the amount of compensation, the Collector shall be guided by the provisions contained in Sections 23 and 24 of the Act. Section 23 provides that in determining the amount of compensation to be awarded for the land acquired under the Act, the Court shall, inter alia, take into consideration the market value of the land at the date of the publication of the Notification under Section 4 of the Act. The Section contains the list of positive factors and Section 24 has a list of negatives, vis-a-vis the land under acquisition, to be taken into consideration while determining the amount of compensation. As already noted, the first step being the determination of the market value of the land on the date of publication of Notification under Sub-section (1) of Section 4 of the Act. One of the principles for determination of the market value of the acquired land would be the price that a willing purchaser would be willing to pay if it is sold in the open market at the time of issue of Notification under Section 4 of the Act. But finding direct evidence in this behalf is not an easy task and, therefore, the Court has to take recourse

to other known methods for arriving at the market value of the land acquired. One of the preferred and well accepted methods adopted for ascertaining the market value of the land in acquisition cases is the sale transactions on or about the date of issue of Notification under Section 4 of the Act. But here again finding a transaction of sale on or a few days before the said Notification is not an easy exercise. In the absence of such evidence contemporaneous transactions in respect of the lands, which have similar advantages and disadvantages is considered as a good piece of evidence for determining the market value of the acquired land. It needs little emphasis that the contemporaneous transactions or the comparable sales have to be in respect of lands which are contiguous to the acquired land and are similar in nature and potentiality. Again, in the absence of sale deeds, the judgments and awards passed in respect of acquisition of lands, made in the same village and/or neighbouring villages can be accepted as valid piece of evidence and provide a sound basis to work out the market value of the land after suitable adjustments with regard to positive and negative factors enumerated in Sections 23 and 24 of the Act. *Undoubtedly, an element of some guess work is involved in the entire exercise, yet the authority charged with the duty to award compensation is bound to make an estimate judged by an objective standard.*

(emphasis supplied)

29. Even in the case of *Thakur Kamta Prasad Singh (Dead) through LRs v. State of Bihar* [(1976) 3 SCC 772], this Court had held that there is an element of guesswork inherent in most cases involving determination of the market value of the acquired land and observed as under:

"6. Section 23 of the Act provides that in determining the

amount of compensation to be awarded for land acquisition under the Act the court shall inter alia take into consideration the market value of the land at the date of the publication of the notification under Section 4 of the Act. Market value means the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when laid out in the most advantageous manner excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired. In considering market value the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. There is an element of guesswork inherent in most cases involving determination of the market value of the acquired land, but this in the very nature of things cannot be helped. The essential thing is to keep in view the relevant factors prescribed by the Act. If the judgment of the High Court reveals that it has taken into consideration the relevant factors, its assessment of the fair market value of the acquired land should not be disturbed. No such infirmity has been brought to our notice as might induce us to disturb the finding of the High Court. The appeal consequently fails and is dismissed but in the circumstances without costs."

30. Similar view was taken by another Bench of this Court in the case of *Special Land Acquisition Officer v. Karigowda* [(2010) 5 SCC 708] where this Court held, "the Court is entitled to apply some amount of reasonable guesswork to balance the equities and fix a just and fair market value in terms of the parameters specified under Section 23 of the Act."

31. The observations made by this Court in a case under the Central Excise Valuation Rules, 1975 titled as

Commissioner of Central Excise, Jaipur v. Rajasthan Spinning and Weaving Mills Ltd. [2007 (12) SCR 703], can be aptly referred to at this stage wherein this Court had held that valuation is not an exact science and some amount of guesswork exists in valuation. Different methods for valuation are prescribed by Valuation Rules which may be applied by the Department but it has to be ultimately ascertained by applying the rule of convergence, the estimated ad valorem value of which would constitute the base of the assessable value.

32. Under the Act, as settled by various judgments of this Court, there are different methods of computation of compensation payable to the claimants, for example it can be based upon comparable sale instances, awards and judgments relating to the similar or comparable lands, method of averages, yearly yields with reference to the revenue earned by the land etc. Whatever method of determining the compensation is applied by the court, its result should always be reasonable, just and fair as that is the purpose sought to be achieved under the scheme of the Act. For attaining that purpose, application of some guesswork may be necessary but this principle would have hardly any application in a case of no evidence. In other words, where the parties have not brought on record any evidence, then the court will not be in a position to award compensation merely on the basis of imagination, conjecture etc.

33. These precedents clearly demonstrate that the Court may apply some guesswork before it could arrive at a final determination, which is in consonance with the statutory law as well as the principles stated in the judicial pronouncements. As already noticed, the guesswork has to be used for determination of compensation with greater element of caution and the principle of guesstimation will have no application to the case of 'no evidence'. This principle is only intended to bridge the gap between the calculated compensation and the

actual compensation that the claimants may be entitled to receive as per the facts of a given case to meet the ends of justice. It will be appropriate for us to state certain principles controlling the application of 'guesstimate:

(a) Wherever the evidence produced by the parties is not sufficient to determine the compensation with exactitude, this principle can be resorted to.

(b) Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence. Further, this entire exercise has to be within the limitations specified under Sections 23 and 24 of the Act and cannot be made in detriment thereto.

34. Applying these principles to the facts of the present case, we have to take recourse to the 'principle of guesstimation' inasmuch as it is essential for fixation of fair market value of the land which shall be the basis for determining the compensation payable to the claimants. Now, we will discuss the evidence led by the parties in that behalf.

35. All the claimants in the present appeals have primarily relied upon the sale instances shown at serial Nos. 109 and 110. These sale instances were not relied upon by the SLAO while making the award and were also rejected by the Reference Court in LA Case No.121 of 1994. This view of the Reference Court was upheld by the High Court vide its judgment in First Appeal Nos. 60-63 of 2001 which is subject matter of the appeal before this Court in C.A. No. 3613 of 2008. We have already noticed that as per these sale instances the value of the land comes to a rate of Rs. 32,72,603 and Rs. 34,87,648 per acre respectively. While accepting the concurrent view of the Reference Court and the High Court subject matter of CA No. 3613 of 2008, we have already held that these sale instances are liable to be ignored

and have rightly been ignored by the Courts below. Besides the fact that these sale deeds are executed between the members of the family, the claimants had full knowledge of the Government's intention to acquire these lands, for the purpose specified, even prior to issuance of notification under Section 4(1) of the Act through Mr. M.K. Jain. These are reasons enough to doubt the consideration paid in these sale deeds.

36. The SLAO, in his Award, has taken note of 140 sale instances immediately preceding the issuance of Notification under Section 4(1) of the Act. The Reference Court, in LA Case No. 121 of 1994, specifically recorded that the highest value reflected in these 140 sale instances is Rs. 12,55,550.50 per acre, except in sale instances at serial Nos. 109 and 110 produced by the claimants. It is interesting to note that the claimants did not produce any other evidence except these two sale instances which had been executed between the members of the family and contained unreasonably high price of the land. There is tremendous gap between the prices of the land fetched in all other sale deeds on one hand, the highest being Rs. 12,55,550.50 per acre and that in sale deeds executed by the claimants between themselves on the other hand which is Rs. 34,87,648 per acre, for sales effected within a span of 2-3 days for similarly situated lands in the same village. It certainly arouses suspicion in the mind of the Court as to the intention behind execution of these sale deeds. Ex facie they appear to have been executed to hike up the price of the land just before the issuance of Notification under Section 4(1) of the Act. If considered from the point of view of a reasonable man, all these circumstances clearly fall beyond the ambit of coincidence and appear to have been 'managed' to achieve the end of receiving higher compensation. In light of these facts and the reasons already recorded, we have no hesitation in holding that the sale instances at serial Nos. 109 and 110 produced by the claimants are liable to be ignored for the purposes of fixation of market value of the acquired land as these transactions are

sham and lack bona fide.

37. The SLAO, in his award had relied upon sale instance shown at serial No. 43 and had therefore determined the market value of the land at the rate of ` 9,78,723.40 per acre (i.e. Rs. 1,86,423.50 per bigha approximately). The compensation awarded on the basis of the above market value and by applying belting system was not accepted by the Reference Court. The Reference Court in LA Case No. 121 of 1994, instead relied upon sale deed at serial No. 108 where the land was sold at the rate of Rs. 12,55,550.50 per acre on 29th November, 1991, i.e. even subsequent to the sale instances relied upon by the claimants. The Reference Court had therefore awarded compensation at the rate of Rs. 12,50,000 per acre which was reduced by the High Court to Rs. 8 ,33,334 after applying a deduction of 33.33%.

38. The Reference Court, in LA Case Nos. 386 of 1993, had determined the market value of the land at a rate of Rs. 6,40,000 per bigha (i.e. Rs. 33,60,000 per acre approximately) and after applying a deduction of 20% awarded compensation at the rate of Rs. 5,12,000 per bigha. This was reduced further by the High Court by increasing the deduction from 20% to 33.33% and therefore awarding a sum of Rs. 4,26,667 per bigha (i.e. ` 22,40,001.80 per acre) as compensation. The two exhibits produced by the claimants were the sole basis for awarding compensation to the claimants in this line of cases. These exhibits offend the very essence of the parameters stated under Section 23 of the Act as defined by this Court in the case of Ram Singh (supra). Thus, the view taken by the Reference Court and the High Court, which is subject matter of C.A. No. 3613 of 2008, rejecting these instances as collusive and sham is liable to be sustained.

39. The judgment of the Reference Court and that of the High Court in these cases, accepting the sale instances under serial Nos. 109 and 110, cannot be sustained in law and is liable to be set aside. However, as it appears from the record

the earlier judgments of the Division Benches of the High Court in First Appeal Nos. 920-921 of 2001, dated 20th July, 2005, and in First Appeal Nos. 918-919 of 2001, dated 09th March, 2006 were not brought to the notice of the Division Bench of the High Court which pronounced the judgments in First Appeal Nos. 60-63 of 2001, dated 11th May, 2006.

40. Now, after we have rejected the sale instances at serial Nos. 109 and 110, we have to consider what compensation the claimants are entitled to receive in accordance with other evidence on record. The sale instance shown at serial No. 108 is certainly an exemplar which can be taken into consideration. This is a sale deed executed on 29th November, 1991 where a land admeasuring 0.90 acres has been sold at a rate of Rs. 12,55,550.50 per acre. As far as the location and potential of this land is concerned, we may refer straightaway to the award of the Reference Court, in LA Case No. 121 of 1994, where it referred to the statement of PW1, Sh. Gyan Swarup, stating that the land which was subject matter of this sale deed is situated at a distance of 1½ furlong of the acquired land in the same village. It is the case of the claimants in all these appeals that the acquired land is surrounded by developed areas like ITBP Colony on the North and there was a 20 feet wide passage ending on the acquired land. Facilities of post office, electricity, hospital, schools etc. were available in those colonies which are very close to the acquired land. The Reference Courts, in their respective awards, have also noticed that heavy construction activity was going on nearby Shimla Road and the value of this land is continuously rising.

41. Another relevant piece of evidence with reference to potential and location of the land is the statement of PW-4 Girdhari Lal Arora, noticed in the judgment of the Reference Court in L.A. Case No. 386 if 1993, who is an Architect by profession. He claims to have visited the site and made plans to divide the land in question into plots after making provision

for civic amenities, children park etc. In these circumstances, it is difficult to doubt that the land in question has substantial potential and is located adjacent to developed areas. He further stated, “In the year 1992 the value of the land around, the acquired land was ` six to 6.50 lacs per bigha and thereafter there had been a slump in the prices of the land”. Statement of this witness has to be given its due value as nothing controversial appears to have come in evidence in his cross-examination. According to this witness, there has been a decreasing trend in the value of the land in that area. The declaration under Section 6 was issued in April, 1992 itself at a time when the prices had started falling.

42. The cumulative effect of the documentary and oral evidence on record is that it is a case of acquisition of land which is situated on a reasonably good location surrounded by developed areas having civic amenities and facilities and further development activity was going on in nearby areas. It was also submitted by the claimants that plotting has already been done on the acquired land and some plots of land have been sold immediately prior to the issuance of the Notification under Section 4(1) of the Act. It is evident that the land acquired had the potential of being developed for residential or institutional purposes and as already noticed, the same was acquired for construction of a Government Polytechnic Institute. Therefore, it is a case where the Court should apply minimal deduction which will meet the ends of justice and would help in determining just and fair compensation for the land in question. We are of the considered view that 10% deduction from the market value of the acquired land would meet the ends of justice.

43. It is not in dispute before us that sale instance at serial No. 108 falls in the Revenue Estate of the same Village and as recorded by the Reference Court, in LA Case No. 121 of 1994, it is situated at a distance of 1½ furlong from the acquired land. The acquired land belonging to the claimants

forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in absolute terms, is certainly comparable for the purposes of determining market value of the land in question. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. We have already held that keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made from the estimated market value of the acquired land.

44. The comparable sale instance under serial No. 108 depicted the fair value of land in that area at the time of issuance of Notification under Section 4(1) of the Act which is Rs. 12,55,550.50 per acre. The time gap between this sale instance and issuance of said Notification is merely two months which would hardly call for any increase in the said value but to balance the equities between the parties we would round off the figure to Rs. 13,00,000 per acre. By applying the principle of guesstimate, thus, we determine the market value of the acquired land at Rs. 13,00,000 per acre as on the date of the issuance of the Notification under Section 4(1) of the Act. Deducting 10% therefrom, it would come to Rs. 11,70,000 per acre which will be the compensation payable to the claimants with statutory benefits and interests thereupon in accordance with law.

45. Ergo, for the reasons aforerecorded, we pass the following orders in the appeals, subject matter of the present judgment :

(i) The Civil Appeal No. 3613 of 2008, the appeal preferred by the claimants Krishna Devi and Others, is partially accepted and the judgment of the High Court impugned in this appeal is modified to the extent that the claimants would be entitled to receive compensation at the rate of Rs. 11,70,000 per acre with interests and other statutory benefits permissible under the law.

(ii) Civil Appeal Nos. 7498-7499 of 2005 preferred by the State of Uttaranchal are partially accepted and the compensation payable to the claimants is reduced from Rs. 22,40,001.80 per acre to Rs. 11,70,000 per acre. The claimants would be entitled to interest and all statutory benefits permissible under the law.

(iii) Civil Appeal No. 1122 of 2011 preferred by the State of Uttaranchal is partially accepted and the compensation payable to the claimants is reduced from Rs. 22,40,001.80 per acre to Rs. 11,70,000 per acre. The claimants would be entitled to interest and all statutory benefits permissible under the law.

(iv) Civil appeal Nos. 7496-7497 of 2005 preferred by the other claimants are dismissed without any order as to costs.

B.B.B. Appeals disposed of.

##NEXT FILE

VIDEOCON INDUSTRIES LTD.

v.

UNION OF INDIA AND ANR.

(Civil Appeal No. 4269 of 2011)

MAY 11, 2011

[R.V. RAVEENDRAN AND G.S. SINGHVI, JJ.]

Arbitration and Conciliation Act, 1996 – s.9 – Jurisdiction for entertaining petition u/s.9 – Seat of arbitration – Production Sharing Contract (PSC) – Dispute between the parties – Matter referred to arbitral tribunal under clause 34.3 of PSC – In terms of clause 34.12 of the PSC, the seat of arbitration was Kuala Lumpur, Malaysia – However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this – Partial award passed – Respondent No.1 challenged the partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur – Thereafter, the respondents made request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but the request was rejected and it was declared that the remaining arbitral proceedings will be held in London – At that stage, the respondents filed application u/s.9 of the Act in Delhi High Court for stay of the arbitral proceedings – Appellant objected to the maintainability of the application and pleaded that the Courts in India did not have the jurisdiction to entertain challenge to the arbitral award – Delhi High Court overruled the objection of the appellant and held that the said High Court had the jurisdiction to entertain the petition filed u/s.9 – On appeal, held: As per the terms of agreement, the seat of arbitration was Kuala Lumpur – If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was required to be signed by all of them – Admittedly, neither there was any agreement between the

parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12 – Mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration – In cases of international commercial arbitrations held out of India provisions of Part I of the Act would apply unless the parties by agreement, express or implied, exclude all or any of its provisions – In that case the laws or rules chosen by the parties would prevail – In the present case, the parties had agreed that notwithstanding Clause 33.1, the arbitration agreement contained in Clause 34 of PSC shall be governed by laws of England – This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act – As a corollary, the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents u/s.9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents -- English Arbitration Act, 1996 – ss.3 and 53.

A Production Sharing Contract (PSC) was executed between respondent No.1-Government of India on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited (hereinafter referred to as "the Contractor") in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by respondent No.1. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of the Videocon Petroleum Limited was changed to Petrocon India Limited, which merged the appellant – Videocon

Industries Limited.

In 2000, disputes arose between the respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under clause 34.3 of the said PSC. The arbitral tribunal fixed the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London. Thereafter, various proceedings were held by the arbitral tribunal at London. Subsequently a partial award was passed.

Respondent No.1 challenged the partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur. On being noticed, the appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 of the PSC only the English Courts had the jurisdiction to entertain any challenge to the award.

After filing the petition before the High Court of Malaysia, the respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected and it was declared that the remaining arbitral proceedings will be held in London. At that stage, the respondents filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 in Delhi High Court for stay of the arbitral proceedings. The appellant objected to the maintainability of the application and pleaded that the Courts in India did not have the jurisdiction to entertain challenge to the arbitral award. The Single Judge of the Delhi High Court overruled the objection of the appellant and held that the said High Court had the jurisdiction to

entertain the petition filed under Section 9 of the Act.

The question which therefore arose for consideration in the present appeal was whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Arbitration and Conciliation Act, 1996 for grant of a declaration that Kuala Lumpur (Malaysia) was contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of PSC.

Allowing the appeal, the Court

HELD:1.1. The first issue is as to whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. It is evident that in terms of clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London would depend on a holistic consideration of the relevant clauses of the PSC. As per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was required to be signed by all of them. Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause

34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London. In this connection, reference can usefully be made to Section 3 of the English Arbitration Act, 1996. A reading of the above provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration. This is expressly indicated in Section 53 of the English Arbitration Act, 1996. [Paras 12, 13]

1.2. The next issue is whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act. In *Bhatia International v. Bulk Trading S.A.,* **a three-Judge Bench of this Court held that the provisions of Part I of the Act would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules**

will not apply. [Para 15]

1.3. In the present case, the parties had agreed that notwithstanding Clause 33.1 of the PSC, the arbitration agreement contained in Clause 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents. In the result, the impugned order is set aside and the petition filed by the respondents under Section 9 of the Act is dismissed. [Paras 19, 20]

Bhatia International v. Bulk Trading S.A. **(2002) 4 SCC 105: 2002 (2) SCR 411;** *Dozco India P. Ltd. v. Doosan Infracore Co. Ltd.* **2010 (9) UJ 4521 (SC) and** *Venture Global Engineering v. Satyam Computer Services Limited* **(2008) 4 SCC 190: 2008 (1) SCR 501 – relied on.**

Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and others **(2006) 1 GLR 658 – approved.**

Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc. **(2003) 9 SCC 79;** *National Thermal Power Corporation v. Singer Company* **(1992) 3 SCC 551: 1992 (3) SCR 106 – referred to.**

Mulamchand v. State of Madhya Pradesh **(1968) 3 SCR 214 and** *State of Haryana v. Lal Chand* **(1984) 3 SCR 715 – cited.**

Case Law Reference:

2002 (2) SCR 411	**relied on**	**Para 8, 9, 15, 16, 17,18**

(1968) 3 SCR 214	**cited**	**Para 10**
(1984) 3 SCR 715	**cited**	**Para 10**
2010 (9) UJ 4521 (SC)	**relied on**	**Para 14**
2008 (1) SCR 501	**referred to**	**Para 16**
(2003) 9 SCC 79	**referred to**	**Para 17**
1992 (3) SCR 106	**referred to**	**Para 17**
(2006) 1 GLR 658	**approved**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4269 of 2011.

From the Judgment and Order dated 30.04.2008 of the High Court of Delhi at New Delhi in O.M.P. No. 255 of 2006.

R.F. Nariman, Manu Nair, Mark D'Souza and Prashant Kalra (for Suresh A. Shroff & Co.) for the Appellant.

K.R. Sasiprabhu and R. Chandrachud for the Respondents.

The Judgment of the Court was delivered by

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

2. Whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for grant of a declaration that Kuala Lumpur (Malaysia) is contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of Production Sharing Contract (PSC) is the question which arises for consideration in this appeal.

3. Respondent No.1 – Government of India owns

petroleum resources within the area of India's territorial waters and exclusive economic zones. Respondent No.2 is an arm of the Ministry of Petroleum and Natural Gas. On 28.10.1994, a PSC was executed between respondent No.1 on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited (hereinafter referred to as "the Contractor") in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by respondent No.1. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of the Videocon Petroleum Limited was changed to Petrocon India Limited, which merged the appellant – Videocon Industries Limited. For the sake of convenience, the relevant clauses of Articles 33, 34 and 35 of the PSC are extracted below:

"33.1 *Indian Law to Govern*

Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.

33.2 *Laws of India Not to be Contravened*

Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

34.3 *Unresolved Disputes*

Subject to the provisions of this Contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within

twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12. *Venue and Law of Arbitration Agreement*

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

35.2 *Amendment*

This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective."

4. In 2000, disputes arose between the respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under clause 34.3 of the PSC. The arbitral tribunal fixed 28.3.2003 as the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London. In its meeting held on 29.6.2003 at Amsterdam, the arbitral tribunal issued various directions in Arbitration Case No.1 of 2003. On the next day, the arbitral tribunal issued similar directions in Arbitration Case Nos.2 and 3 of 2003. On 19.8.2003, the arbitral tribunal issued revised

time schedule for filing of the statement of claim, reply and counter claim, reply to counter claim, documents, affidavit of admission and denial of documents in Arbitration Case No.3 of 2003 and fixed the case for further proceedings to be held at London on 12.12.2003. By another order dated 30.10.2003, the arbitral tribunal directed that the hearing of the application filed by the claimants for taking on record the supplementary claim will take place at London on 15.11.2003, on which date, the following order was passed in Arbitration Case No.3 of 2003:

"By consent of parties, seat of the Arbitration is shifted to London.

Parties will deposit Rs.25,000 each as administrative cost with the Presiding Arbitrator."

5. Thereafter, the following proceedings were held by the arbitral tribunal at London:

(i) 6.2.2004 – Interim Award pronounced in Case No.1 of 2003 pronounced.

(ii) 7.2.2004 – proceedings held in Arbitration Case No.2 of 2003.

(iii) 17.3.2004 – Case No.2 of 2003 fixed for 13-19.5.2004 for final arguments.

(iv) 17.3.2004 – Case No.3 of 2003 fixed for recording of evidence from 3.6.2004 to 9.6.2004.

(v) 17.3.2004 – Case No.3 of 2003 fixed for arguments from 20-26.7.2004.

(vi) 27.3.2004 – final arguments rescheduled to 16-20.5.2004 in Case No.2 of 2003.

(vii) 25.11.2004 – Arbitral Tribunal declared that it will

pass award in Case No.2 of 2003 and further partial award in Case No.1 of 2003.

(viii) 3.2.2005 – Case No.2 of 2003 fixed for 25-26.2.2005 for hearing on the application for clarification filed on behalf of the Government of India.

(ix) 12.3.2005 – The Tribunal declared that it will finalise the award in Case No.3 of 2003 and cross-objections in Case No.1 of 2003.

(x) 31.3.2005 – Partial award passed in Case No.3 of 2003.

6. Respondent No.1 challenged partial award dated 31.3.2005 by filing a petition in the High Court of Malaysia at Kuala Lumpur. On being noticed, the appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 of the PSC only the English Courts have the jurisdiction to entertain any challenge to the award.

7. After filing the petition before the High Court of Malaysia, the respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected vide order dated 20.4.2006 and it was declared that the remaining arbitral proceedings will be held in London.

8. At that stage, the respondents filed OMP No.255 of 2006 under Section 9 of the Act in Delhi High Court for stay of the arbitral proceedings. They filed another OMP No.329 of 2006 questioning award dated 31.3.2005 on the issue of exchange rate. The appellant objected to the maintainability of OMP No.255 of 2006 and pleaded that the Courts in India do not have the jurisdiction to entertain challenge to the arbitral award. The learned Single Judge of the Delhi High Court

overruled the objection of the appellant and held that the said High Court has the jurisdiction to entertain the petition filed under Section 9 of the Act. The learned Single Judge extensively referred to the judgment of this Court in *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105 and observed:

> "The ratio of Bhatia International, in my understanding, is that the provisions of Part-I of the Indian Arbitration Act would apply to international commercial arbitrations held outside India, unless the parties by agreement express or implied, exclude all or any of its provisions.
>
> It is noteworthy that the respondent, while challenging the jurisdiction of this Court to entertain the present petition, has not disputed the applicability of Part I of the Indian Arbitration Act to international commercial arbitrations held outside India. It is not the case of the respondent that section 9 of the Indian Arbitrations Act does not apply to international commercial arbitrations held outside India. What, in fact, learned senior counsel for the respondent has sought to contend before this Court is that the parties herein, by adopting the English Law as the proper law governing the arbitration agreement, have expressly excluded the applicability of the Indian Arbitration Act, and consequently, this Court has no jurisdiction to entertain the present petition. This contention of the respondent has been resisted by learned senior counsel for the petitioner on the ground that English law governs the substantive aspects of the arbitration agreement, whilst the procedural aspect thereof is governed by the curial law, that is, the procedural law of the country where the seat of arbitration is. It is thus contended by learned senior counsel for the petitioner that the juridical seat of arbitration being in Kuala Lumpur, it is the Malaysian laws that would govern the conduct of the arbitral proceedings. Learned senior counsel for the respondent has countervailed the said

averment of the petitioner by submitting that London, and not, Kuala Lumpur is the 'designated seat' of arbitration in view of the order dated 15.11.2003 passed by the Arbitral Tribunal whereby the Arbitral Tribunal recorded the consent of the parties and shifted the seat of arbitration to London. In view of the petitioner having already conceded to London as the juridical seat of arbitration, it is thus contended by learned counsel for the respondent that the petitioner cannot know insist on Kuala Lumpur being the seat of arbitration.

The averments made by the respondent, without prejudice to the veracity thereof, entail an examination on merit and thus cannot be accepted at this preliminary stage. Whether the Courts at Kuala Lumpur or London have the jurisdiction to decide upon the seat of arbitration squarely hinges on the procedural law governing the arbitration agreement. However, in a peculiar situation such as the present one where the governing procedural law is yet to be determined, I am of the view that a question regarding the seat of arbitration can be best decided by the Court to which the parties or to which the dispute is most closely connected. It is important to recall that in the instant case the parties have expressly stated in Article 33.1 of the PSC that the laws applicable to the contract would be the laws in force in India and that the "Contract shall be governed and interpreted in accordance with the laws of India". These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was in India that the PSC was executed. The form of the PSC is closely related to the system of law in India. It is also apparent that the PSC is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. Moreover, whilst the petitioner is an important portfolio of the Government of India, the respondent is also a company incorporated under the Indian laws. The

contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract or the "proper law" (in the words of Dicey) of the contract being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regard to procedural matters.

There is no gainsay that the Courts observe extreme circumspection whilst affording relief under section 9 of the Indian Arbitration Act, lest the annals of party autonomy and sanctity of the arbitral tribunal – the hallmarks of any arbitration – are jeopardized. It is to be appreciated that the object underlying the grant of interim measures under section 9 of the Indian Arbitration Act is to facilitate and sub serve any ongoing arbitral proceedings.

It is much apparent that the disparate stands taken by both parties qua the seat of arbitration has resulted in a veritable impasse in the arbitral proceedings in the present case. The petitioner has brought to our notice that the proceedings initiated by it at the High Court Kuala Lumpur challenging the Partial award have been virtually brought to a standstill owing the objections raised by the respondent on grounds of jurisdiction. The petitioner has already expressed its dissidence about the English Court deciding the question of seat of arbitration for the reason that for the English Court to assume jurisdiction, it is the place of arbitration which is the relevant factor. In such a situation, of the Indian Court does not adjudicate upon the present petition, the arbitral proceedings between the parties will invariably end in a stalemate. This, I am afraid,

would not only be inimical to the interests of the parties but also affront to section 9 of the Indian Arbitration, the underlying object whereof is to sub serve and facilitate arbitral proceedings."

9. Shri R.F. Nariman, learned senior counsel appearing for the appellant argued that the impugned order is liable to be set aside because the learned Single Judge misconstrued and misapplied the judgment of this Court in *Bhatia International v. Bulk Trading S.A.* (supra) and erroneously held that the Delhi High Court has jurisdiction to decide O.M.P. No.255 of 2006. Learned counsel further argued that the learned Single Judge failed to appreciate that the reliefs prayed for in O.M.P. No.255 of 2006 could not have been granted on an application filed under Section 9 of the Act because stay of arbitral proceedings is beyond the scope of that section. Learned senior counsel emphasized that Section 5 of the Act expressly bars intervention of the Courts except in matters expressly provided for in the Act and, therefore, even if the petition filed by the respondents under Section 9 could be treated as maintainable, the High Court did not have jurisdiction over the arbitration proceedings because the same are governed by the laws of England. Shri Nariman then argued that after having expressly consented to the shifting of the seat of arbitration from Kuala Lumpur to Amsterdam in the first instance and effectively taken part in the proceedings held at London till 31.3.2005, respondent No.1 is estopped from claiming that the seat of arbitration continues to be at Kuala Lumpur. Learned senior counsel submitted that the learned Single Judge was not justified in rejecting objection to the maintainability of the petitions filed by respondent No.1 in the Delhi High Court merely because the appellant had earlier filed O.M.P. No.179 of 2003 before the High Court. He submitted that the doctrine of waiver and acquiescence cannot be pressed into service for deciding the issue relating to jurisdiction of the Delhi High Court to entertain the petition filed under Section 9 of the Act. Shri

Nariman further submitted that if respondent No.1 felt aggrieved against partial award it could have filed petition under Sections 67 and 68 of the English Arbitration Act, 1996.

10. Shri Gopal Subramaniam, learned Solicitor General submitted that as per the arbitration agreement which is binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur will be the seat of any intended arbitration, Indian law as the law of contract and English law as the law of arbitration and the mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London. Learned Solicitor General emphasised that once Kuala Lumpur was decided as the venue of arbitration by written agreement, the same could not have been changed except by amending the written agreement as provided in clause 35.2 of the PSC. He then argued that the arbitral tribunal was not entitled to determine the seat of arbitration and the record of proceedings held on 15.11.2003 at London cannot be construed as an agreement between the parties for change in the juridical seat of arbitration. He further argued that the PSC was between the Government of India and ONGC Ltd., Videocon Petroleum Ltd., Command Petroleum (India) Pvt. Ltd. and Ravva Oil (Singapore) Pvt. Ltd. and, therefore, the venue of arbitration cannot be treated to have been changed merely on the basis of the so called agreement between the appellant and the respondents. Learned Solicitor General submitted that any change in the PSC requires the concurrence by all the parties to the contract and the consent, if any, given by two of the parties cannot have the effect of changing the same. He then argued that every written agreement on behalf of respondent No.1 is required to be expressed in the name of the President and in the absence of any written agreement having been reached between the parties to the PSC to amend the same, the consent given for shifting the physical seat of arbitration to London did not result in change of juridical seat of the

arbitration which continues to be Kuala Lumpur. In support of this argument, the learned Solicitor General relied upon the judgments of this Court in *Mulamchand v. State of Madhya Pradesh* (1968) 3 SCR 214 and State of Haryana v. Lal Chand (1984) 3 SCR 715. In the end, he argued that the provisions of the English Arbitration Act, 1996 would have applied only if the seat of arbitration was in England and Wales. He submitted that London cannot be treated as juridical seat of arbitration merely because the parties had decided that the arbitration agreement contained in Article 34 will be governed by the laws of England.

11. We have considered the respective submissions and perused the record.

12. We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. In terms of clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held on 14th and 15th October, 2003 at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? The decision of this would depend on a holistic consideration of the relevant clauses of the PSC. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was required to be signed by all of them. Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London. In this connection, reference can usefully be made to Section 3 of the English Arbitration Act, 1996, which reads as follows:

"3.The seat of the arbitration.

In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated—

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

13. A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration. This is expressly indicated in Section 53 of the English Arbitration Act, 1996, which reads as under:

"53. Place where award treated as made.

Unless otherwise agreed by the parties, where the seat of

the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties."

14. In *Dozco India P. Ltd. v. Doosan Infracore Co. Ltd.* 2010 (9) UJ 4521 (SC), the learned designated Judge while exercising power under Section 11(6) of the Act, referred to the following passage from Redfern v. Hunter:

"The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....

It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

15. The next issue, which merits consideration is whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act. In *Bhatia International v. Bulk Trading S.A.* (supra), the three-Judge Bench considered the important question whether Part I of the Act is applicable to the international arbitration taking place outside India. After noticing the scheme of the Act and argument of the appellant that Part I of the Act would apply only to the cases in which the venue of arbitration is in India, the Court observed:

"A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1)(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called "the convention country"). An international commercial

arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only applies to arbitrations which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country.

Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. *Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.*

If read in this manner there would be no conflict between Section 1 and Section 2(2). The words "every arbitration" in sub-section (4) of Section 2 and the words "all arbitrations and to all proceedings relating thereto" in sub-section (5) of Section 2 are wide. Sub-sections (4) and (5) of Section 2 are not made subject to sub-section (2) of Section 2. It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). To accept Mr. Sen's submission would necessitate adding words in sub-sections (4) and (5) of Section 2, which the legislature has purposely omitted to add viz. "subject to provision of sub-section (2)". However read in the manner set out hereinabove there would also be no conflict between sub-section (2) of Section 2 and sub-sections (4) and/or (5) of Section 2.

That the legislature did not intend to exclude the applicability of Part I to arbitrations, which take place outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows:

> "2. (7) An arbitral award made under this Part shall be considered as a domestic award."

As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians, and (b)

international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India, an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as "domestic awards" or "foreign awards". Mr. Sen admits that provisions of Part II make it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking, an award passed in an arbitration which takes place in a non-convention country would not be a "domestic award". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

(emphasis supplied)

The Court then referred to Section 9 of the Act which empowers the Court to make interim orders and proceeded to observe:

"Thus under Section 9 a party could apply to the court (a) before, (b) during arbitral proceedings, or (c) after the making of the arbitral award but before it is enforced in accordance with Section 36. The words "in accordance with Section 36" can only go with the words "after the making of the arbitral award". It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus it is clear that an application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the court. Thus "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of the Civil Procedure Code. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made, an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the legislature wanted to restrict the applicability of Section 9 it has done so specifically.

We see no substance in the submission that there would be unnecessary interference by courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) thereof. Thus there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act."

The three-Judge Bench recorded its conclusion in the following words:

"To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. *In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."*

(emphasis supplied)

16. In *Venture Global Engineering v. Satyam Computer Services Limited* (2008) 4 SCC 190, a two-Judge Bench was called upon to consider whether the Court of Additional Chief Judge, City Civil Court, Secunderabad had the jurisdiction to entertain the suit for declaration filed by the appellant to set aside the award passed by the sole arbitrator appointed at the instance of respondent No.1 despite the fact that the arbitrator had conducted the proceedings outside India. The trial Court had entertained and allowed the application filed by respondent No.1 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) and rejected the plaint. The Andhra Pradesh High Court confirmed the order of the trial Court. Before this Court, reliance was placed by the appellant on the ratio of *Bhatia International v. Bulk Trading S.A.* (supra) and it was argued that the trial Court had the jurisdiction to entertain the suit. On behalf of the respondents, it was argued that the trial Court did not have the jurisdiction to entertain the suit because the award was made outside India. The Division Bench accepted the argument made on behalf of the appellant and observed:

"On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in Bhatia International we agree with the contention of Mr. K.K. Venugopal and hold that paras 32 and 35 of Bhatia International make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International.

The learned Senior Counsel for the respondent based on para 26 submitted that in the case of foreign award which was passed outside India is not enforceable in India by invoking the provisions of the Act or CPC. However, after critical analysis of para 26, we are unable to accept the argument of the learned Senior Counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase "it must immediately be clarified" that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: "But if not so excluded, the provisions of Part I will also apply to all 'foreign awards'." This exception which is carved out, based on agreement of the parties, in para 21 (placita e to f) is extracted below:

"21. … By omitting to provide that Part I will not apply to international commercial arbitrations which

take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes — (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement."

17. We may now advert to the judgment of the learned Single Judge of the Gujarat High Court in *Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and others* (2006) 1 GLR 658. The facts of that case were that an agreement was entered into between Unocal Bharat Limited, Hardy Oil and Gas Limited, Netherland B.V. (Hardy), Infrastructure Leasing and Financial Services Limited, Housing Development Finance Corporation Limited and Hindustan Oil Exploration Company Limited on 14.10.1998. The agreement had an arbitration clause. A dispute having arisen between the parties, the matter was referred to the arbitral tribunal. During the pendency of the arbitration proceedings, an application was filed by the appellant in the District Court, Vadodara under Section 9 of the Act. A preliminary objection was raised to the maintainability of that petition. The learned District Judge accepted the objection. The learned Single Judge of Gujarat High Court referred to clause 9.5 of the agreement, which was as under:

"9.5 Governing Law and Arbitration

1. This Agreement (except for the provisions of Clause 9.5.4 relating to arbitration) shall be governed by and construed in accordance with the substantive laws of India.

2. Any dispute or difference of whatever nature arising under, out of, or in connection with this Agreement, including any question regarding its existence, validity or termination, which the parties are unable to resolve between themselves within sixty (60) days of notification by one or more Parties to the other(s) that a dispute exists for the purpose of this Clause 9 shall at the instance of any Party be referred to and finally resolved by Arbitration under the rules of the London Court of International Arbitration (SLCIA), which Rules (Rules) are deemed to be incorporated by reference into this clause.

3. The Tribunal shall consist of two arbitrators who shall be Queen's Counsel, practicing at the English Bar in the

Commercial Division of the High Court, one to be selected by the Parties invoking the Arbitration clause acting unanimously and one to be selected by the other shareholders acting unanimously, and one umpire who shall also be a Queen's Counsel, practicing at the English Bar in the Commercial Division of this High Court. If the parties are unable to agree on the identity of the umpire within 15 days from the day on which the matter is referred to arbitration, the umpire shall be chosen and appointed by LCIA. Notwithstanding Article 3.3 of the Rules, the Parties agree that LICA may appoint a British umpire. No arbitrator shall be a person or former employee or agent of, or consultant or counsel to, any Party or any Associated Company or any Party or in any way otherwise connected with any of the Parties.

4. The place of arbitration shall be London and the language of arbitration shall be English. The law governing arbitration will be the English law.

5. Any decision or award of an arbitral tribunal shall be final and binding on the Parties."

The learned Single Judge referred to various judgments of this Court including *Bhatia International v. Bulk Trading S.A.* (supra), *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.* (2003) 9 SCC 79, National Thermal Power Corporation v. Singer Company (1992) 3 SCC 551 and upheld the order of the learned District Judge by observing that in terms of clause 9.5.4 of the agreement, the place of arbitration was London and the law governing arbitration was the English law. The learned Single Judge referred to paragraph 32 of the judgment in *Bhatia International v. Bulk Trading S.A.* (supra) and observed that once the parties had agreed to be governed by any law other than Indian law in cases of international commercial arbitration, then that law would prevail and the provisions of the Act cannot be invoked questioning the arbitration proceedings or the award. This is evident from paragraph 11.3 of the judgment, which is extracted below:

"However, their Lordships observed in Para.32 that in cases of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case laws or rules chosen by the parties would prevail. Any provision, in Part-I, which is contrary to or excluded by that law or rules would not apply. Thus, even as per the decision relied upon by learned advocate for the appellant, if the parties have agreed to be governed by any law other than Indian law in cases of international commercial arbitration, same would prevail. In the case on hand, it is very clear even on plain reading of Clause 9.5.4 that the parties' intention was to be governed by English law in respect of arbitration. It is not possible to give a narrow meaning to this clause as suggested by learned Senior Advocate Mr. Thakore that it would apply only in case of dispute on Arbitration Agreement. It can be interpreted only to mean that in case of any dispute regarding arbitration, English law would apply. When the clause deals with the place and language of arbitration with a specific provision that the law governing arbitration will be the English law, such a narrow meaning cannot be given. No other view is possible in light of exception carved out of Clause 9.5.1 relating to arbitration. Term Arbitration, in Clause 9.5.4 cannot be taken to mean arbitration agreement. Entire arbitral proceedings have to be taken to be agreed to be governed by English law."

18. In our opinion, the learned Single Judge of Gujarat High Court had rightly followed the conclusion recorded by the three-Judge Bench in *Bhatia International v. Bulk Trading S.A.* (supra) and held that the District Court, Vadodara did not have the jurisdiction to entertain the petition filed under Section 9 of the Act because the parties had agreed that the law governing the arbitration will be English law.