MAHADEV GOVIND GHARGE & OTHERS
v.
THE SPECIAL LAND ACQUISITION OFFICER, UPPER KRISHNA PROJECT, JAMKHANDI, KARNATAKA
(CIVIL Appeal No. 5094 of 2005)

MAY 10, 2011

[ASOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

Code of Civil Procedure, 1908 – Order XLI, Rule 22 – Interpretation of – Service of notice of hearing of appeal – Filing of cross-objections – Period of limitation – Commencement of – Condonation of delay – Held: The limitation of one month for filing cross-objection as provided under Order XLI Rule 22 commences from the date of service of notice on the respondent in the appeal or his pleader of the day fixed for hearing the appeal – The cross-objections are required to be filed within the period of one month from the date of service of such notice or within such further time as Appellate Court may see fit to allow depending upon the facts and circumstances of the given case – Since Order XLI Rule 22 itself provide for extension of time, the Courts would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the Court to file cross-objections beyond the statutory period of one month – In the instant case, the cross-objectors were caveators before the High Court and they were heard not only while passing of interim orders but the appeal itself was admitted in their presence – In the circumstances, one month of prescribed period in terms of Order XLI Rule 22 commenced from the date on which the High Court ordered that the appeal may be listed for hearing – As the period for filing the cross objection had long expired, application for

condonation of delay was filed – High Court dismissed the application without recording any specific reasons as to why the averments of the cross-objector were disbelieved – In the peculiar facts and circumstances of the case, the cross-objectors were able to show sufficient/reasonable cause for grant of further time to file the cross objections beyond the period of one month in terms of Order XLI Rule 22 – Delay in filing the cross-objections thus condoned.

Code of Civil Procedure, 1908 – Order XLI, r.22 – Cross-objections – Nature of – Held: Cross-objections within the scheme of Order XLI Rule 22 are to be treated as separate appeal and must be disposed of on same principles in accordance with the provisions of Order XLI.

Code of Civil Procedure, 1908 – s.148A – Rights of a caveator – Held: The rights of a caveator are different from that of cross-objectors per se – A caveator has a right to be heard mandatorily for the purposes of passing of an interlocutory order – A caveator is to be heard by the court before any interim order can be passed against him.

Procedural Law – Hearing of appeal – Stages of – Held: Hearing of the appeal can be classified in two different stages; one at the admission stage and the other at the final stage.

Procedural Law – Date of hearing – Held: Date of hearing has normally been defined as the date on which the court applies its mind to the merits of the case – In a criminal matter the hearing of the case is said to be commenced by the Court only when it applies its mind to frame a charge etc. – Similarly, under civil law it is only when the Court actually applies its mind to averments made by party/parties, it can be considered as hearing of the case – The date of hearing must not be confused with the expression 'step in the proceedings' – These are two different concepts of procedural law and have different connotation and application – What may be a 'step in the proceeding', essentially, may not mean

a 'hearing' by the Court – Necessary ingredients of 'hearing' thus are application of mind by the court and address by the party to the suits.

Procedural law – Purpose and interpretation of – Held: Justice between the parties to a case is the essence of procedural law – Unless the statute expressly prohibits or put an embargo, the Courts would interpret the procedural law so as to achieve the ends of justice – Strict construction of a procedural law is called for where there is complete extinguishment of rights, as opposed to the cases where discretion is vested in the courts to balance the equities between the parties to meet the ends of justice which would invite liberal construction – The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction.

A preliminary notification under section 4(1) of the Land Acquisition Act, 1894 was issued for acquisition of land. The Special Land Acquisition Officer awarded compensation. Aggrieved, the claimants-landowners filed references under section 18 of the Act. The Reference Court enhanced compensation along with all statutory benefits. The respondents filed appeal before the High Court on 12.09.2001. The landowners were on a caveat. The High Court admitted the appeal on the same day and directed the office to post the same for hearing after the LCR were received. The appellants filed cross-objections before the High Court, under Order XLI, Rule 22 of CPC, along with an application for condonation of delay of 404 days in filing the cross-objections.

The High Court dismissed the appeal of the State and also held that the landowners were entitled to interest with effect from the date of the award. Against the said judgment, the State came up in appeal before this Court.

The High Court also dismissed the cross objections filed by the landowners. The High Court held that it was clear that on 12.9.2001 itself, the Court thought it appropriate to hear the appeals out of turn and accordingly directed the office to post the appeal for hearing immediately after the records are received and that the cross objections were not filed either within one month from the date of fixing the date of the appeal or from the date the records of the lower court were received by the registry of the court and therefore, the cross objectors' contention based on the provisions of Order XLI Rule 22(1) CPC was misconceived and untenable. The High Court further held that the explanation offered by the cross objectors for the delay of 404 days was vague and did not amount to sufficient cause so as to condone the delay. Against the dismissal of cross objections, the landowners-cross objectors approached this court by filing Civil Appeal.

The landowners contended before this court that (i) the limitation period of one month, prescribed under Order XLI Rule 22, would not begin to run till an actual date was fixed for hearing by the High Court and notice of it was served on the cross objectors, i.e. landowners; ii) that powers of an appellate Court are very wide under Order XLI Rule 33 and relief could be granted to the landowners even under the said provision; iii) that the landowners had shown sufficient cause for the delay and iv) that land of the landowners was compulsorily acquired and the court was duty bound to award just compensation to the landowners.

Disposing of the appeals, the Court

HELD:1.1. The Code of Civil Procedure, 1908 (CPC) is a law relating to procedure and procedural law is always intended to facilitate the process of achieving the ends of justice. The Courts would normally favour the

interpretation which will achieve the said object. [Para 19] [852-H; 853-A]

1.2. Order XLI of the CPC deals with appeals from original decrees. The provisions of Order XLI, Rule 22 gives right to a respondent to file cross-objections to the decree under appeal which he could have taken by way of an appeal. This right is available to the respondent provided he had filed such objections in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow. [Para 21] [853-G; 854-G-H; 855-A]

1.3. Rule 22 do not provide for any consequences, leave any adverse consequence, in the event the respondent-cross objector defaults in filing the cross objections within the statutory period of one month. On the contrary they provide that the cross objections can be filed within such further time as the Court may see fit to allow. The expression 'or within such further time as the court may see fit to allow' clearly shows that wide judicial discretion is vested in the courts to permit the filing of the cross-objections even after the expiry of 30 days or for that matter any period which, in the facts and circumstances of the case, is found to be just and proper by the Court. [Para 22] [855-B-C]

1.4. Rule 22 is not only silent on the consequences flowing from such default from filing appeal within one month, from the period fixed hereunder, but it even clothes the Court with power to take on record the cross-objections even after the expiry of the said period. Thus, right of the cross-objector is not taken away in absolute terms in case of such default. The Courts exercise this power vested in them by virtue of specific language of Rule 22 itself and thus, its provisions must receive a liberal construction. [Para 23] [855-D-E]

1.5. Such provisions should be construed on their plain meaning and it may not be necessary for the Court to bring into service other principles of statutory interpretation. However, the maxim *De minimis non curat lex* shall apply to such statutory provisions. [Para 25] [856-B]

Sardar Amarjit Singh Kalra (dead) by LRs. v. Pramod Gupta (Smt.) (dead) by LRs. and others **2003 (3) SCC 272: 2002 (5) Suppl. SCR 350 and** *The State of Punjab and another v. Shamlal Murari and another* **(1976) 1 SCC 719: 1976 (2) SCR 82 – relied on.**

Rashida Begum (since deceased now represented through LRs) v. Union of India **(2001) Delhi Law Times 664 (DB);** *Union of India v. Jhutter Singh* **46 (1992) DLT 364;** *Union of India v. Shibu Ram Mittal* **1999 (49) DRJ 166;** *Karnataka State Road Transport Corporation v. R. Sethuram & Anr.* **AIR 1996 Karnataka 380 and** *The East India Hotels Ltd. v. Smt. Mahendra Kumari and another* **AIR 2008 Raj. 131 – referred to.**

Maxwell on The Interpretation of Statutes **12th Edn., by P. St. J. Langan and** *Bennion on Statutory Interpretation* **5th Edn., 2008 – referred to.**

2.1. The procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold. There is no indefeasible divestment of right of the cross-objector in case of a delay and his rights to file cross-objections are protected even at a belated stage by the discretion vested in the Courts. But at the same time, the Court cannot lose sight of the fact that meaning of 'ends of justice' essentially refers to justice for all the parties involved in the litigation. It will be unfair to give an interpretation to a provision to vest a party with a right at the cost of the other, particularly, when statutory

provisions do not so specifically or even impliedly provide for the same. The provisions of Order XLI Rule 22 of the Code are akin to the provisions of the Limitation Act, 1963, i.e. when such provisions bar a remedy, by efflux of time, to one party, it gives consequential benefit to the opposite party. Before such vested benefit can be taken away, the Court has to strike a balance between respective rights of the parties on the plain reading of the statutory provision to meet the ends of justice. If a cross-objector fails to file cross-objections within the stipulated time, then his right to file cross-objections is taken away only in a limited sense. To that extent a benefit is granted to the other party, i.e. the appellant, of having their appeal heard without such cross-objections. Still, however, if the Court is of the opinion that it is just and proper to permit the filing of cross-objection even after the expiry of the statutory limitation of one month, it is certainly vested with power to grant the same, but of course, only after hearing the other party. That is how the rights of the parties are to be balanced in consonance with the scheme of Order XLI Rule 22 of the Code. [Para 28] [857-C-H; 858-A]

2.2. The provisions of a statute are normally construed to achieve the ends of justice, advance the interest of public and to avoid multiplicity of litigation. Strict construction of a procedural law is called for where there is complete extinguishment of rights, as opposed to the cases where discretion is vested in the courts to balance the equities between the parties to meet the ends of justice which would invite liberal construction. Under Order XLI Rule 22 of the Code, cross objections can be filed at any subsequent time, even after expiry of statutory period of one month, as may be allowed by the Court. It is evidently clear that there is no complete or indefeasible extinguishment of right to file cross objections after the expiry of statutory period of limitation provided under the

said provision. Cross-objections within the scheme of Order XLI Rule 22 of the Code are to be treated as separate appeal and must be disposed of on same principles in accordance with the provisions of Order XLI of the Code. [Para 32] [858-G-H; 859-A-D]

2.3. The Court is required to give precedence to the right of a party to put forward its case. Unnecessary and avoidable technical impediments should not be introduced by virtue of interpretative process. At the same time any irreparable loss should not be caused to a party on whom the right might have vested as a result of default of other party. Furthermore, the courts have to keep in mind the realities of explosion of litigation because of which the Court normally takes time to dispose of appeals. It would be a travesty of justice, if after passage of substantial time when the appeal is taken up for final hearing a cross-objector who was heard and participated in the hearing at the admission stage itself, claims that the limitation period for him to file his cross-objection will commence only from the date of service of a fresh notice on him or his pleader, in terms of Order XLI Rule 22 of the Code. Such an interpretation would jeopardize the very purpose and object of the statute and prejudicially affect the administration of justice as the appeal which has come up for final hearing and disposal would again be lost in the bundle of pending cases on this pretext. It is trite that justice must not only be done but must also appear to have been done to all the parties to a *lis* before the Court. [Para 34] [860-C-F]

2.4. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should

normally be construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them. [Paras 35, 36] [860-G-H; 861-A-C]

Kailash v. *Nanhku & others* **(2005) 4 SCC 480: 2005 (3) SCR 289 and** *Sangram Singh v. Election Tribunal, Kotah* **(1955) 2 SCR 1 – relied on.**

Dondapati Narayana Reddy v. *Duggireddy Venkatanarayana Reddy & others* **2001 (8) SCC 115 and** *Byram Pestonji Gariwala* v. *Union Bank of India & others* **[(1992) 1 SCC 31] – referred to.**

Justice G.P. Singh's *Principles of Statutory Interpretation* **11th Edn., 2008 and Crawford's** *Statutory Construction* **– referred to.**

3. The stipulated period of one month in Order XLI, Rule 22 of CPC is to commence from the date of service, on the concerned party or his pleader, of notice of the day fixed for hearing the appeal. A cross-objection may also be filed within such further time as the Appellate Court may see fit to allow. [Para 37] [861-C-D]

Date of hearing:

4.1. Hearing of the appeal can be classified in two different stages; one at the admission stage and the other at the final stage. Date of hearing has normally been defined as the date on which the court applies its mind to the merits of the case. If the appeal is heard *ex-parte*

for admission under Order XLI Rule 11 of the Code, the Court could dismiss it at that very stage or admit the same for regular hearing. Such appeal could be heard in the presence of the other party at the admission stage itself, particularly, in cases where a caveat is lodged by the respondent to the appeal. [Para 38] [861-E-F]

4.2. The concept of 'hearing by the Court', in fact, has common application both under Civil and Criminal jurisprudence. Even in a criminal matter the hearing of the case is said to be commenced by the Court only when it applies its mind to frame a charge etc. Similarly, under civil law also it is only when the Court actually applies its mind to averments made by party/parties, it can be considered as hearing of the case. [Para 39] [861-G-H; 862-A]

4.3. The date of hearing must not be confused with the expression 'step in the proceedings'. These are two different concepts of procedural law and have different connotation and application. What may be a 'step in the proceeding', essentially, may not mean a 'hearing' by the Court. Necessary ingredients of 'hearing' thus are application of mind by the court and address by the party to the suits. [Para 40] [862-E-F]

Siraj Ahmad Siddiqui v. Prem Nath Kapoor **1993 (4) SCC 406: 1993 (2) Suppl. SCR 254 – referred to.**

5.1. The primary intention of giving one month's time and notice to the respondent to file cross-objection is to give him a reasonable opportunity to file cross-objections in the appeal filed by the other party. Filing of cross-objections is not an exclusive but, an alternate remedy which a party can avail as alternative of filing a separate appeal in its own right. [Para 41] [862-G-H]

5.2. The language of Order XLI Rule 22 of the Code

fixes the period of limitation to be computed from the date of service of notice of hearing of the appeal upon the respondent/cross-objector and within one month of such date he has to file cross objections. Thus, the crucial point of time is the date on which the notice of hearing of the appeal is served. This could be a notice for actual date of hearing or otherwise. [Para 42] [863-A-B]

5.3. There appears to be a dual purpose emerging from the language of Order XLI Rule 22 of the Code. Firstly, to grant time of one month or even such further time as the Appellate Court may see fit to allow; and secondly, to put the party or his pleader at notice that the appeal has been admitted and is fixed for hearing and the Court is going to pronounce upon the rights and contention of the parties on the merits of the appeal. Once such notice is served, the period of limitation under Order XLI Rule 22 of the Code will obviously start running from that date. If both these purposes are achieved any time prior to the service of a fresh notice then it would be an exercise in futility to issue a separate notice which is bound to result in inordinate delay in disposal of appeals which, in turn, would be prejudicial to the appellants. A law of procedure should always be construed to eliminate both these possibilities. [Para 43] [863-C-E]

6.1. In the present case, the appellant appeared and argued at the admission stage of the appeal which was admitted in their presence and an order was also passed for final hearing. The appellants had also filed caveat in the appeal. In law, the rights of a caveator are different from that of cross-objectors per se. In terms of Section 148A of the Code, a caveator has a right to be heard mandatorily for the purposes of passing of an interlocutory order. The law contemplates that a caveator is to be heard by the court before any interim order can

be passed against him. But in the present case when the appeal was listed for hearing at the admission stage itself, the appellants had appeared and argued the matter not only in relation to grant of an interim order but also on the merits of the appeal. As evident from order dated 12-9-2001 of the High Court, the records were required to be called for from the lower courts and thereafter, the appeal was to be heard finally. Though the court had not actually fixed any particular date, it had directed the appeal to be listed for hearing. Then again, vide a subsequent order, the High Court had directed the appellant(s) to move an application for early hearing of the appeal. On all these occasions, the appellant(s), or his pleader, was present and participated in the proceedings before the Court. Thus, the appellant(s) not only had the knowledge of pendency of the appeal but also had notice of fixing of hearing of the appeal. Even on a further subsequent date, the High Court took notice of the cross-objection and counsel for the appellant(s)/cross objector was directed to furnish copies of the cross-objection within three weeks to the Additional Advocate General. After the records from lower courts were received, the matter was heard and judgment impugned in the present appeal was pronounced by the High Court in the year 2003. [Paras 45, 46 and 47] [865-B-H; 866-A-E]

6.2. In the circumstances, it is difficult for this Court to hold that the period of 30 days, as contemplated under Order XLI Rule 22 of the Code, never commenced even till final disposal of the appeal. Such an interpretation will frustrate the very purpose of the Code and would be contrary to the legislative intent. The appeal was finally heard without fixing any particular date and in presence of the appellant(s). Under such circumstances, the requirement of fixing a final date separately must be deemed to be waived by the parties. [Para 48] [866-F-G]

7.1. Justice between the parties to a case is the essence of procedural law and unless the statute expressly prohibits or put an embargo, the Courts would interpret the procedural law so as to achieve the ends of justice. [Para 54] [869-D]

7.2. If the provisions of Order XLI, Rule 22 of the Code are examined in the correct perspective and in light of the above stated principle, then the period of limitation of one month stated in Order XLI Rule 22 of the Code would commence from the service of notice of the day of hearing of appeal on the respondent in that appeal. The hearing contemplated under Order XLI Rule 22 of the Code normally is the final hearing of the appeal but this rule is not without any exception. The exception could be where a party respondent appears at the time of admission of the appeal, as a caveator or otherwise and argues the appeal on merits as well as while passing of interim orders and the Court has admitted the appeal in the presence of that party and directs the appeal to be heard finally on a future date actual or otherwise, then it has to be taken as complete compliance of the provisions of Order XLI Rule 22 of the Code and thereafter, the appellant who has appeared himself or through his pleader cannot claim that period mentioned under the said provision of the Code would commence only when the respondent is served with a fresh notice of hearing of the appeal in the required format. If this argument is accepted it would amount to travesty of justice and inevitably result in delay while causing serious prejudice to the interest of the parties and administration of justice. Such interpretation would run contra to the legislative intent behind the provisions of Order XLI Rule 11 of the Code which explicitly contemplate that an appeal shall be heard expeditiously and disposed of as far as possible within 60 days at the admission stage. All the provisions of Order XLI of the Code have to be read conjunctively

to give Order XLI Rule 22 its true and purposive meaning. [Para 55] [869-E-H; 870-A-C]

7.3. The principles for application of the provisions of Order XLI Rule 22 are : (a) Respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order XLI Rule 22 of the Code; (b) The limitation of one month for filing the cross-objection as provided under Order XLI Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal and (c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order XLI Rule 22. In other words the limitation of one month shall start from that date. [Para 55] [870-C-G]

7.4. The cross-objections are required to be filed within the period of one month from the date of service of such notice or within such further time as the Appellate Court may see fit to allow depending upon the facts and circumstances of the given case. Since the provisions of Order XLI Rule 22 of the Code itself provide for extension of time, the Courts would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the Court to file cross-objections beyond the statutory period of one month. [Paras 56, 57] [870-H; 871-A-B]

7.5. The instant case falls squarely within the principles formulated in clause (c). The appellant(s) herein were caveators before the High Court and they were heard not only while passing of interim orders but the

appeal itself was admitted in their presence. Further, the Court directed that the records from lower court be called and after receipt of such record the appeal was directed to be listed for final disposal. Thus, the cross-objector not merely had the knowledge of pendency of the appeal and order of the High Court for its final disposal but he actually participated at all the stages of the proceedings before that Court, i.e. at the stage of admission of appeal, passing of interim orders and variation thereof and at the stage of consideration of application of the cross-objector, moved for early hearing of the appeal and, in fact, the appeal had been directed to be heard finally in his presence. Thus, in these circumstances, one month of prescribed period in terms of Order XLI Rule 22 of the Code shall commence from 12th September, 2001, i.e. the date on which the High Court ordered that the appeal may be listed for hearing. [Para 58] [871-C-F]

7.6. As the period for filing the cross objection had long expired, the application for condonation of delay was filed. The appellants in this Court themselves admitted that they had received the notice of the appeal through their counsel and the period of one month came to an end on 12th October, 2001. This submission has been made in the affidavit annexed to the application filed by the cross-objector before the High Court under Section 5 of the Limitation Act, 1963, along with the cross-objections, praying for condonation of delay and leave of that Court to file their cross-objections beyond the statutory period of one month as provided in Order XLI Rule 22 of the Code. [Para 59] [871-G-H; 872-A-B]

7.7. Delay was sought to be condoned on the ground that the appellants have appeared before the Court and despite receipt of the notice of final hearing they could not file cross-objections within the prescribed time as they were out of their native place and have gone

elsewhere to earn their livelihood and they could not therefore receive the letter and that too within one month. Later, the appellant fell down and his leg was twisted and because of swelling and pain he was not able to drive and consult his counsel. It is only after he got well, he met his counsel and filed the cross-objections on 19th November, 2002, i.e. after a delay of 404 days. The High Court did not find any merit in the reasons shown for condonation of delay and dismissed the said application. Order XLI Rule 22 of the Code itself provides a discretion to the Appellate Court to grant further time to the cross-objector for the purposes of filing cross-objections provided the cross-objector shows sufficient or reasonable cause for his inability to file the cross-objections within the stipulated period of one month from the date of receipt of the notice of hearing of appeal. No specific reasons have been recorded by the High Court in the impugned judgment as to why the said averments did not find favour and was disbelieved. There is nothing on record to rebut these averments made by the cross-objector. [Para 60] [872-C-F]

7.8. In the peculiar facts and circumstances of this case, to do complete justice between the parties, the landowner's appeal is allowed by setting aside the order of the High Court, limited to the extent that the appellants have been able to show sufficient/reasonable cause for grant of further time to file the cross objections beyond the period of one month in terms of Order XLI Rule 22 of the Code. This approach could even be adopted without the aid of Section 5 of the Limitation Act, 1963, which provisions may also find application to such matters. The appellants were entitled to file cross-objections by grant of further time before the High Court. Delay in filing the cross-objections is thus condoned. The High Court has therefore to hear afresh the appeal of the State as also the cross objections of the landowners. In that view of

the matter, there is no need of passing a separate order on the appeal filed by the State before this Court and the same is thus disposed of. [Paras 61 and 62] [872-G-H; 873-A-C]

The East India Hotels Limited v. Smt. Mahendra Kumari **AIR 2008 Raj. 131 – distinguished.**

Pralhad & others v. *State of Maharashtra and another* **2010 (10) SCC 458: 2010 (11) SCR 916 – relied on.**

Salem Advocate Bar Association, Tamil Nadu v. Union of India **(2003) 1 SCC 49: 2002 (3) Suppl. SCR 353;** *Sushil Kumar Sabharwal v. Gurpreet Singh & others* **2002 (5) SCC 377: 2002 (3) SCR 352;** *Rashida Begum (since deceased now represented through LRs) v. Union of India* **(2001) Delhi Law Times 664 (DB);** *Union of India v. Jhutter Singh* **46 (1992) DLT 364 and** *Mutyam Agaiah v. Special Deputy Collector,* ***(NTPC) L.A. Unit.*** **2002 (2) ALT 715 – referred to.**

Case Law Reference:

(2001) Delhi Law Times 664 (DB)	**referred to**	**Paras 15, 49**
(1992) DLT 364	**referred to**	**Paras 15, 49**
1999 (49) DRJ 166	**referred to**	**Para 15**
AIR 1996 Karnataka 380	**referred to**	**Para 17**
AIR 2008 Raj. 131	**referred to**	**Para 18**
2002 (5) Suppl. SCR 350	**relied on**	**Para 19**
1976 (2) SCR 82	**relied on**	**Para 20**
2005 (3) SCR 289	**relied on**	**Para 27**
(1955) 2 SCR 1	**relied on**	**Para 30**
(1992) 1 SCC 31	**referred to**	**Para 31**

2001 (8) SCC 115	**referred to**	**Para 32**
1993 (2) Suppl. SCR 254	**referred to**	**Para 39**
2002 (3) Suppl. SCR 353	**referred to**	**Para 44**
2002 (3) SCR 352	**referred to**	**Para 45**
AIR 2008 Raj. 131	**distinguished**	**Para 49**
2002 (2) ALT 715	**referred to**	**Para 50**
2010 (11) SCR 916	**relied on**	**Para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal NO. 5094 of 2005.

From the Judgment & Order dated 22.10.2003 of the High Court of Karnataka at Bangalore in MFA CROB No. 201 of 2002 in MFA No. 3279 of 2001.

WITH

C.A. No. 5113 of 2005.

Kiran Suri, S.J. Amith, Syed Tabinda, Sanjay R. Hegde, V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Interesting questions involving interpretation of Order XLI Rule 22 of the Civil Procedure Code (hereinafter "CPC") fall for decision in this case in which the relevant facts are that a preliminary notification under section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') was issued on 24.4.1997, for acquisition of land in Survey No. 616/1/1 measuring 2 acres 29 guntas and in Survey No. 616/1B/1 measuring 1 acre 2 guntas. The award was passed by the Special Land Acquisition Officer on 13.04.1999; he considered the land acquired to be dry land and fixed compensation amount at the rate of Rs.31,650/- per acre.

2. Aggrieved, the claimants (landowners) filed references

under section 18 of the Act. The Reference Court enhanced compensation to Rs.3,50,000/- per acre, along with all statutory benefits.

3. The respondents filed an appeal against the judgment of the Reference Court to the High Court of Karnataka on 12.09.2001. The landowners were on a caveat. The High Court admitted the appeal on the same day and directed the office to post the same for hearing immediately after LCR were received.

On 19.11.2002, the appellants filed cross-objections before the High Court, under Order XLI, Rule 22 of CPC, along with an application for condonation of delay of 404 days in filing the cross-objections.

4. On 22.10.2003, the High Court, vide the first impugned judgment, dismissed the appeal of the State holding that the point for consideration in the appeal was squarely covered by the judgment of that court dated 12.8.2003 in M.F.A. No. 3278 of 2001, as a result of which the appeal was liable to be dismissed. The High Court also held that the landowners were entitled to interest with effect from the date of the award, i.e. from 13.4.1999. Against the said judgment, the State came up in the present appeal before this court i.e. Civil Appeal No. 5113 of 2005.

5. On the same day, the High Court, vide the second impugned judgment, also dismissed the cross objections filed by the landowners. In the appeal dismissing the cross objections, two points came up for consideration before the High Court:

(i) Whether the limitation period of one month prescribed under Order XLI Rule 22 (1) of CPC shall run from 12.9.2001 as contended by learned government advocate or from the date of service of notice of date of hearing of appeal fixed by the

court, as contended by the learned advocate of the landowner.

(ii) If the limitation of one month prescribed under Order XLI Rule 22(1) of CPC did not begin to run with effect from 12.9.2001, whether the alternative argument by way of explanation offered by the cross objectors would constitute 'sufficient cause' warranting condonation of delay in filing the cross objection?

6. The High Court stated that the Division Bench had admitted the appeal on 12.9.2001 and had also stayed the operation of the impugned award subject to the land acquisition officer depositing 50% of the enhanced compensation with statutory benefits. On the same day, the Division Bench had directed the office to list the appeal for final hearing after the records were received. Accordingly, the office called for the records and they were received by the office. Subsequently, on 25.1.2002, the Division Bench permitted the cross objectors to move for an early hearing of the appeal. It held as follows:

"Therefore, it is quite clear that on 12.9.2001 itself, the Division Bench thought it appropriate to hear the appeals out of turn and accordingly directed the office to post the appeal for hearing immediately after the records are received. The submission of Sri Kalagi that since the Division Bench did not fix a particular date for final hearing of the appeal, it would not satisfy the requirement of Order XLI Rule 22(1) CPC, is not acceptable to us. We can take judicial notice of the fact that quite often courts direct the final hearing of the matters out of turn or in regular course without fixing a specific date for final hearing of cases. Once an order is made by the court for final hearing, the registry, in compliance with the direction and having regard to the workload of the court concerned, would post cases for final hearing. Therefore, it could not be said that the

Division Bench did not direct final hearing of the appeal on 12.9.2001. The language implied by the Division Bench would go to show that the High Court wanted the registry to post the appeal for final hearing out of turn immediately after the records were received. It is quite apparent from the records that the cross objection was not filed either within one month from the date of fixing the date of the appeal or from the date the records of the lower court were received by the registry of this court. Therefore, the cross objectors' contention based on the provisions of Order XLI Rule 22(1) CPC is misconceived and untenable."

7. On the second point, the High Court was of the opinion that the explanation offered by the cross objectors for the delay of 404 days was vague and did not amount to sufficient cause so as to condone the delay. Consequently, the cross objections were dismissed.

8. Thus, the landowners (cross objectors) approached this court by filing Civil Appeal No. 5094 of 2005 against the impugned judgment of the High Court.

9. Both the appeals were heard together by this Court.

10. Before this court, the landowners in their appeal (Civil Appeal No. 5094 of 2005), raised the following contentions:

a. The limitation period of one month, prescribed under Order XLI Rule 22, would not begin to run till an actual date was fixed for hearing by the High Court and notice of it was served on the cross objectors, i.e. landowners.

b. Powers of an Appellate Court are very wide under Order XLI Rule 33 and relief could be granted to the landowners even under the said provision.

c. The landowners had shown sufficient cause for the delay.

d. Land of the landowners was compulsorily acquired and the court was duty bound to award just compensation to the landowners.

11. The State, in its appeal (Civil Appeal No. 5113 of 2005), contended as follows:

a. The High Court wrongly dismissed the appeal by relying on M.F.A. No. 3278 of 2001 since there was absence of evidence to show that the land in question and the land covered by the said judgment were similar in all respects.

b. The High Court erred in awarding interest from the date of the award and the same was contrary to section 28 of the Act.

12. We have heard the parties and perused the material on record.

13. Rule 22(1) makes it clear that the limitation for filing a cross-objection is one month from the date of service of notice of date fixed for the hearing of appeal. The relevant provision read as follows:

22. Upon hearing respondent may object to decree as if he had preferred a separate appeal- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation- A respondent aggrieved by a finding of the

court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

14. Notice of this Court was drawn to the judgments of different High Courts where the provisions of Order XLI Rule 22 of CPC came up for consideration.

15. In the case of *Rashida Begum (since deceased now represented through LRs) v. Union of India* reported in 91 (2001) Delhi Law Times 664 (DB), the High Court while considering other judgments of the same High Court in *Union of India v. Jhutter Singh* [46 (1992) DLT 364] and *Union of India v. Shibu Ram Mittal* [1999 (49) DRJ 166] held that limitation for the purpose of filing cross objection under Order XLI, Rule 22 will run only after the appellate court has fixed the date of hearing of the appeal and notice thereof has been served on the respondent or his pleader. In coming to the said conclusion, the courts sought to make a distinction between the date of hearing of the appeal under Order XLI, Rule 11 and date for hearing of the appeal under Order XLI, Rule 12.

16. In *Shibu Ram Mittal* (supra), the Division Bench of the Delhi High Court specifically held as follows:

"9. A bare perusal of the relevant provisions contained in Sub-Rule (1) of Rule 22 of Order XLI C.P.C makes it clear that the limitation would begin to run from the date of service of notice on the respondent or his pleader of the day fixed for hearing of the appeal. A notice informing the respondent that an appeal has been admitted against him and intimating a Farzi (tentative) date of hearing cannot be taken as the notice envisaged under this provision. The provision is specific- "notice of the date fixed for hearing

the appeal". A Farzi date cannot be said to be the date fixed for hearing the appeal. Simply because a counsel appeared for the respondents does not displace the requirement of service of notice of actual date of hearing of appeal. The emphasis on the words "notice of date fixed for hearing an appeal" cannot be allowed to be diluted. The provision ensures that the appellant has advance notice before the hearing of the appeal about the cross objections by the respondent."

17. In the case of *Karnataka State Road Transport Corporation v. R. Sethuram & Anr.,* reported in AIR 1996 Karnataka 380, the Karnataka High Court has taken a similar view by holding that the provisions of limitation are to be strictly construed and the rule does not speak of limitation from the date of knowledge of appeal, rather it speaks of limitation from the date of service of notice which would indicate the date of fixation of hearing of appeal by the High Court.

18. However, a different view has been taken by the Rajasthan High Court in the case of *The East India Hotels Ltd. v. Smt. Mahendra Kumari and another,* reported in AIR 2008 Raj. 131. In the said case, the cross objector has put in his appearance before the High Court and a caveat had been lodged even before admission of the appeal. It also appears that the counsel was present and the appeal was admitted in his presence. Under those circumstances, the High Court held that notice prescribed under Order XLI, Rule 14 was not be essential to be served upon the respondents who participated in the proceedings.

19. De hors the facts of the present case, it will be appropriate for us to examine the legislative scheme as well as the principles governing the application of Order XLI and its various rules of the Code of Civil Procedure, 1908 (in short the 'Code'). The Code is a law relating to procedure and procedural law is always intended to facilitate the process of

achieving the ends of justice. The Courts would normally favour the interpretation which will achieve the said object. In the case of *Sardar Amarjit Singh Kalra (dead) by LRs., v. Pramod Gupta (Smt.) (dead) by LRs. and others* [2003 (3) SCC 272], a Constitution Bench of this court held, "laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice."

20. Similar views are also expressed by this Court in the case of *The State of Punjab and another v. Shamlal Murari and another* [(1976) 1 SCC 719] where the Court held as under: -

> "…We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities..."

21. Order XLI of the Code deals with appeals from original decrees. Rules 1 and 2 give the right to file an appeal against a decree in the manner and on the grounds specified therein. Rule 3 provides for rejection of the memorandum of appeal. Rule 3A which was added by the Amendment Act 104 of 1976 (w.e.f. February 1, 1977) provides for application for condonation of delay where the appeal is filed beyond the period of limitation. Rule 5 defines power of the Court to grant

stay, conditional or otherwise, of the decree under appeal. Rule 11 is an important provision which requires the Appellate Court to fix a day for hearing the appellant or his pleader and, on hearing, it may even dismiss the appeal at that very stage. The expression 'after fixing a date for hearing the appellant' is of some significance. It obviously means that the Court should fix a date for hearing the appellant on the merits of the appeal. The hearing contemplated under Rule 11 is not an empty formality but denotes the substantive right of being heard, available to the appellant(s). The Court has to apply its mind to the merits of the appeal and then alone the Court can pass an order of dismissal. In terms of Rule 12, unless the Appellate Court dismisses the appeal under Rule 11, it shall fix a day for hearing of the appeal. The hearing contemplated under Rule 12 is normally called 'final hearing'. Between the day of hearing fixed under Rule 11 and that fixed under Rule 12 there is a requirement to issue notice to the respondent(s). Besides this two other aspects need to be highlighted. First is that Rule 11A of the Code requires the Court to hear the appeal under Rule 11 as expeditiously as possible and to conclude such hearing within 60 days from the date on which the memorandum of appeal is filed. Second is that the fixation of the appeal for hearing under Rule 12 would be on such day which the court may fix with reference to the current business of the court. As is evident, the intention of the legislature is to ensure expeditious disposal of the appeals keeping in mind the heavy burden on the courts. The Appellate Court is vested with very wide powers including framing of additional issues, permitting additional evidence, remanding a case, pronouncing judgments in accordance with law and even admitting an appeal for re-hearing where the appeal was dismissed in default. The provisions of Rule 22 which have been reproduced by us above gives right to a respondent to file cross-objections to the decree under appeal which he could have taken by way of an appeal. This right is available to the respondent provided he had filed such objections in the Appellate Court *within one month from the date of service on him or his pleader of notice of the day*

fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

22. A bare reading of the provisions of Rule 22 clearly show that they do not provide for any consequences, leave any adverse consequence, in the event the respondent-cross objector defaults in filing the cross objections within the statutory period of one month. On the contrary they provide that the cross objections can be filed within such further time as the Court may see fit to allow. The expression 'or within such further time as the court may see fit to allow' clearly shows that wide judicial discretion is vested in the courts to permit the filing of the cross-objections even after the expiry of 30 days or for that matter any period which, in the facts and circumstances of the case, is found to be just and proper by the Court.

23. Rule 22 is not only silent on the consequences flowing from such default from filing appeal within one month, from the period fixed hereunder, but it even clothes the Court with power to take on record the cross-objections even after the expiry of the said period. Thus, right of the cross-objector is not taken away in absolute terms in case of such default. The Courts exercise this power vested in them by virtue of specific language of Rule 22 itself and thus, its provisions must receive a liberal construction.

24. Maxwell on The Interpretation of Statutes, (12th Edn., by P. St. J. Langan), states as follows:-

> "A reference to the power of a court being exercisable "at any time thereafter" will receive a literal construction {*L. v. L.* [1962] P.101}. But where something is to be done "forthwith" by some person or body, a court will not require instantaneous compliance with the statutory requirement [*Sameen v. Abeyewickrema* (1963) A.C. 597] " 'Forthwith,' " Harman L.J. has said, "is not a precise time and, provided that no harm is done, 'forthwith' means any reasonable time thereafter," and so may, according to the

> circumstances, involve action within days or years [*Hillingdon London Borough Council v. Cutler* (1968) 1 Q.B. 124]"

25. Such provisions should be construed on their plain meaning and it may not be necessary for the Court to bring into service other principles of statutory interpretation. However, the maxim De minimis non curat lex shall apply to such statutory provisions.

26. Bennion on Statutory Interpretation (5th Edn., 2008, at page 55) states that

> "Where discretion exists The Court will be more willing to hold that a statutory requirement is merely directory if any breach of the requirement is necessarily followed by an opportunity to exercise some judicial or official discretion in a way which can adequately compensate for that breach."

27. In the case of *Kailash v. Nanhku & others,* [(2005) 4 SCC 480], a Bench of three Judges of this Court while interpreting the provisions of Order VIII Rule 1 of the Code, which has more stringent language and provides no such discretion to extend the limitation as provided to the Courts in Order XLI Rule 22, had observed that despite the use of such language in the provisions of Order VIII Rule 1 of the Code, the judicial discretion to extend the limitation contained therein has been a matter of legal scrutiny for quite some time but now the law is well settled that in special circumstances, the Court can even extend the time beyond the 90 days as specified therein and held as under:

> "The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried… In an adversarial system, no party should ordinarily be denied the

opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

28. Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold. We have already noticed that there is no indefeasible divestment of right of the cross-objector in case of a delay and his rights to file cross-objections are protected even at a belated stage by the discretion vested in the Courts. But at the same time, the Court cannot lose sight of the fact that meaning of 'ends of justice' essentially refers to justice for all the parties involved in the litigation. It will be unfair to give an interpretation to a provision to vest a party with a right at the cost of the other, particularly, when statutory provisions do not so specifically or even impliedly provide for the same. The provisions of Order XLI Rule 22 of the Code are akin to the provisions of the Limitation Act, 1963, i.e. when such provisions bar a remedy, by efflux of time, to one party, it gives consequential benefit to the opposite party. Before such vested benefit can be taken away, the Court has to strike a balance between respective rights of the parties on the plain reading of the statutory provision to meet the ends of justice. If a cross-objector fails to file cross-objections within the stipulated time, then his right to file cross-objections is taken away only in a limited sense. To that extent a benefit is granted to the other party, i.e. the appellant, of having their appeal heard without such cross-objections. Still, however, if the Court is of the opinion that it is just and proper to permit the filing of cross-objection even after the expiry of the statutory limitation of one month, it is certainly vested with power to grant the same, but of course, only after hearing the other party. That is how the rights of the parties are to be balanced in consonance with the

scheme of Order XLI Rule 22 of the Code.

29. In Justice G.P. Singh's Principles of Statutory Interpretation (11th Edn., 2008), the learned author while referring to judgments of different Courts states (at page 134) that procedural laws regulating proceedings in court are to be construed as to render justice wherever reasonably possible and to avoid injustice from a mistake of court. He further states (at pages 135 and 136) that: "Consideration of hardship, injustice or absurdity as avoiding a particular construction is a rule which must be applied with great care. "The argument ab inconvenienti", said LORD MOULTON, "is one which requires to be used with great caution"."

30. The learned author while referring to the judgments of this Court in the case of Sangram Singh v. Election Tribunal, Kotah [(1955) 2 SCR 1] recorded (at page 384) that "while considering the non-compliance with a procedural requirement, it has to be kept in view that such a requirement is designed to facilitate justice and further its ends and therefore, if the consequence of non-compliance is not provided, the requirement may be held to be directory…"

31. This Court in the case of Byram *Pestonji Gariwala v. Union Bank of India & others* [(1992) 1 SCC 31] referred to Crawford's Statutory Construction (para 254) to say that: "Statutes relating to remedies and procedure must receive a liberal construction 'especially so as to secure a more effective, a speedier, a simpler, and a less expensive administration of law'."

32. The consistent view taken by this Court is that the provisions of a statute are normally construed to achieve the ends of justice, advance the interest of public and to avoid multiplicity of litigation. In the case of *Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy & others* [2001 (8) SCC 115], this Court expressed similar view in relation to amendment of pleadings. The principles stated in this judgment

may aptly be applied generally in relation to the interpretation of provisions of the Code. Strict construction of a procedural law is called for where there is complete extinguishment of rights, as opposed to the cases where discretion is vested in the courts to balance the equities between the parties to meet the ends of justice which would invite liberal construction. For example, under Order XLI Rule 22 of the Code, cross objections can be filed at any subsequent time, even after expiry of statutory period of one month, as may be allowed by the Court. Thus, it is evidently clear that there is no complete or indefeasible extinguishment of right to file cross objections after the expiry of statutory period of limitation provided under the said provision. Cross-objections within the scheme of Order XLI Rule 22 of the Code are to be treated as separate appeal and must be disposed of on same principles in accordance with the provisions of Order XLI of the Code.

33. This Court in the case of *Sangram Singh* (supra) while dealing with the principles of interpretation of provisions of the Code, laid down three principles which have to be kept in mind while interpreting any portion of the Code and held as under:

> "31. In our opinion, Wallace, J., and the other judges who adopt the same line of thought, are right. As we have already observed, our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an ex parte order. Of course the fact that it is proceedings ex parte will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an ex parte decree or other ex parte order which the Court is

> authorised to make. All that Rule 6(1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between rules 7 and 13 emphasises this.

34. This Court has reiterated the above dictum with approval in the case of *Kailash* (supra). The above-stated principles require the Court to give precedence to the right of a party to put forward its case. In other words unnecessary and avoidable technical impediments should not be introduced by virtue of interpretative process. At the same time any irreparable loss should not be caused to a party on whom the right might have vested as a result of default of other party. Furthermore, the courts have to keep in mind the realities of explosion of litigation because of which the Court normally takes time to dispose of appeals. It would be a travesty of justice, if after passage of substantial time when the appeal is taken up for final hearing a cross-objector who was heard and participated in the hearing at the admission stage itself, claims that the limitation period for him to file his cross-objection will commence only from the date of service of a fresh notice on him or his pleader, in terms of Order XLI Rule 22 of the Code. Such an interpretation would jeopardize the very purpose and object of the statute and prejudicially affect the administration of justice as the appeal which has come up for final hearing and disposal would again be lost in the bundle of pending cases on this pretext. It is trite that justice must not only be done but must also appear to have been done to all the parties to a lis before the Court.

35. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be

construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances.

36. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them.

37. Now, we would proceed to examine the language of Order XLI Rule 22 of the Code. The stipulated period of one month is to commence from the date of service, on the concerned party or his pleader, of notice of the day fixed for hearing the appeal. A cross-objection may also be filed within such further time as the Appellate Court may see fit to allow.

Date of hearing

38. First and foremost, we must explain what is meant by 'hearing the appeal'. Hearing of the appeal can be classified in two different stages; one at the admission stage and the other at the final stage. Date of hearing has normally been defined as the date on which the court applies its mind to the merits of the case. If the appeal is heard ex-parte for admission under Order XLI Rule 11 of the Code, the Court could dismiss it at that very stage or admit the same for regular hearing. Such appeal could be heard in the presence of the other party at the admission stage itself, particularly, in cases where a caveat is lodged by the respondent to the appeal.

39. The concept of 'hearing by the Court', in fact, has common application both under Civil and Criminal jurisprudence. Even in a criminal matter the hearing of the case is said to be commenced by the Court only when it applies its mind to frame a charge etc. Similarly, under civil law also it is

only when the Court actually applies its mind to averments made by party/parties, it can be considered as hearing of the case. This Court in the case of *Siraj Ahmad Siddiqui v. Prem Nath Kapoor* [1993 (4) SCC 406] while dealing with the provisions of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972, referring to the concept of first hearing, held as under:

> "13. The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. ……We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."

40. The date of hearing must not be confused with the expression 'step in the proceedings'. These are two different concepts of procedural law and have different connotation and application. What may be a 'step in the proceeding', essentially, may not mean a 'hearing' by the Court. Necessary ingredients of 'hearing' thus are application of mind by the court and address by the party to the suits.

41. Now we would proceed to discuss the purpose of giving one month's time and notice to the respondent to file cross-objection. The primary intention is, obviously, to give him a reasonable opportunity to file cross-objections in the appeal filed by the other party. It may be noticed that filing of cross-objections is not an exclusive but, an alternate remedy which a party can avail as alternative of filing a separate appeal in its own right.

42. The language of Order XLI Rule 22 of the Code fixes the period of limitation to be computed from the date of service of notice of hearing of the appeal upon the respondent/cross-objector and within one month of such date he has to file cross objections. Thus, the crucial point of time is the date on which the notice of hearing of the appeal is served. This could be a notice for actual date of hearing or otherwise.

43. There appears to be a dual purpose emerging from the language of Order XLI Rule 22 of the Code. Firstly, to grant time of one month or even such further time as the Appellate Court may see fit to allow; and secondly, to put the party or his pleader at notice that the appeal has been admitted and is fixed for hearing and the Court is going to pronounce upon the rights and contention of the parties on the merits of the appeal. Once such notice is served, the period of limitation under Order XLI Rule 22 of the Code will obviously start running from that date. If both these purposes are achieved any time prior to the service of a fresh notice then it would be an exercise in futility to issue a separate notice which is bound to result in inordinate delay in disposal of appeals which, in turn, would be prejudicial to the appellants. A law of procedure should always be construed to eliminate both these possibilities.

44. A Bench of three Judges of this Court in the case of Salem Advocate Bar Association, Tamil Nadu v. Union of India [(2003) 1 SCC 49] while examining the constitutional validity of various amended provisions of the Code, (amended or introduced by Amendment Act 46 of 1999 and Amendment Act 22 of 2002) discussed requirements of Section 27 of the Code which relates to issuance of summons to the defendants to appear and answer the claim. Such summons are required to be issued within one month from the date of institution of the suit. The Court held that once steps in furtherance to issuance of summons within one month are taken by the plaintiff, then even if the summons are not served within that period, it will be substantial compliance of the provisions of Section 27 of

the Code. Following dictum of the court can be usefully noticed at this stage.

> "7. It was submitted by Mr. Vaidyanathan that the words "on such day not beyond thirty days from the date of the institution of the suit" seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January, 2002, then the correct addresses of the defendants and the process fee must be filed in the Court within thirty days so that summons be issued by the Court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, be compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons."

45. The learned counsel for the appellant also relied upon the judgment of this court in the case of *Sushil Kumar Sabharwal v. Gurpreet Singh & others* [2002 (5) SCC 377] to contend that knowledge of appeal cannot be equated to notice of date of hearing. There is no doubt that this Court in para 11 of that judgment made a distinction between the knowledge of the date of hearing and the knowledge of pendency of suit.

Referring to the evidence in that case, this Court held that the version of the defendant should have been believed by the courts concerned because he was denied a reasonable opportunity to present his case before the Court. In the present case this distinction is hardly of any help to the counsel for the appellant inasmuch as they have appeared and argued at the admission stage of the appeal which was admitted in their presence and an order was also passed for final hearing.

46. Adverting to the facts of the present case, as already noticed, the appellants had also filed caveat in the appeal. In law, the rights of a caveator are different from that of cross-objectors per se. In terms of Section 148A of the Code, a caveator has a right to be heard mandatorily for the purposes of passing of an interlocutory order. The law contemplates that a caveator is to be heard by the court before any interim order can be passed against him. But in the present case when the appeal was listed for hearing at the admission stage itself, the appellants had appeared and argued the matter not only in relation to grant of an interim order but also on the merits of the appeal. The High Court, on 12th of September, 2001, after applying its mind to the merits of the case had passed the following order:

> "Admit.
>
> Heard the counsel for the appellant and respondent.
>
> Interim stay as prayed, in I.A. II/01 subject to the appellant depositing 50% of amount awarded with all statutory benefits etc., before the reference court, within eight weeks.
>
> Respondents permitted to withdraw 25% of the amount. Remaining 25% amount shall be kept in fixed deposit for the term of six months.
>
> Call for records.
>
> List for hearing immediately after the records are received with connected cases."

47. As is evident from the above order, the records were required to be called from the lower courts and thereafter, the appeal was to be heard finally. Though the court had not actually fixed any particular date, it had directed the appeal to be listed for hearing. Then again, vide its order dated 25th January, 2002, the High Court had directed the appellant(s) to move an application for early hearing of the appeal. On all these occasions, the appellant(s), or his pleader, was present and participated in the proceedings before the Court. Thus, the appellant(s) not only had the knowledge of pendency of the appeal but also had notice of fixing of hearing of the appeal. Even on 18th September, 2003, the High Court took notice of the cross-objection and counsel for the appellant(s)/cross objector was directed to furnish copies of the cross-objection within three weeks to the Additional Advocate General. After the records from lower courts were received, the matter was heard and judgment impugned in the present appeal was pronounced by the High Court on 22nd October, 2003.

48. In these circumstances, it is difficult for this Court to hold that the period of 30 days, as contemplated under Order XLI Rule 22 of the Code, never commenced even till final disposal of the appeal. Such an interpretation will frustrate the very purpose of the Code and would be contrary to the legislative intent. We may also notice that the appeal was finally heard without fixing any particular date and in presence of the appellant(s). Under such circumstances, the requirement of fixing a final date separately must be deemed to be waived by the parties.

49. It may be noticed that somewhat divergent views have been taken by different High Courts while interpreting the provisions of Order XLI Rule 22 of the Code. The High Court of Rajasthan in the case of *The East India Hotels Limited v.*

Smt. Mahendra Kumari [AIR 2008 Raj. 131] took the view that respondent cross-objector had put in appearance through his counsel as a caveator and the appeal was admitted on 28th March, 2006 in his presence and participation. As the appeal was admitted in their presence, the Rajasthan High Court opined that no notice thereafter was required to be served on the caveator for the purposes of Order XLI Rule 22 and period of limitation of one month would start from 28th March, 2006 (i.e. the date of admission) for filing of cross-objection. The filing of the cross objection in that case was delayed by 507 days. On the issue of condonation the High Court felt that the delay could not be condoned in the facts and circumstances of the case and thus dismissed the cross-objections as barred by time. It also needs to be noticed that the judgments of the Delhi High Court in the case of *Jhutter Singh* (supra) and *Rashida Begum* (supra) were also examined by the Rajasthan High Court and are distinguished on facts as in those cases at no point of time the objector or respondent had participated.

50. The Rajasthan High Court also relied upon the judgment of the High Court of Andhra Pradesh in the case of *Mutyam Agaiah v. Special Deputy Collector, (NTPC) L.A. Unit.* [2002 (2) ALT 715] wherein that High Court while accepting the submissions of the respondent had held that:

> "…We have to understand the issue of notices in the proper perspective. The notices are meant for giving knowledge to the other side regarding the judicial proceedings filed by the appellant. It is not every time necessary that the notices should be in writing in the prescribed form. If the knowledge of filing of the appeals can be proved, then it is sufficient notice in law. The respondent-cross objector engaged an Advocate, who filed vakalatnama and he defended the cause of the claimant in the Original Petition. It means that the cross-objector had sufficient knowledge regarding the appeals. Nothing prevented for the respondent-cross-objector for filing the objections……."

51. In the case of *Rashida Begum* (supra) the Delhi High Court had noticed that limitation for filing the cross objection would start from the date of service of notice of hearing of the appeal. A notice containing only the date of hearing of the stay application but not the appeal would not be 'notice' as contemplated under Order XLI Rule 22 of the Code.

52. The view taken by the Delhi High Court is more in line with the intent of the provisions of Order XLI Rule 22 while the decision of the Rajasthan High Court was on its own facts and cannot be treated to be stating a preposition of law. The application of law would always depend upon the facts and circumstances of a given case and what is the true and correct construction of Order XLI Rule 22 we shall shortly proceed to state.

53. In the case of *Pralhad & others v. State of Maharashtra and another* [2010 (10) SCC 458], a Bench of this Court to which one of us was a member was dealing with the object and scope of the powers vested in the Court in terms of Order XLI Rule 33 of the Code. This Court observed that Rule 33 empowers the Appellate Court to pass any decree or make any order which ought to have been passed or made and also to pass or make such further decree or order as the case may require. The Appellate Court can exercise this power notwithstanding that appeal is only with respect to a part of decree. This power may be exercised in favour of any of the respondents or the parties although such respondent or party may not have filed any appeal or objections. In other words, the Court has been vested with the power to pass such orders which ought to have been passed in the facts of a given case. While dealing with this issue, this Court held as under:

> "18. The provision of Order XLI Rule 33 CPC is clearly an enabling provision, whereby the appellate court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass or make such further or other decree or order as the case may

require. Therefore, the power is very wide and in this enabling provision, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression "order ought to have been made" would obviously mean an order which justice of the case requires to be made. This is made clear from the expression used in the said rule by saying "the court may pass such further or other order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law."

54. The Court clearly held that the expression "order ought to have been made" obviously means an order which justice demands in facts of the case. The dictum of law stated by this Court clearly demonstrates that justice between the parties to a case is the essence of procedural law and unless the statute expressly prohibits or put an embargo, the Courts would interpret the procedural law so as to achieve the ends of justice.

55. If we examine the provisions of Order XLI Rule 22 of the Code in its correct perspective and in light of the above stated principles then the period of limitation of one month stated therein would commence from the service of notice of the day of hearing of appeal on the respondent in that appeal. The hearing contemplated under Order XLI Rule 22 of the Code normally is the final hearing of the appeal but this rule is not without any exception. The exception could be where a party respondent appears at the time of admission of the appeal, as a caveator or otherwise and argues the appeal on merits as well as while passing of interim orders and the Court has admitted the appeal in the presence of that party and directs the appeal to be heard finally on a future date actual or otherwise, then it has to be taken as complete compliance of the provisions of Order XLI Rule 22 of the Code and thereafter, the appellant who has appeared himself or through his pleader

cannot claim that period mentioned under the said provision of the Code would commence only when the respondent is served with a fresh notice of hearing of the appeal in the required format. If this argument is accepted it would amount to travesty of justice and inevitably result in delay while causing serious prejudice to the interest of the parties and administration of justice. Such interpretation would run contra to the legislative intent behind the provisions of Order XLI Rule 11 of the Code which explicitly contemplate that an appeal shall be heard expeditiously and disposed of as far as possible within 60 days at the admission stage. All the provisions of Order XLI of the Code have to be read conjunctively to give Order XLI Rule 22 its true and purposive meaning. Having analytically examined the provisions of Order XLI Rule 22, we may now state the principles for its applications as follow:

(a) Respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order XLI Rule 22 of the Code;

(b) The limitation of one month for filing the cross-objection as provided under Order XLI Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order XLI Rule 22. In other words the limitation of one month shall start from that date.

56. Needless to notice that the cross-objections are required to be filed within the period of one month from the date

of service of such notice or within such further time as the Appellate Court may see fit to allow depending upon the facts and circumstances of the given case.

57. Since the provisions of Order XLI Rule 22 of the Code itself provide for extension of time, the Courts would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the Court to file cross-objections beyond the statutory period of one month.

58. Examining the case in hand within the legal framework afore-stated, it has to be held that the case falls squarely within the principles formulated in clause (c). The appellant(s) herein were caveators before the High Court and they were heard not only while passing of interim orders but the appeal itself was admitted in their presence. Further, the Court directed that the records from lower court be called and after receipt of such record the appeal was directed to be listed for final disposal. Thus, the cross-objector not merely had the knowledge of pendency of the appeal and order of the High Court for its final disposal but he actually participated at all the stages of the proceedings before that Court, i.e. at the stage of admission of appeal, passing of interim orders and variation thereof and at the stage of consideration of application of the cross-objector, moved for early hearing of the appeal and, in fact, the appeal had been directed to be heard finally in his presence. Thus, in these circumstances, one month of prescribed period in terms of Order XLI Rule 22 of the Code shall commence from 12th September, 2001, i.e. the date on which the High Court ordered that the appeal may be listed for hearing.

59. As the period for filing the cross objection had long expired, the application for condonation of delay was filed. It is interesting to note that the appellants in this Court themselves admitted that they had received the notice of the appeal through their counsel and the period of one month came to an end on 12th October, 2001. This submission has been made in

paragraph 3 of the affidavit annexed to the application filed by the cross-objector before the High Court under Section 5 of the Limitation Act, 1963, along with the cross-objections, praying for condonation of delay and leave of that Court to file their cross-objections beyond the statutory period of one month as provided in Order XLI Rule 22 of the Code.

60. Delay was sought to be condoned on the ground that the appellants have appeared before the Court and despite receipt of the notice of final hearing they could not file cross-objections within the prescribed time as they were out of their native place and have gone to Karwar to earn their livelihood and they could not therefore receive the letter and that too within one month. Later, the appellant fell down and his leg was twisted and because of swelling and pain he was not able to drive and consult his counsel in Bangalore. It is only after he got well, he met his counsel and filed the cross-objections on 19th November, 2002, i.e. after a delay of 404 days. The High Court did not find any merit in the reasons shown for condonation of delay and dismissed the said application. We have already noticed that Order XLI Rule 22 of the Code itself provides a discretion to the Appellate Court to grant further time to the cross-objector for the purposes of filing cross-objections provided the cross-objector shows sufficient or reasonable cause for his inability to file the cross-objections within the stipulated period of one month from the date of receipt of the notice of hearing of appeal. No specific reasons have been recorded by the High Court in the impugned judgment as to why the said averments did not find favour and was disbelieved. There is nothing on record to rebut these averments made by the cross-objector.

61. In the peculiar facts and circumstances of this case, to do complete justice between the parties, we allow the landowner's appeal by setting aside the order of the High Court, limited to the extent that the appellants herein have been able to show sufficient/reasonable cause for grant of further time to

file the cross objections beyond the period of one month in terms of Order XLI Rule 22 of the Code. This approach could even be adopted without the aid of Section 5 of the Limitation Act, 1963, which provisions may also find application to such matters. Be that as it may, we do not consider it necessary to delve on this issue in any further detail. Suffice it to say that the appellants were entitled to file cross-objections by grant of further time before the High Court. Delay in filing the cross-objections is thus condoned.

62. The High Court has therefore to hear afresh the appeal of the State as also the cross objections of the landowners. In that view of the matter, there is no need of passing a separate order on the appeal filed by the State before this Court and the same is thus disposed of.

63. Since considerable time has elapsed, we request the High Court to dispose of the appeal and the cross objections as early as possible, preferably within a period of three months from the date of production of this order before the High Court.

64. Parties to bear their own costs.

B.B.B. Appeals disposed of.

MRS. SARADAMANI KANDAPPAN

v.

MRS. S. RAJALAKSHMI & ORS.

(Civil Appeal Nos. 7254-7256 of 2002)

And

(Contempt Petition (C) No. 28-29 of 2009)

JULY 4, 2011

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Contract Act 1872:

s.55 – Effect of failure to perform at a fixed time in contracts in which time is essential – Held: In a contract relating to sale of immovable property if time is specified for payment of sale consideration but not in regard to the execution of sale deed, time will become the essence only with reference to payment of sale consideration but not in regard to execution of sale deed – Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract – In the instant case, in the agreement for sale, there was a conscious effort to delink the terms relating to payment of balance sale consideration from the term relating to execution of sale deed and making the time essence only in regard to the payment of the balance sale consideration – Therefore, failure of the plaintiff to pay the balance consideration clearly amounted to breach since time for such payment was the essence of the contract – The defendants were justified in determining the agreement of sale – The rejection of the prayer for specific performance is upheld – However, there was no provision in the agreement for forfeiture of the amounts already paid, even in the event of breach by the purchaser – On the other hand, it provided

that if the vendors did not satisfy the purchaser in regard to their title, the amounts received would be refunded – Though the plaintiff is not entitled to the relief of specific performance, it cannot be said that the plaintiff had filed false, frivolous and mischievous suits – In view of that, in terms of the agreement and in terms of its offer, the plaintiff was entitled to recover the amounts paid by her.

Principle " Time is not of the essence of the contracts relating to immovable properties – Relevance of – Need for legislation – Held: The said principle took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years – As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed – This principle made sense during the period when there was comparatively very little inflation in India – But a drastic change occurred from the beginning of the last quarter of the twentieth century – There is a galloping inflation and prices of immovable properties are increasing steeply, by leaps and bounds – Market values of properties are no longer stable or steady – Judicial notice is taken of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now – Properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now – The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance – The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance – A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to

cover his delays, laches, breaches and 'non-readiness' – The precedents from an era, when high inflation was unknown, holding that time is not the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein was unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist – Legislation – Specific relief – Equity.

s.54 – Reciprocal promises – In the instant case, agreement of sale of immovable property contained an unconditional promise to pay the balance consideration in three instalments and the said promise by the purchaser was not made dependent upon performance of any obligation by vendors – The contract specifically stated that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to purchaser – This showed that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally – The sale deed was not required to be executed within any specific period – The purchaser had to fulfil her obligation in regard to payment of price and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser – The sale deed had to be executed only after payment of complete sale consideration within the time stipulated.

Agreement of sale – Suit by purchaser for permanent injunction to protect possession – Held: As per the terms of the contract, the purchaser was only entrusted with the suit schedule properties as a caretaker until possession is given on receipt of the entire sale consideration – As neither the entire sale consideration was paid nor possession delivered, the plaintiff remained merely a caretaker and on cancellation

of the agreement of sale by the defendants, the plaintiff became liable to leave the suit schedule properties as the possession continued to be with the defendants – Since appellant never had 'possession' she was not entitled to seek a permanent injunction to protect her possession.

Agreement of sale whether amounts to encumbrance – Held: An 'encumbrance' is a charge or burden created by transfer of any interest in a property – It is a liability attached to the property that runs with the land – Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property – Receiving advances or amounts in pursuance of an MOU would also not amount to creating an encumbrance.

***Suit**: Recovery suit – Claim of plaintiff that she paid Rs.1,25,000/– to defendant no.4 as commission – Trial court held that the said amount was not paid as commission but was paid as consideration for the movables – Said suit dismissed by trial court – In the High Court, the appellant did not press for any decree in view of the finding that the amount paid was part of the consideration for movables – No reason to interfere with the dismissal of the suit for recovery.*

***Legislation**: Reasonableness of – Held: Laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable – There is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices – Contract Act, 1872.*

***Specific relief**: Suit for specific performance – Held: Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties*

prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and, therefore, time/period prescribed cannot be ignored – Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract – Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement – Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal – The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance – The three years period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser – Equity – Contract Act, 1872.

***Pleadings**: Plea of fraud – Held: Whenever a party wants to put forth a contention of fraud, it has to be specifically pleaded and proved – In the instant case, plaint did not allege any fraud by the defendants – The contention that the vendors deliberately or intentionally suppressed any information regarding the pending encumbrances or the fact that the original documents were not available and thereby committed fraud was neither pleaded nor proved – The appellant did not allege in the plaint, any fraud on the part of vendors, in regard to suppression of encumbrances over the property – From the evidence on record as rightly held by the courts below it was not possible to make out either any fraud or any suppression or failure to disclose facts on the part of the respondents.*

***Evidence**: Defendants 1 to 3 entered into an agreement of sale of properties – Entire transaction done on behalf of the defendants 1 to 3 by defendant No.4 who alone had complete knowledge of the entire transaction – In suits*

between the plaintiff and defendants, defendant no.4 gave evidence on behalf of all the other defendants – Non-examination of defendants 1 to 3 – Held: When one of the defendants who was conversant with the facts has given evidence, it was not necessary for the other defendants to be examined as witnesses to duplicate the evidence – Where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction – Therefore, the evidence of the fourth defendant was sufficient to put forth the case of the defendants and there was no need to examine the other three defendants who did not have full or complete knowledge of the transactions.

The respondent nos. 2, 3 and 4 were respectively the son, daughter and husband of the first respondent. They owned the suit properties which they agreed to sell to the appellant for Rs.3.75 lacs on 17.1.1981. On the date of agreement, Rs.1 lac was paid as advance to respondents. As per the agreement, the appellant was to pay Rs.1 lac on or before 28.2.1981, Rs.1 lac on or before 6.4.1981 and Rs.75000 on or before 30.5.1981. Clause 6 of agreement stated that the payment on due dates was the essence of the contract and in case of failure on the part of the appellant, the respondents would cancel the agreement. On the same day (i.e. 17.1.1981), respondent no.4 in a letter addressed to the appellant acknowledged the receipt of Rs.1.25 lacs paid on various dates as commission for the said transaction relating to sale of suit properties. By the said letter, he agreed that in case the transaction of sale remained unconcluded or got cancelled because of default on the part of the sellers or

buyer or because of defective title, the entire amount of Rs.1.25 lacs received by him as commission would be refunded. In pursuance of the said agreement the appellant paid further advances of Rs.1,00,000 on 28.2.1981 and of Rs.25,000 on 2.4.1981. The balance of 75,000 in regard to the instalment payable on 6.4.1981 and the last instalment of Rs.75,000 payable on or before 30.5.1981 was not paid by the appellant.

Respondent nos.1 to 3 sent a notice to the appellant cancelling the agreement dated 17.1.1981 on the ground of default in payment of the balance of the sale consideration in exercise of their right to cancel the agreement on such default under clause 6 of the agreement. The appellant sent a reply that time was never intended to be the essence of the agreement; that respondents failed to produce the original documents of title inspite of repeated demands and, therefore, it was agreed between the appellant's husband and the fourth respondent during discussions held in March 1981 in the presence of witnesses that the original documents would be made available as soon as possible and the appellant would pay the balance only thereafter and that sale would be completed within a reasonable time of handing over the documents and, therefore, a further advance of Rs.25000 was received on 2.4.1981. Thereafter, the appellant got a notice published in the newspaper informing the public about the said sale transaction. One 'G' sent a response notice that the documents relating to the suit properties were deposited with him and if the appellant purchased the said lands, she would be doing at her own risk. A notice was also sent by the respondents stating that the claim of the appellant that she purchased the said land and was in possession thereof and was cultivating them was false; the survey numbers mentioned in the notice were erroneous; that after the agreement dated 17.1.1981 was cancelled, they

had entered into an agreement with a third party which fell through because of the public notice, causing loss to them; and that the appellant was appointed only as a caretaker of the lands under the agreement dated 17.1.1981 and the said appointment was cancelled and a new caretaker was appointed. Respondents 1 to 3 called upon the appellant to hand over all movables on 19.11.1981 to the new caretaker.

The appellant filed three different suits. First and second suits were filed against respondent nos.1 to 4 for permanent injunction and for specific performance of contract. The third suit was filed against respondent no.4 for return of Rs.1.25 lacs paid as commission with interest. The Single Judge of the High Court dismissed all the suits. A Division Bench of the High Court dismissed the appeals affirming the judgment of the trial court. The Division Bench, however, directed the respondents to return Rs.3,50,000 (i.e. Rs.2,25,000 paid to defendants 1 to 3 and Rs.1,25,000 paid to defendant No. 4) with interest at 9% per annum for the period during which the appellant was not acting as caretaker till the complete payment was made.

The questions which arose for consideration in the instant appeals were:

(i) whether the time stipulated for payment of balance consideration was the essence of contract and whether the defendants were justified in cancelling the agreement, when the time schedule stipulated for such payment was not adhered to;

(ii) whether the parties had agreed upon sequence of performance, which required payment of balance consideration by appellant, as stipulated in clause (4) of the agreement, only after the respondents

satisfied the appellant regarding their title to the lands;

(iii) whether the respondents had failed to disclose the encumbrances over the properties and thereby committed fraud, entitling the appellant for extension of time stipulated for payment corresponding to the delay caused by the fraud and consequently the cancellation of the agreement by notice dated 2.8.1981 was illegal and invalid;

(iv) whether an adverse inference ought to be drawn on account of the non-examination of defendants 1 to 3 who were the vendors under the agreement of sale.

Dismissing the appeals and disposing of the contempt petition, the Court

HELD: QUESTION (i)

1.1. Section 55 of the Contract Act 1872 deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract. The standard agreements of sale normally provide for payment of earnest money deposit or an advance at the time of execution of agreement and the balance of consideration payable at the time of execution/registration

of the sale deed. In the absence of contract to the contrary, the purchaser is bound to tender the balance consideration only at the time and place of completing the sale. In this case there was a conscious effort to delink the terms relating to payment of balance price (clauses 4, 5 and 6) from the term relating to execution of sale deed (clause 7) and making the time essence only in regard to the payment of the balance sale consideration. There was also a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the sale deed. The intention making time essence of the contract for payment of balance price was clear from the following: (a) clause 4 required the balance consideration to be paid in three instalments; (b) Clause 5 made it clear that if any of the dates of payment was subsequently declared as a holiday, then the next immediate working day would be the date of payment. This showed a clear intention that payment was to be made on the stipulated dates and even a day's delay was not acceptable unless the due date was declared to be a holiday; (c) Clause 6 specifically stipulated that the payments on due dates was the essence of the contract and in case of failure on the part of the purchaser the vendors would cancel the agreement. On the other hand, the terms relating to performance of sale clearly indicated that time was not intended to be the essence, for completion of the sale. Clause 3 provided that the execution of sale deed would depend upon the second party (purchaser) getting satisfied regarding the title to the lands, so also the nil encumbrance. The said clause did not say that payment of balance consideration would depend upon the purchaser getting satisfied regarding title or nil encumbrances. Clause 7 provided that the sale deed would be executed at the convenience of the purchaser, as and when she wanted them to be executed either in

her name or in the name of her nominee or nominees. Clause 12 provided that if the second party (purchaser) found the title of the properties to be unsatisfactory or unacceptable, the vendors would be put on notice about her intention not to conclude the sale and in such an event, if the vendors failed to satisfy the purchaser regarding their title, the vendors shall pay to the purchaser within three months from that date, all monies advanced by the purchaser till then. Clause 12 also provided that the payments of balance sale price in three instalments on the specified due dates were not dependent upon the further examination of title or the satisfaction of the purchaser about the title which showed that the purchaser on the basis of whatever initial examination she had taken of the documents, had unconditionally agreed to pay the amounts in three instalments and if the purchaser was not thereafter satisfied with the title or found the title unacceptable and if the vendors failed to satisfy her about their title when she notified them about her dissatisfaction, the vendors had to refund all payments made within three months. Thus it was categorically made clear in the agreement that time regarding payment of balance price was the essence of the contract and such payment was not dependent upon the purchaser's satisfaction regarding title. Apart from that, the plaintiff in her evidence admitted that time for performance was the essence of the contract. Her evidence also showed that she apparently did not have the funds to pay the balance of Rs.75,000 due on 6.4.1981 and Rs.75000/- due on 30.5.1981 as was evident from the Bank pass book. It was, therefore, possible that being not ready to perform the contract in terms of the agreement, the appellant had invented a modification in the terms of the agreement. The Single Judge and the Division Bench recorded a concurrent finding that the time was the essence of the contract and that no change was agreed

in respect of the agreement terms as alleged by the appellant. The appellant was unable to place any material which called for reversal of the said findings. Therefore, time regarding payment stipulated in clauses (4), (5) and (6) of the agreement of sale was the essence of the contract and failure of the appellant to adhere to it, justified cancellation of the agreement by the respondents. [Para 17, 20-22] [912-F-G; 913-A; 915-G-H; 916-A-H; 917-A-H; 918-A-E]

N.Srinivasa v. Kuttukaran Machine Tools Ltd. **2009 (5) SCC 182:2009 (2) SCR 852;** *Chand Rani v. Kamal Rani* **1993 (1) SCC 519: 1992 (3) Suppl. SCR 798;** *Gomathinayagam Pillai v. Pallaniswami Nadar* **1967 (1) SCR 227;** *Govind Prasad Chaturvedi v. Hari Dutt Shastri* **1977 (2) SCC 539: 1977 (2) SCR 877 – relied on.**

1.2. The distinction between contracts relating to immovable properties and other contracts was not drawn by section 55 of Contract Act (or any other provisions of Contract Act or Specific Relief Act, 1963). Courts in India made the said distinction, by following the English law evolved during the nineteenth century. This Court held that time is not of the essence of the contracts relating to immovable properties; and *that notwithstanding default in carrying out the contract within the specified period,* specific performance will ordinarily be granted, if having regard to the express stipulation of the parties, nature of the property and surrounding circumstances, it is not inequitable to grant such relief. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not

material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. Judicial notice is taken of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous,

but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees. [Paras 23-25] [918-F-H; 919-A-H; 920-A-F]

Indira Kaur v. Sheo Lal Kapoor **1988 (2) SCC 188;** *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* **AIR 1915 PC 83 – relied on.**

1.3. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable. There is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. [Paras 26-27] [920-G; 923-D-E]

Rattan Arya v. State of Tamil Nadu **(1986) 3 SC 385;** *Malpe Vishwanath Acharya v. State of Maharashtra* **(1998) 2 SCC 1: 1997 (6) Suppl. SCR 717;** *K.S. Vidyanadam and Others vs. Vairavan* **(1997) 3 SCC 1: 1997 (1) SCR 993 – relied on.**

1.4. Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and, therefore, time/period prescribed cannot be ignored. Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract. Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser. [Para 28] [923-F-H; 924-A-C]

QUESTION (ii)

2.1 Section 54 of Contract Act provides that when a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. There was no such express fixation of the order in which the reciprocal promises were to be performed. Clause (4) of the agreement did not say that the balance of the sale price shall be paid only after the vendors

satisfied the purchaser in regard to title or that the purchaser shall pay the balance of sale price only after she satisfies herself regarding title of the vendors to the lands. Nor did clause (3) contain a provision, after stating that execution of the sale deed shall depend upon the purchaser getting satisfied regarding title to the land as also the nil encumbrance, that the payment of sale consideration will also depend upon such satisfaction regarding title and nil encumbrance. There is an unconditional promise to pay the balance consideration in three instalments and the said promise by the purchaser is not dependent upon performance of any obligation by vendors. The contract specifically stated that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to purchaser. This clearly demonstrated that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally. In fact if the intention of the parties was that only after the vendors satisfying the purchaser about their title, balance consideration had to be paid, clause (12) would be redundant as the situation contemplated therein would not arise. Further, if that was the intention, the purchaser would not have paid Rs.1,00,000 as further advance on 28.1.1981 and Rs.25,000 on 2.4.1981. Therefore, the contract did not expressly (or even impliedly) specify the order of performance of reciprocal promises, as alleged by the appellant. The terms of the contract made it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in

clause 4 and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, Section 52 of the Contract Act which talks about the order of performance of reciprocal promises did not help the appellant but actually supported the vendors-respondents. [Paras 34, 36, 37] [927-F-G; 928-F-H; 929-A-H; 930-A-B]

QUESTION (iii)

3.1. Whenever a party wants to put forth a contention of fraud, it has to be specifically pleaded and proved. The plaint did not allege any fraud by the defendants. Evidence showed that before the agreement was entered, the purchaser's husband and legal advisor had examined the xerox copies of the title deeds and satisfied themselves about the title of the vendors. The appellant in her evidence clearly admitted that xerox copies of the title deeds were shown to her husband. The agreement of sale provided that the sale would depend upon purchaser getting satisfied about the title of the vendors. The manner in which the agreement was drafted by the purchaser showed that the purchaser and/or her husband were made aware of the encumbrances. Firstly there was no provision in the agreement that the lands were *not subject to any encumbrances.* Secondly, the provision for payment of sale price within a specified time did not link the payment to execution of a sale deed. Thirdly the contract provided that on execution of the agreement the purchaser will take possession as caretaker of the suit schedule properties and that on complete payment of the sale price on 30.5.1981, she will be entitled to possession in part performance and that the execution of the sale deed will be whenever required by

the purchaser, totally disconnected with either payment of price or delivery of possession. All these provisions demonstrated that the vendors were in urgent need of money, that the purchaser was made aware of the encumbrances, that on the purchaser paying the sale price, the vendors had to clear the encumbrances and thereafter convey the property, free from encumbrances. The contention that the vendors deliberately or intentionally suppressed any information regarding the pending encumbrances or the fact that the original documents were not available and thereby committed fraud was neither pleaded nor proved. The appellant did not allege in the plaint, any fraud on the part of vendors, in regard to suppression of encumbrances over the property. The entire plaint tried to justify that the plaintiff did not commit breach of contract by not paying the balance instalments on 6.4.1981 and 30.5.1981, except for a stray sentence that the plaintiff will be entitled to proceed against the third defendants 1 to 3 for damages, for not performing their part of the contract and not disclosing several prior encumbrances over the property. In the written statement, the defendants submitted that the encumbrance certificate upto the year 1980 had been given to appellant's husband, which showed the encumbrance in favour of State Bank of Mysore, that plaintiff and her husband both knew before entering into the agreement of sale that original documents were with the said bank and that therefore the allegation that the encumbrance was not disclosed was false. It was also disclosed in the written statement, that a document was surreptitiously detained by one 'G'. It was stated that the defendants intended to utilise the last two instalments for securing back the original documents by discharging the loans. It was not disputed that the amount due to 'G' was around Rs.40,000 and the amount due to State Bank of Mysore was around Rs.39,000 and any of the last two instalments would have been sufficient to discharge the

said liabilities. The appellant having committed default in paying the last two instalments which would have enabled discharging the debts, cannot find fault with the vendors by contending that they did not secure the original title deeds. If the mortgage/encumbrance was made known to appellant's husband and if it had been understood that the same would be cleared from the last of the instalments paid by the appellant, the absence of original title deeds could not be made a ground for not paying the last two instalments. The claim of the appellant that the vendors should have cleared all the encumbrances before payment of the last two instalments is not borne out by any evidence. Even in law, the obligation of the vendors is to convey an encumbrance free, good and marketable title subject to contract to the contrary. The stage of execution of sale deed had not arrived as the appellants did not pay the amount due in terms of the contract. The appellant contended that the debt due to the Bank of India had been fraudulently suppressed by the vendors. There was no reference to such a mortgage either in the plaint or the evidence of the plaintiff. No one was examined from the bank nor any document produced to prove the existence of such mortgage. Appellant attempted to produce some documents relating to the said mortgage with an application under Order 41 Rule 27 CPC which was rejected by the High Court. What is significant and relevant is the fact that as on the date of the agreement of sale (17.1.1981) the first defendant was not a debtor of Bank of India but on the other hand the bank itself was a debtor to the extent of more than Rs.33,00,000 with interest. Therefore the contention of the appellant that an encumbrance in favour of Bank of India was in existence and that was not disclosed and the said liability was not disclosed, was wholly untenable. From the evidence on record as rightly held by the courts below it was not possible to make out either any fraud or any suppression

or failure to disclose facts on the part of the respondents. [Para 40, 42] [932-D-H; 933-A-B; 934-D-H; 935-A-B]

Bank of India v. Vijay Transport **2000 (8) SCC 512: 2000 (3) Suppl. SCR 685 – relied on.**

3.2. The failure of the appellant to pay the balance of Rs.75,000 on 6.4.1981 and failure to pay the last instalment of Rs.75,000 on or before 30.5.1981 clearly amounted to breach since time for such payment was the essence of the contract, the respondents were justified in determining the agreement of sale. Therefore rejection of the prayer for specific performance is upheld. The appellant was not put in possession of the suit properties in part-performance of the agreement of sale. Under clause 15 of the agreement of sale, she was only entrusted with the suit schedule properties as a caretaker until possession is given on receipt of the entire sale consideration. As neither the entire sale consideration was paid nor possession delivered, the plaintiff remained merely a caretaker and on cancellation of the agreement of sale by the respondents, the plaintiff became liable to leave the suit schedule properties as the possession continued to be with the defendants. As appellant never had 'possession' she was not entitled to seek a permanent injunction to protect her possession. There was also no reason to interfere with the dismissal of the suit for recovery of Rs.1,25,000 from the fourth respondent. The trial court held that the said amount was not paid as commission but was paid as consideration for the movables. The said suit was dismissed by the trial court. In the High Court, the appellant did not press for any decree against the fourth respondent in view of the finding that the amount paid was part of the consideration for movables. Therefore the dismissal of suit for Rs.1,25,000 is also upheld. [Paras 43 to 45] [935-C-H; 936-A-C]

3.3. The Division Bench to do broad justice and work out the equities, took note of the offer of the defendants in their written statement to refund the amount paid as advance and directed the defendants to refund the sum of Rs.2,25,000 paid to defendants 1 to 3 under the agreement and Rs.1,25,000 paid to the fourth respondent, in all, Rs.3,50,000 with interest at 9% per annum for the period when the appellant was not acting as a care taker till date of payment. There is no reason to interfere with the direction to refund Rs.3,50,000 with interest. However, a modification is required to be made as to the rate of interest and the period for which interest is payable. The High Court had awarded interest on the sum of Rs.3,50,000 at 9% per annum for the period in which the appellant had not acted as caretaker till the date of payment. The agreement of sale did not provide for forfeiture of the amounts paid as advance under any circumstances and on the other hand, specifically provided that if the plaintiff was not satisfied with the title of the defendants, the amounts received as advance would be refunded. In fact, the respondents, in their written statement, offered to refund the amount. Therefore, the High Court ought to have granted interest from the date of cancellation of the agreement (2.8.1981) to the date of payment. The High Court was not justified in restricting the interest to only for the period during which the appellant had not acted as caretaker. The liability to refund the advance has nothing to do with the appointment of the plaintiff as caretaker or the obligation of the plaintiff to return the property on cancellation of the agreement. Having regard to the facts and circumstances. The rate of interest shall be increased to 12% per annum instead of 9% per annum. [Para 46] [936-D-H; 937-A-B]

QUESTION (iv)

4.1. There were four defendants in the suit.

Defendants-respondents 1, 2 and 3, who were the owners of the lands were respectively the wife, son and daughter of the fourth defendant. It was an admitted position that the entire transaction was done on behalf of the defendants 1,2 and 3 by defendant No.4 who alone had complete knowledge of the entire transaction. Fourth defendant had given evidence on behalf of all the other defendants. When one of the defendants who was conversant with the facts has given evidence, it was not necessary for the other defendants to be examined as witnesses to duplicate the evidence. Where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Therefore, the evidence of the fourth defendant (examined as DW2) was sufficient to put forth the case of the defendants and there was no need to examine the other three defendants who did not have full or complete knowledge of the transactions. In the circumstances, there was no merit in the contention that the suits ought to have been decreed, as defendants 1, 2 and 3 did not step into the witness box. [Para 47] [937-D-H; 938-A-D]

Vidhyadhar v. Mankikrao & Anr. **(1999) 3 SCC 573: 1999 (1) SCR 1168;** *Balasaheb Dayandeo Naik (Dead) through LRs. and Ors. v. Appasaheb Dattatraya Pawar* **(2008) 4 SCC 464: 2008 (1) SCR 1169;** *Man Kaur (dead) by LRS. v. Hartar Singh Sangha* **(2010) 10 SCC 512: 2010 (12) SCR 515 – relied on.**

4.2. The appellant alleged that one 'J' filed three suits against respondents 1 to 3 in the years 2007 and 2008 for injunctions and other reliefs, alleging that he had entered into three Memorandum of Understanding (MOU for short) dated 5.7.2002 with them, under which they had agreed to enter into agreements of sale in regard to the suit schedule properties; that he had paid advances to each of them on 5.7.2002, and that he had further paid to respondents 1 to 3 in the years 2004 and 2005, a sum of Rs.1,50,00,000. The appellants contended that the alleged act of receiving Rs.1,50,00,000 in the years 2004 and 2005 by respondents 1 to 3 from 'J' amounted to creating an encumbrance over the suit property and thereby respondents 1 to 3 had committed contempt of the order dated 11.11.2002 of this Court. No material was produced by the appellant to establish the said allegation. An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provided that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MOUs are not even agreements of sale. In these circumstances, it is not possible to hold that the respondents have created any encumbrances or violated the order dated 11.11.2002. Hence, these contempt petitions are liable to be rejected. [Paras 49, 50] [938-H; 939-A-H; 940-A]

National Textile Corporation vs. State of Maharashtra **AIR 1977 SC 1566: 1977 (3) SCR 525 and** *State of H.P. vs. Tarsem Singh* **2001 (8) SCC 104: 2001 (2) Suppl. SCR 545 – relied on.**

5. The fact that defendants 1 to 3 received Rs.2,25,000 out of the sale price of Rs.3,75,000 was not in dispute. Similarly, there was no dispute that the fourth defendant had received a sum of Rs.1,25,000 from the plaintiff and agreed to refund the said amount if the sale remained unconcluded or if the agreement of sale was cancelled. The Division Bench of the High Court found fit to award the said amount, after affirming the decision rejecting the prayer for specific performance, in view of the offer made by defendants 1 to 3 in their written statement to repay the amounts received towards the sale consideration. The time stipulated for payment of the balance price by the plaintiff was the essence of the contract and when the same was not paid, defendants 1 to 3 were justified in cancelling the sale agreement. But, there was no provision in the agreement for forfeiture of the amounts already paid, even in the event of breach by the purchaser. On the other hand, it provided that if the vendors did not satisfy the purchaser in regard to their title, the amounts received would be refunded. The consistent case of the plaintiff was that the defendants 1 to 3 failed to satisfy her about their title. Further, defendants 1 to 3 in their written statement filed in the specific performance suit had agreed to refund all amounts received by them from the plaintiff. It is true that the offer was conditional upon the plaintiff not creating any hindrance in the way of the defendants by filing false, frivolous and mischievous suits. Though the decision of the Single Judge and the Division Bench that the plaintiff is not entitled to the relief of specific performance is affirmed, it cannot be said that the plaintiff had filed false, frivolous and mischievous suits. In view of that, in terms

of the agreement and in terms of its offer, the plaintiff was entitled to recover the amounts paid by her. A sum of Rs.2,25,000 was paid under the agreement of sale to defendants 1 to 3. The finding of the Single Judge that the sum of Rs.1,25,000 paid by the plaintiff to the fourth defendant was also the consideration for the movables in addition to the consideration of Rs.3,75,000 under the agreement of sale, was not been challenged by the defendants. In the circumstances, the Division Bench was justified in granting a decree in favour of the plaintiff for Rs.3,50,000 with interest. [Para 53, 54] [941-B-H; 942-A-B]

Case Law Reference:

2009 (2) SCR 852	relied on	Para 18
1992 (3) Suppl. SCR 798	relied on	Para 19
1967 (1) SCR 227	relied on	Para 19
1977 (2) SCR 877	relied on	Para 19
1988 (2) SCC 188	relied on	Para 23
AIR 1915 PC 83	relied on	Para 23
(1986) 3 SC 385	relied on	Para 26.1
1997 (6) Suppl. SCR 717	relied on	Para 26.2
1997 (1) SCR 993	relied on	Para 27, 28
1999 (1) SCR 1168	relied on	Para 42
2008 (1) SCR 1169	relied on	Para 47
2010 (12) SCR 515	relied on	Para 47
1977 (3) SCR 525	relied on	Para 50
2001 (2) Suppl. SCR 545	relied on	Para 50
2000 (3) Suppl. SCR 685	relied on	Para 50

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7254-7256 of 2002.

From the Judgment & Order dated 19.06.2002 of the High Court of Judicature at Madras in O.S.A. Nos. 12 of 1992, 32 of 1995 and 148 of 1999.

WITH

Contempt. Pet. (C) No. 28-30 of 2009 and

Civil Appeal Nos. 4641-4642 of 2003.

Nalini Chidambram, Abdul Hamid, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma for the Appellant.

L. Nageswara Rao, T.L.Y. Iyer, K. Ramammurthy, N.V. Nagasubramaniam, V. Ramasubramaniam, Vikas, David Rao, Khwairakpam Nobin Singh for the Respondents.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J.1. These appeals by special leave (CA Nos.7254 to 7256 of 2002) are directed against the common judgment and decree dated 19.6.2002 passed by the Madras High Court in O.S.A. Nos.12 of 1992, 32 of 1995 and 148 of 1999 filed by the appellant herein against the common judgment dated 29.11.1991 passed by a learned Single Judge of that court in Civil Suit Nos. 95/1984, 302/1989 and 170/1984 and filed by the respondents herein. The appellants and respondents herein who were the plaintiffs and defendants respectively in the three suits, will be referred, for the purpose of convenience, by their ranks in the suit also.

2. Respondent Nos.2, 3 and 4 are respectively the son, daughter and husband of first respondent. The first respondent is the owner of Survey Nos. 13, 14 and 15, the second respondent is the owner of lands bearing Survey Nos. 16 and 18 and the third respondent is the owner of Survey Nos. 19 and 20, all situated in Chettiaragaram Village, Saidapet Taluk,

Chingleput District in all measuring 24 acres 95 cents. The said lands along with the trees, wells, pump-houses, farm godowns, perimeter fence and some furniture, are together referred to as the 'schedule properties'. Respondents 1 to 4 entered into agreement of sale dated 17.1.1981 with the appellant herein for sale of the schedule properties, at a price of Rs.15,000 per acre (in all Rs.3,74,250 rounded off to Rs.3,75,000). On the date of the agreement, Rs.1,00,000 was paid as advance to respondents, which was duly acknowledged in the agreement. Clauses 3, 4, 5, 6, 7, 12 and 15 of the agreement which are relevant for our purposes are extracted below :-

"3. The execution of the sale deeds shall depend upon the party of the second part getting satisfied regarding the title to the land, so also the nil encumbrance.

4. The mode of payment of the balance of Rs.2,75,000/- (Rupees Two lakhs and seventy five thousand only) shall be as under :

(a) Rs.1,00,000/- (one lakh) on or before 28.2.1981

(b) Rs.1,00,000/- (one lakh) on or before 6.4.1981

(c) Rs.75,000/- (seventy five thousand) on or before 30.5.1981

5. If however any of the above mentioned dates are subsequently declared as holidays then the next immediate working day shall be the day of the payment.

6. The payments on due dates is the essence of this contract and in case of failure on the part of the party of the second part, the party of the first part shall cancel this agreement.

7. The sale deed shall be executed at the convenience of the party of the second part as and when she wants them to be executed either in her name or in the name of her nominee or nominees.

12. If the party of the second part finds the titles of the properties herein above mentioned to be unsatisfactory or unacceptable, the party of the first part shall be put on notice revealing her intention not to conclude the sale and in such event if the party of the first part, fails to satisfy the party of the second part regarding the title the party of the first part shall pay to the party of the second part within three months the date there of all the monies advanced by the party of the second part till then.

15. The party of the first part has a caretaker at present. From the day of this agreement the party of the second part shall act as a caretaker for the entire properties and be in trust of all the properties till the party of the first part given the possession of the entire properties to the party of the second part on payment of the sale amount i.e. after the entire sale amount is paid.

(emphasis supplied)

3. On the same day (17.1.1981) the fourth respondent, in a letter addressed to the appellant, acknowledged the receipt of Rs.1,25,000 paid on various dates as commission for the said transaction relating to sale of the said 24.95 acres of land. By the said letter, he agreed that in case the transaction of sale remained unconcluded or got cancelled because of the default on the part of the sellers or buyers under the agreement dated 17.1.1981 or because of defective title, the entire amount of Rs.1,25,000 received by him as commission would be refunded within three months thereof.

4. In pursuance of the said agreement the appellant paid further advances of Rs.1,00,000 on 28.2.1981 and of Rs.25,000 on 2.4.1981. The balance of 75,000 in regard to the instalment payable on 6.4.1981 and the last instalment of Rs.75,000 payable on or before 30.5.1981 was not paid by the appellant.

5. Respondents 1 to 3 caused a notice dated 2.8.1981 to be issued through their counsel to appellant, cancelling the agreement dated 17.1.1981, on the ground of default in paying the balance of the sale consideration, in exercise of their right to cancel the agreement on such default, under clause 6 of the agreement. The relevant portion of the cancellation notice is extracted below:

"My clients state that even at the time of entering into the said agreement of sale, you looked into the documents of title and satisfied yourself about the title of my clients to the said property. My clients were always ready and wiling to conclude the sale and expected you to pay the balance of sale consideration of Rs.2,75,000/- in accordance with clause 4 of the said agreement. Now that you have committed defaults in the payment of the balance of consideration. Not withstanding the fact that you have not even sent any communication whatsoever to my clients as to whether you were ready and willing to pay the balance of consideration under the said agreement, my clients waited for a long time and in the circumstances my clients have no other alternative except to invoke clause 6 of the said agreement. Accordingly, my clients hereby cancel the said agreement dated 17th January 1981 entered into between yourself and my clients in view of your failure to have paid the balance of sale consideration according to clause 4 of the said agreement, as the payment of the instalment on due dates was agreed to be the essence of the contract.

Please take notice that the said agreement dated 17.1.1981 has been cancelled and my clients will be refunding the sum of Rs. 2,25,000/- only so far received by them as aforesaid on their concluding the sale with any third party and ascertaining the deficit, if any, in the sale price for deducting the same from the amounts refundable to you in receipt of which you may expect a communication from my clients on their concluding the sale with third party".

6. The appellant sent a reply dated 7.8.1981 through counsel contending that time was never intended to be the essence of the agreement though it was formally mentioned in the agreement that time was of the essence; that respondents had failed to produce the original documents of title in spite of repeated demands and therefore it was agreed between the appellant's husband and the fourth respondent during discussions held in March 1981 in the presence of witnesses, that the original documents would be made available as soon as possible and the appellant should pay the balance only thereafter, and that sale should be completed within a reasonable time of handing over the documents; and that as a token of such understanding, a further advance of Rs.25,000 was received on 2.4.1981. The appellant also denied the claim of the respondents that the appellant had got examined the documents of title and satisfied herself about that title at the time of entering into the agreement of sale. The appellant asserted that there was no default on her part and contended as follows :-

> "The allegation that your client was always ready and willing to conclude the sale and expected my client to pay the balance of the sale consideration of Rs. 2.75 lakhs in accordance with clause 4 of the said agreement etc. is not correct. The very attitude your client is not giving the documents of title for scrutiny from January 1981 for the past 6 months will prove the hollowness of the claim. The further allegation that my client has committed default in payment etc. is also not true, because my client has already paid Rs. 2,25,000/- and on 2.4.1981 when the sum of Rs. 25,000/- was paid it was specifically understood that the balance of money will be paid and the sale will be completed within a reasonable time as soon as the documents of title were handed over to her. Therefore, the question of default in payment of the instalment does not arise. Moreover, it is very unreasonable on the part of your client to allege that default has been committed when the truth is otherwise.
>
> My client is ready and willing to pay the balance of sale consideration and have the sale completed provided the documents are handed over to her immediately for scrutiny and approval. Once again in the circumstances set out above, there is no default on the part of my client and she is always ready and willing to perform her part of the agreement provided your client hands over the documents for scrutiny and the title is found good to the satisfaction of my client's legal advisers.
>
> My client therefore stated that the purported cancellation of the agreement by the said notice is not legal and valid and your client is called upon to perform her part of the obligation, viz., the handing over of the original documents forthwith and without any undue delay, so that the transaction may be completed. I hope that your client will see the reasonableness in the offer and will not precipitate the matter any further. My client expects an early reply in this regard."

7. This brought forth a rejoinder dated 26.8.1981 from respondents 1 to 3 through their counsel. They denied the claim of the appellant that there was a variation in the term regarding payment of balance consideration in specified instalments. They also denied that such a variation was agreed at a meeting held in March 1981. They reiterated that the time was the essence of the contract and that the agreement was executed only after the appellant had satisfied herself about their title and the respondent's husband had in fact taken true copies of all the documents together with the encumbrance certificate upto 1980, and in those circumstances, the question of appellant again seeking any document of title did not arise. They contended that they were not bound to deliver the original documents before payment of the entire price. It was pointed out that payment of instalments relating to sale consideration

stipulated in the agreement did not depend upon the appellant satisfying herself about the title after scrutinising the documents of title and that the appellant had unconditionally agreed to pay the entire consideration on the due dates mentioned in clause (4) of the agreement. It was further pointed out that as appellant was already in possession of xerox copies of the documents of title, if she wanted inspection of the originals, she could have addressed a letter seeking inspection.

8. This brought forth a second reply dated 4.9.1981 from the appellant, reiterating the averments in the reply notice dated 7.8.1981. Thereafter the appellant got a public notice published in the newspaper 'Hindu' dated 11.11.1981 through her counsel, informing the public that she had purchased the schedule properties (as also Sy. Nos.20/1, 21 and 24) from respondents 1 to 3 through the fourth respondent and that she was in possession thereof and was cultivating them. The notice further stated that pending completion of documentation, she had learnt that respondents were trying to resell the properties and issued a warning that if any third party enters into any agreement with the owners, they will be doing so at their own risk, and the same will not bind her. This public notice brought forth two responses. The first was a notice dated 14.11.1981 from one Gulecha stating that the documents relating to Sy. Nos. 16 and 18 were deposited with him by the second respondent as security for a loan taken from him and that if appellant purchased the said lands, she will be doing so at her risk. The second was a notice dated 14.11.1981 from respondent Nos. 1 to 3 through their counsel stating that the claim of the appellant that she had purchased the lands bearing Nos.8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 20/1, 21 and 24 and was in possession thereof was false; the survey numbers mentioned were erroneous; that after the agreement dated 17.1.1981 was cancelled, they had entered into an agreement with a third party which fell through because of the public notice, causing loss to them; that the appellant had been appointed only as a caretaker of the lands under the agreement dated 17.1.1981 and the said

appointment was cancelled and a new caretaker had been appointed. Respondents 1 to 3 called upon the appellant to hand over all movables on 19.11.1981 to the new caretaker.

9. In this factual background the appellant filed the following three suits:-

(i) O.S. No. 1709/1981 on the file of the District Munsif, Poonamallee against respondents 1 to 4 for a permanent injunction restraining the respondents, their men and agents from in any way interfering with her peaceful possession and enjoyment of the suit properties. (This suit was subsequently transferred to Madras High Court and renumbered as C.S. No.302 of 1989).

(ii) C.S. No. 95/1984 on the file of Madras High Court, filed on 19.6.1982, against respondents 1 to 4 seeking a decree for specific performance of the agreement of sale dated 17.1.1981 and a direction to respondents 1 to 3 to execute a sale deed after receiving the balance.

(iii) C.S. No. 170 of 1984 on the file of the Madras High Court, filed on 12.1.1984 against the fourth respondent for return of Rs.1,25,000/- paid as commission along with the interest at market rate from 17.1.1981 to date of payment.

10. The first two suits were resisted by the defendants contending that time was of the essence of the term regarding payment of sale price and that the agreement was cancelled as a consequence of default committed by appellant in paying the balance sale price in terms of the agreement. It was alleged that appellant's husband knew even before the agreement was signed that the original documents were with State Bank of Mysore and Gulecha and that the release of the documents could be obtained only on payment of amounts due and that could have been done only if the appellant had paid the instalments in terms of the agreement.

11. The four respondents contested the third suit (C.S. No.170 of 1984) filed against him by denying that he had received a commission of Rs.1.25 lakhs and contending that it was received as security for due performance of the contract in terms of the agreement dated 17.1.1981.

12. The following issues were framed in the injunction suit:

(i) Whether the plaintiff is entitled to the permanent injunction as prayed for against the defendants?

(ii) To what reliefs, the plaintiff is entitled to?

The following issues were framed in the specific performance suit :

(1) Whether the plaintiff has committed breach of the contract by way of default in payment and thus was lacking in readiness and willingness to perform his part of the contract?

(2) Is the time essence of the contract?

(3) If so, whether the termination of the contract by the defendant is valid?

(4) Is not the plaintiff entitled to specific performance?

(5) To what relief is the parties entitled?

Addl. Issue (1) :Whether the fourth defendant is a necessary and proper party to the suit?

Addl. Issue (2) :Whether by reason of filing of C.S. No. 170 of 1984, is the plaintiff entitled to specific performance?

In the suit for refund of Rs.1,25,000/-, the following issues were framed:

(1) Whether the payment of Rs. 1,25,000/- made by the plaintiff to the defendant on 17.1.1981 was towards the commission charges as per the letter given by the defendant or towards part of consideration for the sale in question?

(2) Whether the plaintiff is entitled to return of the said amount of Rs.1,25,000/-.

(3) To what other relief, if any, the plaintiff is entitled?

13. Common evidence was recorded in the three suits. On behalf of the plaintiff, three witnesses were examined, that is plaintiff as PW1 and one Babu as PW-2 and one Balaraman as PW-3. Ex P-1 to P-20 were marked on behalf of the plaintiff. On behalf of the defendants, two witnesses were examined, that is one Rajendran as DW-1 and fourth defendant as DW-2. Ex.D-1 to D-6 were marked on behalf of the defendants. After considering the oral and documentary evidence, a learned Single Judge of the High Court, by his common judgment dated 29.11.1991, dismissed all the three suits.

14. Aggrieved by the said judgment, the appellant filed three original side appeals. A Division Bench of the Madras High Court dismissed the said appeals by common judgment dated 19.6.2002, affirming the judgment of the trial court. The Division Bench however directed the respondents to repay Rs.3,50,000 (i.e. Rs.2,25,000 paid to defendants 1 to 3 and Rs.1,25,000 paid to defendant No. 4) with interest at 9% per annum for the period during which the appellant was not acting as caretaker till the complete payment was made. While disposing of the said three appeals, the Division Bench also dismissed three applications. The first (CMP No.2888/1996) was an application filed for appointment of an Advocate Commissioner to note the existing condition and physical features of the suit property. The second (CMP No.17401/1997) was an application filed by the appellant's son to implead him as a party alleging that the substantial part of the amounts paid

to defendant came from him. The third (CMP No.7471/1002) was an application by the appellant to receive by way of additional evidence, a judgment rendered by this Court in suo moto contempt proceedings, as also a letter from the appellant's counsel to the Bank of India, Mylapore Branch and a reply thereto.

15. The learned Single Judge and the Division Bench, after exhaustive consideration of the evidence, have recorded the following findings of fact :

(a) Respondents 1 to 3 entered into an agreement dated 17.1.1981 agreeing to sell 24 acres 95 cents of land to the plaintiff for a consideration of Rs.3,75,000/- and received in all, Rs.2,25,000 as advance.

(b) Plaintiff had paid an additional consideration of Rs.1,25,000 for the movables and taken a letter from the fourth respondent describing it as 'commission', by way of security, with the understanding that if the sale did not take place, the amount should be refunded.

(c) The time for payment of the balance sale price stipulated in Clause (4) of the agreement of sale was the essence of the contract.

(d) Plaintiff's claim that in March, 1981, clause (4) regarding payment schedule was modified by oral agreement under which it was agreed that the instalments due on 6.4.1981 and 30.5.1981 could be paid after the defendants satisfied the plaintiff about their title to the property agreed to be sold, was not established by plaintiff. The terms of the agreement remained unaltered.

(e) Plaintiff committed breach by failing to pay the sum of Rs.1,00,000 due on 6.4.1981 (except Rs.25,000 paid on 2.4.1981) and the sum of Rs.75,000 due on 30.5.1981 and the defendants were therefore justified in cancelling the agreement on 2.8.1981.

(f) The defendants did not deliver possession of the properties agreed to be sold, to the plaintiff in part performance of the agreement of sale dated 17.1.1981. The defendants delivered the property to the plaintiff in trust to hold the same as caretaker, until the vendors received the entire sale price and delivered possession. Therefore when the agreement was cancelled and consequently the appointment as caretaker came to an end, the plaintiff became liable to return the suit schedule properties to the defendants.

(g) The plaintiff and her husband had knowledge of the existence of mortgage, before entering into the agreement of sale on 17.1.1981; and the case put forth by the defendants that as per the understanding between the parties, the defendants had to discharge the mortgage debts and secure the original title deeds after receiving the entire consideration, merited acceptance. As per the term of the agreement, the defendants had no obligation to produce the original title deeds or proof of clearance of loans, before plaintiff paid the entire sale consideration.

(h) The plaintiff failed to establish her readiness and willingness to complete the sale in terms of the agreement and she was not entitled to the relief of specific performance.

16. Feeling aggrieved by the judgment of the division bench, the appellant has filed these appeals (CA Nos. 7254 to 7256 of 2002), challenging the findings of fact arrived at by the High Court and also raising some legal contentions. Where findings of fact recorded by the learned single Judge (trial court) are affirmed by the appellate bench of the High Court in appeal, this court will be reluctant to interfere with such findings in exercise of jurisdiction under Article 136 of the Constitution, unless there are very strong reasons to do so. On the contentions urged, the following questions arise for our consideration:

(i) Whether the time stipulated for payment of balance consideration was the essence of contract and whether the defendants were justified in cancelling the agreement, when the time schedule stipulated for such payment was not adhered to?

(ii) Whether the parties had agreed upon sequence of performance, which required payment of balance consideration by appellant, as stipulated in clause (4) of the agreement, only after the respondents satisfied the appellant regarding their title to the lands?

(iii) Whether the respondents had failed to disclose the encumbrances over the properties and thereby committed fraud, entitling the appellant for extension of time stipulated for payment corresponding to the delay caused by the fraud and consequently the cancellation of the agreement by notice dated 2.8.1981 is illegal and invalid?

(iv) Whether an adverse inference ought to be drawn on account of the non-examination of defendants 1 to 3 who were the vendors under the agreement of sale?

Re: Question (i)

17. The appellant contends that time is not the essence of the agreement of sale dated 17.1.1981. She contends that where the vendors fail to give the documents of title to satisfy the purchaser about their title, and the purchaser is ready and willing to perform the contract, the termination of the agreement of sale by the vendors is illegal and amounts to breach of contract. They submit that High Court had failed to apply section 55 of the Contract Act, 1872. Section 55 of Contract Act deals with the effect of failure to perform at a fixed time, in contract in which time is essential. Said Section is extracted below :

"Section 55. Effect of failure to perform at a fixed time, in contract in which time is essential.-- When a party to a contract promises to do a certain thing at or before a

specified time, or certain things at or before a specified time, and fails to do such thing at or before a specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so."

The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless

such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

18. Relying upon the observation of this court in *N.Srinivasa v. Kuttukaran Machine Tools Ltd.* [2009 (5) SCC 182] that "in the contract relating to immovable property, time cannot be the essence of the contract", the appellant put forth the contention that in all contracts relating to sale of immovable property, time stipulated for performance, even if expressed to be the essence, has to be read as not being the essence of the contract and consequently the contract does not become voidable by the failure to perform before the specified time. A careful reading of the said decision would show that the sentence relied on (occurring in para 31) apparently was not the statement of legal position, but a conclusion on facts regarding the contract that was being considered by the court in that case, with reference to its terms. In fact the legal position is differently stated in para 27 of the said decision, thus:

> "27. In a contract for sale of immoveable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was the essence of the contract. It is better to refer to the terms and conditions of the contract itself."

19. The legal position is clear from the decision of a Constitution Bench of this court in *Chand Rani v. Kamal Rani* [1993 (1) SCC 519], wherein this court outlined the principle thus:

> "It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in

> England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

Relying upon the earlier decisions of this court in *Gomathinayagam Pillai v. Pallaniswami Nadar* [1967 (1) SCR 227] and *Govind Prasad Chaturvedi v. Hari Dutt Shastri* [1977 (2) SCC 539], this Court further held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land. In Chand Rani, clause (1) of the agreement of sale required the balance consideration to be paid as under: "Rs.98,000/- will be paid by the second party to the first party within a period of ten days only and the balance Rs.50,000 at the time of registration of the sale deed….". This court held that time regarding payment of Rs.98,000 was the essence, on the following reasoning:

> "The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant

delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement."

The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract.

20. Let us consider the terms of the agreement of sale in this case to find out whether time was the essence. The standard agreements of sale normally provide for payment of earnest money deposit or an advance at the time of execution of agreement and the balance of consideration payable at the

time of execution/registration of the sale deed. In the absence of contract to the contrary, the purchaser is bound to tender the balance consideration only at the time and place of completing the sale [see clause (b) of section 55(5) of Transfer of Property Act, 1882 'TP Act' for short]. In this case we find that there is a conscious effort to delink the terms relating to payment of balance price (clauses 4, 5 and 6) from the term relating to execution of sale deed (clause 7) and making the time essence only in regard to the payment of the balance sale consideration. There is also a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the sale deed. The intention making time essence of the contract for payment of balance price is clear from the following : (a) clause 4 requires the balance consideration to be paid in three instalments that is Rs.1,00,000 on or before 28.2.1981; Rs.1,00,000 on or before 6.4.1981; and Rs.75,000 on or before 30.5.1981; (b) Clause 5 makes it clear that if any of the abovementioned dates of payment is subsequently declared as a holiday, then the next immediate working day shall be the date of payment. This shows a clear intention that payment should be made on the stipulated dates and even a day's delay was not acceptable unless the due date was declared to be a holiday; (c) Clause 6 specifically stipulates that the payments on due dates is the essence of the contract and in case of failure on the part of the purchaser the vendors shall cancel the agreement.

21. On the other hand, if we look at the terms relating to performance of sale, there is a clear indication that time was not intended to be the essence, for completion of the sale. Clause 3 provides that the execution of sale deed shall depend upon the second party (purchaser) getting satisfied regarding the title to the lands, so also the nil encumbrance. It is significant that the said clause does not say that payment of balance consideration shall depend upon the purchaser getting satisfied regarding title or nil encumbrances. Clause 7 provides that the

sale deed shall be executed at the convenience of the purchaser, as and when she wants them to be executed either in her name or in the name of her nominee or nominees. Clause 12 provides that if the second party (purchaser) finds the title of the properties to be unsatisfactory or unacceptable, the vendors shall be put on notice about her intention not to conclude the sale and in such an event, if the vendors fail to satisfy the purchaser regarding their title, the vendors shall pay to the purchaser within three months from that date, all monies advanced by the purchaser till then. It is thus evident from clause 12 also that the payments of balance sale price in three instalments on the specified due dates were not dependent upon the further examination of title or the satisfaction of the purchaser about the title. It is clear that the purchaser on the basis of whatever initial examination she had taken of the documents, had unconditionally agreed to pay the amounts in three instalments of Rs.1,00,000 on or before 28.2.1981; Rs.1,00,000 on or before 6.4.1981 and Rs.75,000 on or before 30.5.1981; and if the purchaser was not thereafter satisfied with the title or found the title unacceptable and if the vendors failed to satisfy her about their title when she notified them about her dissatisfaction, the vendors had to refund all payments made within three months. Thus it is categorically made clear in the agreement that time regarding payment of balance price was the essence of the contract and such payment was not dependent upon the purchaser's satisfaction regarding title.

22. Apart from the above, the plaintiff in her evidence admitted that time for performance was the essence of the contract vide the following questions and answers :

> Q : The payment of the due date and in case of failure on the part of the party of second part, the party of the first part shall cancel the agreement. Is this in the agreement or not?
>
> Ans. Yes. The dates and the title are important.

> Q : Do you know that everywhere in this agreement one thing is made clear that time is the essence of the agreement ?
>
> Ans. Yes. Time is the essence of the contract and also the title must be proved in the agreement.

Her evidence also shows that she apparently did not have the funds to pay the balance of Rs.75,000 due on 6.4.1981 and Rs.75000/- due on 30.5.1981 as was evident from the Bank pass book. It was therefore possible that being not ready to perform the contract in terms of the agreement, the appellant had invented a modification in the terms of the agreement. The learned Single Judge and the Division Bench have recorded a concurrent finding that the time was the essence of the contract and that no change was agreed in respect of the agreement terms as alleged by the appellant. The appellant is unable to place any material which calls for reversal of the said findings. Therefore it has to be held that time regarding payment stipulated in clauses (4), (5) and (6) of the agreement of sale was the essence of the contract and failure of the appellant to adhere to it, justified cancellation of the agreement by the respondents.

An aside regarding the principle "time is not of the essence" for future consideration

23. It is of some interest to note that the distinction between contracts relating to immovable properties and other contracts was not drawn by section 55 of Contract Act (or any other provisions of Contract Act or Specific Relief Act, 1963). Courts in India made the said distinction, by following the English law evolved during the nineteenth century. This Court held that time is not of the essence of the contracts relating to immovable properties; and that notwithstanding default in carrying out the contract within the specified period, specific performance will ordinarily be granted, if having regard to the express stipulation

of the parties, nature of the property and surrounding circumstances, it is not inequitable to grant such relief. [vide *Gomathinayagam Pillai* (supra), *Govind Prasad Chaturvedi* (supra) and *Indira Kaur v. Sheo Lal Kapoor* – 1988 (2) SCC 188 and Chand Rani (supra) following the decision of Privy Council in Jamshed Khodaram Irani v. Burjorji Dhunjibhai – AIR 1915 PC 83 and other cases]. Of course, the Constitution Bench in Chand Rani made a slight departure from the said view.

24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable.

26.1) In *Rattan Arya v. State of Tamil Nadu* – (1986) 3 SC 385, this Court held:

"We must also observe here that whatever justification there may have been in 1973 when Section 30(ii) was amended by imposing a ceiling of Rs. 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possible got for Rs. 400 per month in 1973 will today cost at least five times more. In these days of universal day to day escalation of rentals any ceiling such as that imposed by Section 30(ii) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in *Motor General Traders v. State of A.P.* (1984) 1 SCC 222, a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14."

(emphasis supplied)

26.2) In *Malpe Vishwanath Acharya v. State of Maharashtra* – (1998) 2 SCC 1 a three Judge bench of this court considered the validity of determination of standard rent by freezing or pegging down the rent as on 1.9.1940 or as on the date of first letting, under sections 5(10)(B), 7, 9(2)(b) and 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Ac, 1947. This court held that the said process of determination under the Act, which was reasonable when the law was made, became arbitrary and unreasonable in view of constant escalation of prices due to inflation and corresponding rise in money value with the passage of time. This Court held:

"In so far as social legislation, like the Rent Control Act is concerned, the law must strike a balance between rival

interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, nay, necessary that some protection should be given to the tenants in order to ensure that they are not exploited. At the same time such a law to be revised periodically so as to ensure that a disproportionately larger benefit than the one which was intended is not given to the tenants……

Taking all the facts and circumstances into consideration, we have no doubt that the existing provisions of the Bombay Rent Act relating to the determination and fixation of the standard rent can no longer be considered to be reasonable……"

The principle underlying the said decisions with reference to statutes, would on the same logic, apply to decisions of courts also.

27. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in *K.S. Vidyanadam and Others vs. Vairavan* – (1997) 3 SCC 1 (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

"It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect.

In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973. ……We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties – fuelled

by large scale migration of people from rural areas to urban centres and by inflation.

Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties – evolved in times when prices and values were stable and inflation was unknown – requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so."

(emphasis supplied)

Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.

28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyanadam* (supra) :

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/ refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

Re: Question (ii)

29. Before the learned Single Judge, the appellant had concentrated on the contention that time for payment was not the essence of the contract and therefore the failure to pay the second instalment on or before 6.4.1981 and the final instalment on or before 30.5.1981 did not entitle the vendors to cancel/ terminate the agreement. As that contention was rightly rejected by the learned Single Judge, the emphasis before the Division Bench was on the contention that the term regarding payment was altered by an oral understanding. It was contended that though time was the essence of the contract in regard to payments, it was equally necessary for the defendants to produce original title deeds to show that there were no encumbrances over the suit properties; that after paying the first instalment of Rs.1,00,000 on 28.2.1981, the plaintiff and her husband got doubts about the original title deeds as they learnt that the properties had been mortgaged; that therefore the plaintiff's husband along with his friends Babu (PW2) and Balaraman (PW3) went to defendants' house in March, 1981 and made inquiries and then the defendants requested for some more time promising that they would get original title

deeds for verification and therefore on 2.4.1981 only Rs.25000 was paid towards the second instalment of Rs.1,00,000 due on 6.4.1981 with the understanding that the balance of Rs.75,000 towards the second instalment as also the third instalment would be paid only after the production of original title deeds. Therefore the contention was that though time regarding payment was essence of the contract and the balance consideration of Rs.2,75,000 had to be paid in three instalments of Rs.1,00,000, Rs.1,00,000 and Rs.75000 on 28.2.1981, 6.4.1981 and 30.5.1981 respectively, there was an alteration in those terms, as per an oral understanding in March, 1981 to postpone payment of the second and third instalments, till the original documents of title were produced by the defendants. In short the emphasis of the plaintiff was on an oral agreement altering the time schedule and the terms which made time for payment the essence of the contract. Neither the Single Judge nor the Division Bench accepted the claim of appellant that there were any such discussions or oral understanding in March 1981 leading to variation in terms or that the time for payment was postponed.

30. Before this court there was again a significant shift in the stand of the appellant. Faced with the finding that time for payment was the essence and that there was no change in the terms relating to payment, the emphasis is on a different contention based on section 52 of the Contract Act. The appellant contended that the agreement of sale laid down the order in which the reciprocal promises were to be performed; that it first required respondents 1 to 3 as vendors, to furnish the original title deeds and a nil encumbrance certificate to satisfy the appellant about their title; that the appellant had to pay the balance of the sale price only after the vendors discharged their said obligation; that the appellant was entitled to withhold the balance sale price till the vendors discharged their liabilities, secured the original title deed and delivered them to her and satisfied her about their title; and that without performing their obligation by producing the original title deeds,

the vendors cannot expect performance by the purchaser, to pay the balance price. The appellant contended that courts below failed to appreciate the scope of section 51 to 54 of Contract Act. To appreciate the said contention it is necessary to refer to sections 51 to 53 of the Contract Act.

31. Section 51 provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise, unless the promisee is ready and willing to perform his reciprocal promise. For example, if the contract provides that the balance of sale consideration shall be paid by the purchaser to the vendor against execution of sale deed within a period of three months, the purchaser need not pay the balance sale consideration if the vendor was not willing to execute the sale deed. Similarly the vendor need not execute the sale deed unless the purchaser is ready to pay the balance sale consideration.

32. Section 52 relates to the order of performance of reciprocal promises. It provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. Let us illustrate with reference to an agreement of sale which provides that the vendor shall make out to the satisfaction of the purchaser a good, marketable and subsisting title and provide all documents as required by the purchaser to satisfy him about the title of the vendor, that the vendor shall obtain a certificate of clearance from a specified authority for the sale, that the sale shall be completed within a period of four months of receipt of the clearance certificate and the purchaser shall pay the balance sale price at the time of registration of the sale. It is evident that the vendor will have first to make out a title by producing the documents required by the purchaser and also obtain the clearance certificate. Only thereafter the sale deed shall have to be executed and payment of the sale

consideration will have to be made at the time of registration of the sale deed. The vendor cannot seek payment of the balance sale price without performing his obligations as per the agreement.

33. Section 53 provides that when a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. Let us take by way of illustration an agreement which provides that out of the sale price Rs.10,00,000, Rs.1,00,000 was paid as advance, Rs.4,00,000 was to be paid within one month to enable the vendor to purchase an alternative property and shift his residence from the property agreed to be sold, and the sale deed has to be executed within three months from the date of agreement of sale and vacant possession of the premises should be given, against payment of balance price. If the purchaser failed to pay Rs.4,00,000 within one month and thereby prevented the vendor from purchasing another property and shifting to such premises, the vendor will not be able to perform his obligation to deliver vacant possession. Thus the contract becomes voidable at the option of the vendor.

34. Section 54 of Contract Act provides that when a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. The agreement in this case provides a good illustration for this section. The purchaser cannot claim that the vendors should produce the original title deeds and satisfy her regarding their title, or claim execution

of the sale deed, unless and until she paid the entire consideration within the time stipulated in clause (4) of the agreement, which would enable the vendors to repay the loans and obtain release of the original title deeds.

35. The appellant contends that clause (3) of the agreement provides that execution of the sale deed shall depend upon the purchaser getting satisfied regarding (vendors') title to the lands and that the property is not subject to any encumbrance; that the said clause precedes clause (4) requiring payment of balance consideration of Rs.2,75,000 in three instalments; and that shows that the intention of parties was that the satisfaction of the purchaser in regard to the vendors' title to the land and encumbrance, was a condition precedent for payment of the balance consideration. In other words, it is contended that the contract provides the order in which reciprocal promises are to be performed, by placing clause (3) before clause (4), that is the vendors should first satisfy the purchaser regarding title of the vendors and only when that promise is performed by the vendors, the question of purchaser performing her promise to pay the balance consideration would arise.

36. The order of performance of reciprocal promises does not depend upon the order in which the terms of the agreement are reduced into writing. The order of performance should be expressly stated or provided, that is, the agreement should say only after performance of obligations of vendors under clause (3), the purchaser will have to perform her obligations under clause (4). As there is no such express fixation of the order in which the reciprocal promises are to be performed, the appellant's contention is liable to be rejected. We have already noticed that the contract contains two different streams of provisions for performance. One relates to payment of the balance consideration by the purchaser in the manner provided, which is not dependent upon any performance of obligation by the vendors. It is significant that clause (4) of the agreement

did not say that the balance of the sale price shall be paid only after the vendors satisfied the purchaser in regard to title or that the purchaser shall pay the balance of sale price only after she satisfies herself regarding title of the vendors to the lands. Nor does clause (3) contain a provision, after stating that execution of the sale deed shall depend upon the purchaser getting satisfied regarding title to the land as also the nil encumbrance, that the payment of sale consideration will also depend upon such satisfaction regarding title and nil encumbrance. As noticed above there is an unconditional promise to pay the balance consideration in three instalments and the said promise by the purchaser is not dependent upon performance of any obligation by vendors. The contract specifically states that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to purchaser. This clearly demonstrates that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally. In fact if the intention of the parties was that only after the vendors satisfying the purchaser about their title, balance consideration had to be paid, clause (12) would be redundant as the situation contemplated therein would not arise. Further, if that was the intention, the purchaser would not have paid Rs.1,00,000 as further advance on 28.1.1981 and Rs.25,000 on 2.4.1981. It is therefore clear that the contract does not expressly (or even impliedly) specify the order of performance of reciprocal promises, as alleged by the appellant.

37. The terms of the contract makes it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in clause 4 and thereafter vendors

were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, section 52 of the Contract Act does not help the appellant but actually supports the vendors-respondents.

Re: Question (iii)

38. Learned counsel for the appellant next submitted that the lands belonging to the first respondent were mortgaged to Bank of India, the lands belonging to the second defendant were mortgaged to one Gulecha, the lands belonging to third respondent were mortgaged to State Bank of Mysore and therefore none of the original title deeds were in the custody of vendors; that having regard to section 55 (1) of Transfer of Property Act, 1882 ('TP Act' for short) the vendors were bound to disclose to the purchaser, any material defect in their title to the property; that the failure of vendors to disclose the existence of the mortgages/encumbrances amounted to fraudulent conduct within the meaning of section 55 of TP Act. It was submitted that the vendors had deliberately failed to disclose the existence of the said encumbrances to the purchaser and thereby committed a fraud which made the purchaser to enter into an agreement of sale and part with a potion of the sale consideration in advance; that when the purchaser got doubts and insisted on production of the original title deeds, the fourth respondent took time to get the original title deeds and agreed that the balance of sale price due may be paid after production of sale deeds. It was submitted that having regard to section 55 of the TP Act, failure to disclose the encumbrances amounted to fraud; and in view of such fraud by the respondents, the appellant was prevented from performing her part of the contract by paying the balance price before the agreed dates and therefore the appellant was entitled to extension of further time for performing her promise to pay the

balance price, corresponding to the delay caused by such fraud, having regard to the provisions of section 34 of the TP Act.

39. Section 55 of TP Act lists the rights and liabilities of the buyer and the seller in the absence of a contract to the contrary. The relevant portion of section 55 reads thus:

> "55. Rights and liabilities of buyer and seller -- In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:
>
> (1) The seller is bound-
>
> (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
>
> (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
>
> (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto; x x x x x

Section 34 of the TP Act relied upon by appellant, is extracted below:

> "34. Transfer conditional on performance of act, time being specified
>
> Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled."

40. Whenever a party wants to put forth a contention of fraud, it has to be specifically pleaded and proved. It is significant that the plaint does not allege any fraud by the defendants. Evidence shows that before the agreement was entered, the purchaser's husband and legal advisor had examined the xerox copies of the title deeds and satisfied themselves about the title of the vendors. The appellant in her evidence clearly admits that xerox copies of the title deeds were shown to her husband. The agreement of sale provided that the sale would depend upon purchaser getting satisfied about the title of the vendors. The manner in which the agreement was drafted by the purchaser shows that the purchaser and/or her husband were made aware of the encumbrances. Firstly there is no provision in the agreement that the lands were not subject to any encumbrances. Secondly, the provision for payment of sale price within a specified time does not link the payment to execution of a sale deed. Thirdly the contract provided that on execution of the agreement the purchaser will take possession as care taker of the suit schedule properties and that on complete payment of the sale price on 30.5.1981, she will be entitled to possession in part performance and that the execution of the sale deed will be whenever required by the purchaser, totally disconnected with either payment of price or delivery of possession. All these provisions demonstrate that

the vendors were in urgent need of money, that the purchaser was made aware of the encumbrances, that on the purchaser paying the sale price, the vendors had to clear the encumbrances and thereafter convey the property, free from encumbrances. The contention that the vendors deliberately or intentionally suppressed any information regarding the pending encumbrances or the fact that the original documents were not available and thereby committed fraud is neither pleaded nor proved.

41. The appellant did not allege in the plaint, any fraud on the part of vendors, in regard to suppression of encumbrances over the property. The entire plaint tried to justify that the plaintiff did not commit breach of contract by not paying the balance instalments on 6.4.1981 and 30.5.1981, except for a stray sentence that the plaintiff will be entitled to proceed against the third defendants 1 to 3 for damages, for not performing their part of the contract and not disclosing several prior encumbrances over the property. In the written statement the defendants submitted that the encumbrance certificate upto the year 1980 had been given to appellant's husband, which showed the encumbrance in favour of State Bank of Mysore, that plaintiff and her husband both knew before entering into the agreement of sale that original documents were with the said bank and that therefore the allegation that the encumbrance was not disclosed was false. It was also disclosed in the written statement, that a document was surreptitiously detained by one Gulecha. It was stated that the defendants intended to utilise the last two instalments for securing back the original documents by discharging the loans. It is not disputed that the amount due to Gulecha was around Rs.40,000 and the amount due to State Bank of Mysore was around Rs.39,000 and any of the last two instalments would have been sufficient to discharge the said liabilities. The appellant having committed default in paying the last two instalments which would have enabled discharging the debts, can not find fault with the vendors by contending that they did not secure the original title

deeds. If the mortgage/encumbrance was made known to appellant's husband and if it had been understood that the same would be cleared from the last of the instalments paid by the appellant, the absence of original title deeds could not be made a ground for not paying the last two instalments. The claim of the appellant that the vendors should have cleared all the encumbrances before payment of the last two instalments is not borne out by any evidence. Even in law, the obligation of the vendors is to convey an encumbrance free, good and marketable title subject to contract to the contrary. The stage of execution of sale deed had not arrived as the appellants did not paid the amount due in terms of the contract.

42. The appellant contended that the debt due to the Bank of India had been fraudulently suppressed by the vendors. There is no reference to such a mortgage either in the plaint or the evidence of the plaintiff. No one has been examined from the bank nor any document produced to prove the existence of such mortgage. Appellant attempted to produce some documents relating to the said mortgage with an application under Order 41 Rule 27 CPC which was rejected by the High Court. Before us, the appellants relied upon the decision in *Bank of India v. Vijay Transport* [2000 (8) SCC 512] which related to the bank's suit against Vijay Transport of which the first respondent was stated to be a partner. The said decision of this court discloses that proceedings were commenced in the year 1975 against the firm in which the first respondent was a partner, for recovery of Rs.18,14,817.91 in the Court of Sub-Judge, Eluru; that the partnership firm raised a counter claim of Rs. 34,48,799 against the Bank; and that on 6.7.1976 the Bank's suit was decreed only for Rs.1,00,418/55 whereas the counter claim of the first respondent was decreed for Rs.34,48,799 with costs. The bank filed an appeal before the High Court which was allowed on 20.9.1983 and the Bank's suit was decreed for Rs.18,49,209.70 with interest and the firm's counter claim was dismissed. But what is significant and relevant is the fact that as on the date of the agreement of sale

(17.1.1981) the first defendant was not a debtor of Bank of India but on the other hand the bank itself was a debtor to the extent of more than Rs.33,00,000 with interest. Therefore the contention of the appellant that an encumbrance in favour of Bank of India was in existence and that was not disclosed and the said liability was not disclosed, is wholly untenable. From the evidence on record as rightly held by the courts below it is not possible to make out either any fraud or any suppression or failure to disclose facts on the part of the respondents.

43. We are therefore of the view that the failure of the appellant to pay the balance of Rs.75,000 on 6.4.1981 and failure to pay the last instalment of Rs.75,000 on or before 30.5.1981 clearly amounted to breach and time for such payment was the essence of the contract, the respondents were justified in determining the agreement of sale which they did by notice dated 2.8.1981 (Ex. P5). Therefore rejection of the prayer for specific performance is upheld.

44. We may next briefly deal with the correctness of the dismissal of the suit for injunction. The appellant was not put in possession of the suit properties in part-performance of the agreement of sale. Under clause 15 of the agreement of sale, she was only entrusted with the suit schedule properties as a caretaker until possession is given on receipt of the entire sale consideration. As neither the entire sale consideration was paid nor possession delivered, the plaintiff remained merely a caretaker and on cancellation of the agreement of sale by the respondents, the plaintiff became liable to leave the suit schedule properties as the possession continued to be with the defendants. As appellant never had 'possession' she was not entitled to seek a permanent injunction to protect her possession. We have held that the cancellation of agreement was justified and upheld the rejection of the suit for specific performance. In the circumstances, the dismissal of the suit for injunction by the learned Single Judge, affirmed by the Division Bench, is also not open to challenge.

45. We also find no reason to interfere with the dismissal of the suit for recovery of Rs.1,25,000 from the fourth respondent. The trial court held that the said amount was not paid as commission but was paid as consideration for the movables. The said suit was dismissed by the trial court. In the High Court the learned counsel for the appellant during arguments clearly stated that the appellant was not pressing for any decree against the fourth respondent in view of the finding that the amount paid was part of the consideration for movables. Therefore the dismissal of suit for Rs.1,25,000 is also upheld.

46. The division bench to do broad justice and work out the equities, took note of the offer of the defendants in their written statement to refund the amount paid as advance and directed the defendants to refund the sum of Rs.2,25,000 paid to defendants 1 to 3 under the agreement and Rs.1,25,000 paid to the fourth respondent, in all, Rs.3,50,000 with interest at 9% per annum for the period when the appellant was not acting as a care taker till date of payment. We find no reason to interfere with the direction to refund Rs.3,50,000 with interest. We however propose to make a modification in regard to the rate of interest and the period for which interest is payable. The High Court has awarded interest on the sum of Rs.3,50,000 at 9% per annum for the period in which the appellant had not acted as caretaker till the date of payment. As noticed above, the agreement of sale does not provide for forfeiture of the amounts paid as advance under any circumstances and on the other hand, specifically provides that if the plaintiff was not satisfied with the title of the defendants, the amounts received as advance would be refunded. In fact, the respondents, in their written statement, offered to refund the amount. Therefore, the High Court ought to have granted interest from the date of cancellation of the agreement (2.8.1981) to date of payment. The High Court was not justified in restricting the interest to only for the period during which the appellant had not acted as caretaker. The liability to refund the advance has nothing to do

with the appointment of the plaintiff as caretaker or the obligation of the plaintiff to return the property on cancellation of the agreement. Having regard to the facts and circumstances, we are of the view that the rate of interest shall be increased to 12% per annum instead of 9% per annum.

Re : Question No. (iv)

47. The appellant contended that none of the three vendors (defendants 1, 2 and 3) stepped into the witness box to give evidence and therefore an adverse inference should be drawn against them that the case put forth by them is incorrect. Reliance was also placed on the decisions of this court in *Vidhyadhar v. Mankikrao & Anr.* (1999) 3 SCC 573 and *Balasaheb Dayandeo Naik (Dead) through LRs. and Ors. v. Appasaheb Dattatraya Pawar* (2008) 4 SCC 464 in that behalf. There were four defendants in the suit. Defendants 1,2 and 3, who were the owners of the lands were respectively the wife, son and daughter of the fourth defendant. It is an admitted position that the entire transaction was done on behalf of the defendants 1,2 and 3 by defendant No.4 who alone had complete knowledge of the entire transaction. Fourth defendant has given evidence on behalf of all the other defendants. When one of the defendants who is conversant with the facts has given evidence, it is not necessary for the other defendants to be examined as witnesses to duplicate the evidence. The legal position as to who should give evidence in regard to the matters involving personal knowledge have been laid down by this court in *Man Kaur (dead) by LRS. v. Hartar Singh Sangha* (2010) 10 SCC 512. This court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the

transaction. This court further observed:

> "Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

Therefore the evidence of the fourth defendant (examined as DW2) was sufficient to put forth the case of the defendants and there was no need to examine the other three defendants who did not have full or complete knowledge of the transactions. In the circumstances we find no merit in the contention that the suits ought to have been decreed, as defendants 1,2 and 3 did not step into the witness box.

Re : Contempt Petition (C) Nos.28-29/2009 :

48. The appellant has filed these contempt petitions praying that respondents 1 to 4 be punished for committing contempt of the order dated 11.11.2002 made in C.A. Nos.7254-7256/2002. The appellant filed the said appeals aggrieved by the common judgment dated 19.6.2002 passed by the Division Bench of the High Court, affirming the dismissal of the three suits of appellant for injunction, for specific performance and for refund of Rs.1,25,000/-. This Court on 11.11.2002 while granting leave in the special leave petitions, made an interim order that the respondent shall not encumber the property in any manner.

49. The appellant alleges that one Jeevanandam filed three suits against respondents 1 to 3 in the years 2007 and 2008 for injunctions and other reliefs, alleging that he had

entered into three Memorandum of Understanding (MOU for short) dated 5.7.2002 with them, under which they had agreed to enter into agreements of sale in regard to the suit schedule properties; that he had paid advances to each of them on 5.7.2002, and that he had further paid to respondents 1 to 3 in the years 2004 and 2005, a sum of Rs.1,50,00,000. The appellants contend that the alleged act of receiving Rs.1,50,00,000 in the years 2004 and 2005 by respondents 1 to 3 from Jeevanandam, amounted to creating an encumbrance over the suit property and thereby respondents 1 to 3 have committed contempt of the order dated 11.11.2002 of this Court. The appellant also wants this court to hold an enquiry and hold that the MOUs were actually entered subsequent to the interim order dated 11.11.2002, but deliberately anti-dated to get over the interim order and therefore the execution of the said MOUs also amounts to creating an encumbrance. It is not necessary for us to examine the question whether the MOUs were anti-dated as the said question is not relevant as will presently be seen, apart from the fact that no material has been produced by the appellant to establish the said allegation.

50. An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See *National Textile Corporation vs. State of Maharashtra* - AIR 1977 SC 1566 and *State of H.P. vs. Tarsem Singh* - 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MOUs are not even agreements of sale. In these circumstances, it is not possible to hold that the respondents have created any encumbrances or violated the order dated 11.11.2002. Hence, these contempt

petitions are liable to be rejected.

51. We make it clear that nothing stated in this order on the contempt petitions will be construed as an expression of any opinion on the merits of the dispute between Jeevanandam and respondents 1 to 3, and necessarily any pending litigation between them will have to be decided on the merits of the respective cases.

CIVIL APPEAL NOS. 7254-7256 OF 2002

52. These appeals are filed by the vendors – defendants 1 to 3 (who are respondents 1 to 3 in C.A. Nos.7254-7256/2002). They are aggrieved by the judgment and decree of the Division Bench in O.S.A. No.12/1992 (arising from the specific performance suit) and O.S.A.No. 148/1999 (arising out of the money suit) whereby the Division Bench directed defendants 1 to 3 to jointly repay Rs.3,50,000 with interest at 9% per annum during the period the plaintiff was not acting as a caretaker till the date of payment. Defendants 1 to 3 urge the following contentions :

(a) In their written statement (filed in the specific performance suit), their offer was to repay the amount advanced was a conditional offer subject to the plaintiff not obstructing the defendants from interfering with the property or filing any frivolous, mischievous or vexatious suit and voluntarily handing over the possession of the property. They had not unconditionally agreed to repay the sum of Rs.3,50,000. As the plaintiff failed to hand over the possession and obstructed the defendants from selling the property, the offer to return the advance had stood withdrawn.

(b) During the pendency of the Original Side Appeals, the plaintiff was permitting to continue in possession as Receiver of the suit properties and she had reaped a huge benefit of more than Rs.37,00,000 due to continuing in

possession for about 15 years. As the plaintiff was permitted to retain the said benefit, no further benefit ought to have been given by directing refund of the sum of Rs.3,50,000 with interest.

53. The fact that defendants 1 to 3 received Rs.2,25,000 out of the sale price of Rs.3,75,000 is not in dispute. Similarly, there is no dispute that the fourth defendant had received a sum of Rs.1,25,000 from the plaintiff and agreed to refund the said amount if the sale remained unconcluded or if the agreement of sale was cancelled. The division bench of the High Court found fit to award the said amount, after affirming the decision rejecting the prayer for specific performance, in view of the offer made by defendants 1 to 3 in their written statement to repay the amounts received towards the sale consideration. We have held that the time stipulated for payment of the balance price by the plaintiff was the essence of the contract and when the same was not paid, defendants 1 to 3 were justified in cancelling the sale agreement. But, we also found that there was no provision in the agreement for forfeiture of the amounts already paid, even in the event of breach by the purchaser. On the other hand it provides that if the vendors did not satisfy the purchaser in regard to their title, the amounts received would be refunded. The consistent case of the plaintiff was that the defendants 1 to 3 failed to satisfy her about their title.

54. Further, defendants 1 to 3 in their written statement filed in the specific performance suit had agreed to refund all amounts received by them from the plaintiff. It is true that the offer was conditional upon the plaintiff not creating any hindrance in the way of the defendants by filing false, frivolous and mischievous suits. Though we have affirmed the decision of the learned Single Judge and the Division Bench that the plaintiff is not entitled to the relief of specific performance, it cannot be said that the plaintiff had filed false, frivolous and mischievous suits. In view of the above, in terms of the agreement and in terms of its offer, the plaintiff was entitled to

recover the amounts paid by her. A sum of Rs.2,25,000 was paid under the agreement of sale to defendants 1 to 3. The finding of the learned Single Judge that the sum of Rs.1,25,000 paid by the plaintiff to the fourth defendant was also the consideration for the movables in addition to the consideration of Rs.3,75,000 under the agreement of sale, was not been challenged by the defendants. In the circumstances, the Division Bench was justified in granting a decree in favour of the plaintiff for Rs.3,50,000 with interest. These appeals are therefore liable to be dismissed.

Conclusion :

55. In view of the foregoing the appeals and contempt petitions are disposed of as follows:

(i) C.A. Nos.7254-7256/2002 are allowed in part only in regard to the rate of interest and period for which interest is payable, with respect to the decretal amount of Rs.3,50,000/-. We direct that respondents 1 to 3 shall refund the sum of Rs.3,50,000/- to appellant as directed by High Court, with interest at 12% per annum from 2.8.1981 to the date of payment. Subject to the aforesaid modification in regard to the period for which interest is payable and rate of interest, the judgment of the Division Bench of the Madras High Court is upheld in its entirety.

(ii) Contempt Petition Nos.28-29/2009 are dismissed.

(iii) C.A. Nos.4641-4642/2003 are dismissed.

(iv) Parties are directed to bear their respective costs.

As a consequence, CS No. 170/1984 and CS No. 302/1989 stand dismissed. CS No. 95/1984 is decreed in part in favour of the appellant for Rs.3,50,000 with interest at 12% per annum from 2.8.1981 to date of payment.

D.G. Matters disposed of.

V. SUMATIBEN MAGANLAL MANANI (DEAD) BY L.R.
v.
UTTAMCHAND KASHIPRASAD SHAH AND ANR.
(Civil Appeal No.6685 of 1999)

JULY 4, 2011

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

Rent Control:

Eviction – On the ground of sub-letting – Case of plaintiff-landlady that she had let out the shop in question to defendant no.1-tenant for running grocery business but the latter sublet the same to defendant no.2-milk vendor – Appellate court, on the basis of material on record, arrived at the finding of subletting against defendant no.1-tenant – High Court, in revision, was dismissive of the finding of the appellate court on the issue of sub-letting – Justification of – Held: Not Justified – The plaintiff's case of subletting of the shop by defendant no.1 to defendant no.2 was greatly supported by the report prepared by the Court Commissioner who had visited the suit shop – The Court Commissioner did not find any grocery items in the suit shop but found lying there six empty milk cans and some glass show-cases containing small card-board boxes used for packaging sweets, bearing the name "Chandrika Dudh Ghar" and in the loft of the shop five more milk cans and some 150 to 250 empty sweet boxes – The Court Commissioner also found there certain books of accounts but before he could examine those books of accounts the inspecting party was attacked by four or five people coming from the adjoining shop of defendant no.2 – The intruders assaulted the husband and attorney holder of plaintiff-landlady and disrupted the inspection being held by the Court Commissioner – The inspection, thus, came to an abrupt end – Clearly the inspection by the Court

Commissioner was obstructed at the instance of defendant no.2 and the intruders had come at his behest – The defendant no.1 took a rather lame plea to try to explain away the findings of the Court Commissioner by stating that the marriage of his nephew was to take place and he had given an order for sweets to defendant No.2 – The appellate court rightly rejected the explanation furnished by defendant no.1 observing that there should be no reason for empty sweet boxes to be lying at the shop after two years of the marriage – The defendant no.1 not only fabricated evidence by later on keeping in the suit shop sweet boxes with the inscription about his nephew's wedding but also abused the process of the court for his purpose by filing a separate suit and getting a Court Commissioner appointed in that suit for the discovery of the fake sweet boxes – The appellate court rightly came to find and hold that the suit premises were in fact in the use and occupation of defendant no.2.

Eviction – On the ground of non-user of premises – Suit for eviction – Decree passed by trial court – Appellate court affirmed the finding of trial court that the suit shop was not used by the tenant for the purpose for which it was let out for a continuous period of more than six months immediately preceding the date of the suit and confirmed the eviction decree – Tenant filed revision before the High Court – High Court set aside the findings of fact arrived at by the courts below on the issue of non-user of the suit shop – Justification of – Held: Not justified – High Court took a rather perfunctory view of the matter – The appellate court did not arrive at its finding on a juxtaposition of segregated pieces of fact but took into consideration the overall picture emerging from all the material facts and circumstances relating to the case – Apart from the suit shop the tenant had set up two other shops – When the Court Commissioner visited the suit shop it was found closed – The tenant gave a false explanation for not opening the shop, stating that it was not opened due to the death of his maternal uncle even though one other shop set

up by him was not only open but he was also personally present there on that date – "Rojmel" filed by tenant in support of the plea that he ran grocery business at the suit shop through an employee was false – Electricity bills showed that there was no consumption of electricity in the suit shop over a period of six months immediately preceding the filing of the suit – In fact, electric supply to the suit shop was disconnected for non-payment of the minimum charges – High Court overlooked that later on the tenant had got the electricity connection to the suit shop restored and thereafter the electricity bills were showing normal consumption of electricity – High Court also overlooked that the tenant had resorted to many falsehoods in his attempt to wriggle out of facts and circumstances established by the plaintiff-landlady's evidence.

Code of Civil Procedure, 1908 – s.115 – Revision – Eviction decree – Upheld by appellate Court but set aside by the High Court in exercise of its revisional jurisdiction – Held: On facts, the High Court committed a mistake in interfering with and setting aside the findings of fact properly arrived at by the courts below – Judgment of the High Court is set aside and the decree passed by the trial court as affirmed by the appellate court is restored.

The appellant-landlady, who had let out the shop in question to the defendant no.1-tenant for running grocery business, filed suit seeking decree of eviction. The trial court allowed the suit and granted decree of eviction in favour of the plaintiff-appellant on the ground that the suit shop had not been used by the defendant no.1-tenant, without reasonable cause, for the purpose for which it was let out, for a continuous period of six months immediately preceding the date of the suit. The appellate court not only affirmed the finding of the trial court on non-user of the suit shop for a period of six months preceding the filing of the suit but also held the defendant no.1-tenant liable for eviction on the ground that he had

inducted defendant no.2-milk vendor as a sub-tenant. In revision filed by defendant no.1-tenant, however, the High Court held that both the findings arrived at by the trial court and the appellate court were bad and erroneous and accordingly set aside the eviction decree. Hence the present appeal.

Allowing the appeal, the Court

HELD:

Issue of sub-letting

1.1. The appellate court examined the evidences adduced by the two sides in support of their respective cases with great care and thoroughness. The appellate court noted that the ground of sub-letting was raised on behalf of the plaintiff at a later stage through an amendment in the plaint. It referred to the evidence of 'M', the husband and power of attorney holder of the plaintiff, who fully supported the plaintiff's case in all particulars. The appellate court found that the plaintiff's case of subletting of the shop by defendant no.1 to defendant no.2 was greatly supported by the report prepared by the Court Commissioner appointed in another suit and who had visited the suit premises. The said Court Commissioner did not find there any grocery items but found lying in the suit shop six empty milk cans and some glass show-cases containing small card-board boxes used for packaging sweets, bearing the name "Chandrika Dudh Ghar". In the loft of the shop there were five more milk cans and some 150 to 250 empty sweet boxes were also lying there. The Court Commissioner also found there certain books of accounts but before he could examine those books of accounts the inspecting party was attacked by four or five people coming from the adjoining shop of defendant no.2. The intruders assaulted 'M' and disrupted the inspection being held by

the Court Commissioner. The inspection, thus, came to an abrupt end. In regard to the incident 'M', who had faced the main brunt of the assault, filed a criminal complaint against defendant no.2. In the criminal case, defendant no.2 was sentenced by the Metropolitan Magistrate to undergo imprisonment for a certain period. The conviction of defendant no.2 was upheld by the Sessions Court, though the sentence was reduced to imprisonment till the rising of the court. Against the order passed by the Sessions Court, defendant no.2 did not prefer any revision before the High Court and the order of conviction, thus, attained finality. In these circumstances there is no reason to doubt that the inspection by the Court Commissioner was obstructed at the instance of defendant no.2 and the persons who came to the suit shop, the site of inspection, and assaulted 'M', had come at his behest. [Paras 7, 8] [956-G-H; 957-A-H; 958-A-B]

1.2. On behalf of defendant no.1 a rather lame plea was taken to try to explain away the findings of the Court Commissioner. It was stated on his behalf that the marriage of his nephew Ashokbhai was to take place and he had given an order for sweets to defendant No.2. But the defendant no.1. did not stop there. He later on, filed another suit in which a Court Commissioner was appointed who visited the suit premises and conveniently found at the suit premises sweet boxes with the inscription "At the occasion of the marriage of nephew Shri Ashok Kumar". The appellate court rightly rejected the explanation furnished by defendant no.1 relying on the report of the Court Commissioner observing that there should be no reason for empty sweet boxes to be lying at the shop after two years of the marriage. The defendant no.1 not only fabricated evidence by later on keeping in the suit shop the sweet boxes with the inscription about his nephew's wedding but also abused

the process of the court for his purpose by filing a separate suit and getting a Court Commissioner appointed in that suit for the discovery of the fake sweet boxes. [Para 9] [958-C-G]

1.3. On a detailed consideration of the materials on record, the appellate court came to find and hold that the suit premises were in fact in the use and occupation of defendant no.2 and in the facts of the case it was not necessary for the appellant-landlady to prove the monetary consideration between the tenant and the sub-tenant. [Para 10] [958-G-H; 959-A-B]

1.4. The view taken by the High Court on the issue of subletting cannot be accepted. On the basis of the materials available on record, the appellate court was perfectly justified in arriving at the finding of subletting against defendant no.1. [Para 23] [966-C]

Bharat Sales Limited v. Life Insurance Corporation of India, **AIR 1998 SC 1240: 1998 (1) SCR 711 – referred to.**

Issue of non-user of premises

2.1. On the issue of non-user of the suit shop for the purpose it was let out, the appellate court noted that according to the plaintiff the suit premises were rented out to defendant no.1 in June, 1974 for grocery business. But the business of grocery evidently did not succeed and since a few months after it was taken on rent, the shop was kept closed. [Para 11] [960-B]

2.2. M' in his deposition before the court fully supported the case of the plaintiff on the question of non-user as well. Apart from the evidence of the plaintiff, there were two sets of photographs, one taken on January 4, 1977 and the other on January 3, 1981 in which the suit shop appeared closed. In regard to the two sets of photographs the appellate court rightly said that those

would, at best, show that the shop was closed on the dates on which the photographs were taken. The photographs, therefore, could not form conclusive evidence of non-user of the shop over a period of six months and, at best, they could be used as a piece of corroborative evidence. [Para 12] [960-D-H]

2.3. Apart from the photographs, there was the report of the Court Commissioner who visited the suit shop on July 23, 1977 and found it closed. The explanation of defendant no.1 was that on that date his maternal uncle had died and the shop was not opened for that reason. His witness 'MT', who was writing the accounts of business of defendant no.1, however, had a different explanation. According to him, the shop was not opened on July 23, 1977 because that was a holiday. But grocery shops are not known to be closed on holidays. After finding the suit shop closed, the Court Commissioner proceeded to visit the shop of defendant no.1 called 'Mahavir Provision Stores' at Sardar Patel Colony. There the shop was not only open but defendant no.1 was himself present in the shop. The court observed, and rightly so, that on account of the death of the maternal uncle it cannot be that one shop would open and the other would remain closed. [Para 13] [961-A-D]

2.4. The most clinching evidence on the issue of non-user of the suit premises, however, comes in the form of the electricity bills dated 10.1.1977, 23.2.1977, 25.3.1977, 2.5.1977, 2.6.1977 and 2.9.1977 respectively. These electricity bills clearly show that in the suit shop there was no consumption of electricity for the period of six months before the filing of the suit. [Para 14] [961-E-F]

2.5. The explanation of defendant no.1 for non-consumption of electricity was that being a devout Jain he closed the shop at 5:30 P.M. before the day getting dark. He, therefore, did not need any electric light (or for

that matter any electric fan) and hence, there was no consumption of electricity in his shop. The falsehood of the explanation, however, was exposed by the fact that the electric supply to the demised shop was disconnected for non-payment of the minimum charges. Defendant no.1 then made an application, for resumption of the supply and transfer of the service from the name of the landlady to his own name. On his application, the electric supply was restored in the year 1979 and then the monthly bills, dated December, 2, 1980 and January 2, 1981 showed normal consumption of electricity in the suit shop. There was no explanation by defendant No.1 how and why the suit shop that showed no electric consumption in earlier years started showing normal electric consumption from December 1979. The resumption of electric consumption in the suit shop also lends credence to the case of the plaintiff that after remaining closed for two-three years, the shop was sublet by defendant no. 1 to defendant no. 2 who used it for his milk business. [Para 15] [962-B-E]

2.6. The appellate court also referred to the book of account, in the form of "Rojmel" produced by defendant no.1 in support of his claim that the suit shop was in his occupation and he carried on his grocery business from there. The appellate court on a detailed examination of the entries made in the "Rojmel" found that it was a crude and clumsy fabrication made for the purpose of the suit. [Para 16] [962-F-G]

2.7. In addition to its own finding on the question of subletting, the appellate court, on a careful consideration of all the materials on record, affirmed the finding recorded by the trial judge that the suit premises were not used by the tenant for the purpose for which it was let for a continuous period of more than six months immediately preceding the date of the suit. It, accordingly,

confirmed the decree of eviction passed by the trial court. Against the order passed by the appellate court, defendant no.1 filed revision before the High Court and the High Court, taking a rather perfunctory view of the matter interfered with and set aside the findings of fact arrived at by the appellate court. [Paras 17, 18] [962-H; 963-A-C]

2.8. The criticism by the High Court of the appellate court judgment, on the issue of non-user of the suit premises, is unwarranted. The appellate court did not arrive at its finding on a juxtaposition of segregated pieces of fact but it took into consideration the overall picture emerging from all the material facts and circumstances relating to the case. The appellate court expressly said that the two sets of photographs would only show that the shop was closed on the dates the pictures were taken and those pictures alone were not sufficient to prove non-user of the suit premises over a period of six months and they could, at best, be used as corroborative evidence. It, however, took into consideration the circumstance that apart from the suit premises defendant No.1 had set up another shop called "Mahavir Provision Stores" at Sardar Patel Colony and yet another shop in Chandlodia area. It also took into consideration that when the Court Commissioner visited the suit shop on July 23, 1977 it was found closed. What is of greater significance in that regard, however, is that defendant no.1 gave a false explanation for not opening the shop, stating that it was not opened due to the death of his maternal uncle even though the other shop at Sardar Patel Colony was not only open but he was also personally present there on that date. The court also took into consideration the false "Rojmel" filed by defendant No.1 in support of the plea that he continued to run the grocery business at the suit premises through an employee. The court also noticed that another Court

Commissioner had gone to the suit premises on September 22, 1981. He did not find in the shop any grocery articles but found there articles belonging to defendant no.2 who carried on his milk business from the adjoining shop. Besides all this, the appellate court had taken into consideration the electricity bills that showed that there was no consumption of electricity over a period of six months immediately preceding the filing of the suit. [Para19] [963-G-H; 964-A-E]

2.9. The High Court failed to appreciate all the material facts and circumstances as regards the electricity bills. The High Court thought that the electricity bills showing no consumption of electricity for the period of six months immediately preceding the filing of the suit were of no consequence because the bills for even the period prior to the period of six months preceding the suit showed no consumption of electricity. The High Court overlooked the fact that even though in terms of Section 13(1)(k) of the Bombay Rent Act, the plaintiff was required to prove non-user of the shop premises for a period of six months immediately preceding the filing of the suit, as a matter of fact, the case of the plaintiff was that defendant No.1 was not using the shop and keeping it closed for a much longer period. Thus, the bills produced by defendant no.1 showing no consumption of electricity in fact supported the case of the plaintiff. The High Court also overlooked that later on in the year 1979 defendant no.1 had got the electricity connection to the suit shop restored and thereafter the electricity bills were showing normal consumption of electricity. The High Court also overlooked that defendant no.1 had resorted to many falsehoods in his attempt to wriggle out of facts and circumstances established by the plaintiff's evidence. [Para 21] [965-B-E]

3. The High Court, in exercise of its revisional jurisdiction, committed a mistake in interfering with and

setting aside the findings of fact properly arrived at by the courts below. The judgment of the High Court is set aside and the decree passed by the trial court as affirmed by the appellate court is restored. [Para 23] [966-C-D]

Case Law Reference:

1998 (1) SCR 711 referred to Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6685 of 1999.

From the Judgment & Order dated 23.07.1999 of the High Court of Gujarat at Ahmedabad in Civil Revision Application No. 1692 of 1998.

Dattatray Vyas, Abhijit P. Medh, Chirag M. Shroff for the Appellant.

Tarun Kumar V. Shah, H.A. Raichura, Umesh Kumar Khaitan for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal at the instance of the landlady is directed against the judgment and order dated July 23, 1999 passed by a learned single judge of the Gujarat High Court in Civil Revision Application No.1692/1998. By the impugned order, the High Court allowed the revision application filed by defendant no.1, the tenant (respondent no.1 before this Court), set aside the judgments and orders passed by the trial judge and a division bench of the Small Causes Court and dismissed the appellant's application claiming eviction of defendant No.1 from the suit premises, besides arrears of rent.

2. The trial judge had allowed the appellant's application and granted a decree of eviction in her favour on the ground that the suit premises had not been used by the tenant, without reasonable cause, for the purpose for which they were let for a continuous period of six months immediately preceding the

date of the suit. In appeal against the judgment of the trial judge preferred by defendant no. 1 and the cross-objection filed by the plaintiff-appellant, the division bench of the Small Causes Court not only affirmed the finding of the trial court on non-user of the suit premises for a period of six months preceding the filing of the suit but also held the tenant liable for eviction on the ground that he had inducted in the suit premises defendant no.2 as a sub-tenant. In the revision filed by defendant no.1, however, the High Court held that both the findings arrived at by the trial court and the appeal court were bad and erroneous. It, accordingly, set aside the decree of eviction passed by the trial court and affirmed by the appeal court against defendant no.1 and dismissed the suit of the appellant-plaintiff.

3. The plaintiff-appellant is the owner of bungalow No.6 situated in Pathik Society, Naranpura, Ahmedabad. A part of the property, being the middle garage, bearing M.C. No.145-6-1, and F.P. No.11-11-A-6-1 was let out to defendant no.1 on June 1, 1974 for carrying on grocery business on a monthly rent of Rs.100/- plus municipal taxes, education cess etc. On June 9, 1977, a notice (Exh.68) was given to defendant No.1 on behalf of the appellant stating that he was in default in payment of the monthly rent and the demised shop was not in use since one year prior to the date of the notice. He was, accordingly, asked to vacate the shop and hand over its possession to the plaintiff. The notice did not have the desired result and, consequently, on July 18, 1977, the appellant filed the suit (H.R.P. Suit No.2866/1977) seeking a decree of eviction and for payment of arrears of rent and mesne profits against defendant no.1 on grounds of default in payment of rent, bonafide personal need and non-user of the suit shop by defendant no.1, without any reasonable cause, for a period of six months immediately preceding the filing of the suit. It was after the filing of the suit but before the summons was served on defendant no.1 that, he gave his reply (Exh.67) to the plaintiff's notice on August 23, 1977. In the reply, he did not expressly controvert the allegation that the suit premises were

not in use since one year before the date of the notice.

4. Later on, after the service of summons of the suit, defendant no.1 filed a written statement controverting all the allegations made by the plaintiff in the plaint. He denied any default on his part in payment of rent and also denied that the plaintiff-appellant was in bonafide personal need of the suit shop. He also denied the allegation of non-user and asserted that he carried on his business from the suit shop. Here, it may be noted that, in the plaint as it was originally filed, there was no allegation of any subletting of the shop by defendant no.1 but during the pendency of the suit, the plaintiff made an application stating that defendant no.1 had acquired a shop in Sardar Patel Colony, where he carried on his grocery business under the name and style of "Mahavir Provision Stores". He had acquired, yet another shop in Chandlodia area. The suit shop that was not in use by him was sublet by him to one Kishanchand Chandansingh Rao who was carrying on his milk business under the name and style of "Chandrika Dudh Ghar" in the shop adjoining the suit shop. Defendant no.1 was realising rental of the plaintiff's shop from him. After being inducted in the suit shop, the sub-tenant was using it for carrying on his business and was keeping his articles there. The application seeking amendment in the plaint was allowed by the trial judge by order dated December 11, 1981, following which necessary amendments were carried out in the original plaint and the aforementioned Kishanchand Chandansingh Rao was impleaded in the suit as defendant no.2. On notice being issued, defendant no.2 filed a written statement denying the allegation of being inducted in the suit shop as a sub-tenant and stating that he was dragged in the suit unnecessarily only with a view to harass him. Defendant no.1 filed additional written statement, denying the allegation that he had inducted defendant no.2 in the suit shop as sub-tenant or that he was realising any rent from him.

5. On the basis of the pleadings of the parties, the trial

judge framed a large number of issues of which issue numbers (3), (4) and (4)(A) are of relevance for the present. Those are as under:

"(3) Whether the plaintiff proves that the defendant has acquired a suitable alternative accommodation as alleged?

"4) Whether the defendant keeps the suit premises closed and does not use for more than six months prior to the suit as alleged?

"(4)(A) Whether the plaintiff proves that defendant No.1 has sublet, assigned or transferred the suit premises to the defendant No.2 and is profiteering thereby?"

6. On issue No.3, the trial judge gave a finding in the negative. On issue no.(4)(A) he held that though there appeared some substance in the plaintiff's case that the suit premises were in the use and occupation of defendant no.2, there was no evidence that it was in his exclusive possession and that he paid some consideration or any monthly rent to defendant no.1 for being inducted in the suit premises and, hence, the plea of subletting could not be a ground for eviction. On issue No.(4), however, he held in favour of the plaintiff and found that defendant no.1 had kept the suit premises closed, without any reasonable cause for more than six months preceding the date of the filing of the suit. It, accordingly, gave a decree of eviction against defendant No.1 on that basis.

7. Against the judgment and decree passed by the trial judge, defendant no.1 preferred an appeal before the division bench of the Small Causes Court. The appellant-plaintiff too filed her cross-objections. The appellate court examined the evidences adduced by the two sides in support of their respective cases with great care and thoroughness and it is to the appellate order that we propose to refer here in some detail. The appellate court noted that the ground of subletting was raised on behalf of the plaintiff at a later stage through an

amendment in the plaint. It referred to the evidence of Maganbhai Rambhai Manani, the husband and power of attorney holder of the plaintiff who was examined at Exh. 101 and who fully supported the plaintiff's case in all particulars. It also referred to the evidence of defendant no. 1 at Exh.344. Defendant no. 1 denied all the allegations made in the plaint, including the allegation of subletting. He maintained that he was carrying on his business from the suit shop through an employee, Damodar. The appellate court found that the plaintiff's case of subletting of the shop by defendant no.1 to defendant no.2 was greatly supported by the report prepared by the Court Commissioner who was appointed in another suit being H.R.P. Suit No.3291/81 and who visited the suit premises on September 22, 1981. The Court Commissioner did not find there any grocery items but he found lying in the suit shop six empty milk cans and some glass show-cases containing small card-board boxes used for packaging sweets, bearing the name "Chandrika Dudh Ghar". In the loft of the shop there were five more milk cans and some 150 to 250 empty sweet boxes were also lying there. Interestingly, the Court Commissioner also found there certain books of accounts but before he could examine those books of accounts the inspecting party was attacked by four or five people coming from the adjoining shop of defendant no.2. The intruders assaulted Maganbhai Manani and disrupted the inspection being held by the Court Commissioner. The inspection, thus, came to an abrupt end.

8. In regard to the incident Maganbhai, the husband and power of attorney holder of the plaintiff who had faced the main brunt of the assault, filed a criminal complaint against Kishanchand, defendant no.2. It is admitted that in the criminal case, Kishanchand was sentenced by the Metropolitan Magistrate to undergo imprisonment for a certain period. Against the judgment and order passed by the Magistrate, he preferred an appeal before the Sessions Court. In the appeal his conviction was maintained though the sentence was reduced to imprisonment till the rising of the court. Against the order

passed by the Sessions Court, Kishanchand did not prefer any revision before the High Court and the order of conviction, thus, attained finality. In those circumstances there is no reason to doubt that the inspection by the Court Commissioner was obstructed at the instance of Kishanchand, defendant no.2 and the persons who came to the suit shop, the site of inspection, and assaulted Maganbhai, had come at his behest.

9. On behalf of defendant no.1 a rather lame plea was taken to try to explain away the findings of the Court Commissioner. It was stated on his behalf that the marriage of his nephew Ashokbhai was to take place in August or September, 1981 and he had given an order for sweets to defendant No.2. It was put to the plaintiff's witness Maganbhai Rambhai Manani that the sweet boxes found at the suit premises by the Court Commissioner in course of his visit there on September 22, 1981 would be bearing the inscription, "On the marriage of Ashok". The witness, of course, denied the suggestion. But the defendant did not stop there. He, later on, filed another suit being H.R.P. Suit No.70/83 in which a Court Commissioner was appointed who visited the suit premises on February 24, 1983. The Court Commissioner conveniently found at the suit premises sweet boxes with the inscription "At the occasion of the marriage of nephew Shri Ashok Kumar". The appellate court rightly rejected the explanation furnished by defendant no.1 relying on the report of the Court Commissioner observing that there should be no reason for empty sweet boxes to be lying at the shop after two years of the marriage. But, we see something more in the conduct of defendant no.1. He not only fabricated evidence by later on keeping in the suit shop the sweet boxes with the inscription about his nephew's wedding but also abused the process of the court for his purpose by filing a separate suit and getting a Court Commissioner appointed in that suit for the discovery of the fake sweet boxes.

10. On a detailed consideration of the materials on record,

the appellate court came to find and hold that the suit premises were in fact in the use and occupation of defendant no.2 and in the facts of the case it was not necessary for the landlady to prove the monetary consideration between the tenant and the sub-tenant. In support of the view taken by it, the appellate court relied upon a decision of this Court in *Bharat Sales Limited v. Life Insurance Corporation of India,* AIR 1998 SC 1240 and in paragraph 38 of the judgment observed as follows:-

> "38. In view of our earlier discussion and even in view of the finding of the learned trial Judge, it can be safely said that defendant No.2 is found in use and occupation of the suit premises. In that case, according to our view, it is not necessary for the landlord to prove the monetary consideration by sub-tenant to the tenant. We are also of the opinion that in case of subletting or in case of illegal transfer, such consideration can be presumed. In this connection, our attention is drawn by Mr. Pandya, learned advocate who appears on behalf of the appellant, to a decision of *M/s. Bharat Sales Limited v. Life Insurance Corporation of India,* reported in A.I.R. 1998, Supreme Court, page-1240. In this decision, it has been observed by Their Lordships that:
>
> ".. To prove subletting production of affirmative evidence showing payment of monetary consideration by sub-tenant to the tenant is not necessary. Inference as to subletting can be drawn from proof of delivery of exclusive possession of the premises by tenant to sub-tenant. Sub-tenancy or subletting comes into existence when tenant gives up possession of the tenanted accommodation wholly or in part and puts another person in exclusive possession thereof. This arrangement comes about mutual agreement or understanding between the tenant and person to whom possession is so delivered. In this process, landlord is kept out of the scene. Rather scene is enacted behind the back of the landlord, concealing

> overact and transferring possession to a person who is utter stranger to the landlord…."

11. Coming to the issue of non-user of the suit shop for the purpose it was let out, the appellate court noted that according to the plaintiff the suit premises were rented out to defendant no.1 in June, 1974 for grocery business. But the business of grocery evidently did not succeed and since a few months after it was taken on rent, the shop was kept closed. Then, in the amendment petition filed on behalf of the plaintiff, it was expressly alleged that defendant no.1 was carrying on his grocery business under the name and style of "Mahavir Provision Stores" from another shop in Sardar Patel Colony and later on he had set up yet another shop in Chandlodia area and the suit premises were sublet to defendant no.2.

12. Maganbhai Manani, the husband and the power of attorney holder of the plaintiff in his deposition before the court fully supported the case of the plaintiff on the question of non-user as well. Apart from the evidence of the plaintiff, there were two sets of photographs, one taken on January 4, 1977 and the other on January 3, 1981 in which the suit shop appeared closed. The photographs taken on January 4, 1977, at exhibits 301 to 304, were formally proved by one Mr. Narendrabhai Madhavlal Gajjar at (Exh.300) who is a professional photographer and has a shop under the name and style of Gajjar Studio. He stated before the court that he had taken the photographs on the instructions of the husband of the landlady on January 4, 1977 at about 10 to 11 in the morning and had issued the bill, Exh.201. The other set of photographs, dated January 3, 1981, were taken by Vinodbhai Boria, who is also a professional photographer. In regard to the two sets of photographs the appellate court rightly said that those would, at best, show that the shop was closed on the dates on which the photographs were taken. The photographs, therefore, could not form conclusive evidence of non-user of the shop over a period of six months and, at best, they could be used as a piece of corroborative evidence.

13. Apart from the photographs, there was the report of the Court Commissioner who visited the suit shop on July 23, 1977 and found it closed. The explanation of defendant no.1 was that on that date his maternal uncle had died and the shop was not opened for that reason. His witness Maheshkumar Trivedi, at Exh. 404, who was writing the accounts of business of defendant no.1, however, had a different explanation. According to him, the shop was not opened on July 23, 1977 because that was a holiday. The court has observed that grocery shops are not known to be closed on holidays. But the matter does not end there. After finding the suit shop closed, the Court Commissioner proceeded to visit the shop of defendant no.1 called 'Mahavir Provision Stores' at Sardar Patel Colony. There the shop was not only open but defendant no.1 was himself present in the shop. The court has observed, and rightly so, that on account of the death of the maternal uncle it cannot be that one shop would open and the other would remain closed.

14. The most clinching evidence on the issue of non-user of the suit premises, however, comes in the form of the electricity bills. Electricity bills, Exhs. 172 to 177, are dated 10.1.1977, 23.2.1977, 25.3.1977, 2.5.1977, 2.6.1977 and 2.9.1977 respectively. These electricity bills clearly show that in the suit shop there was no consumption of electricity for the period of six months before the filing of the suit. In order to prove non-consumption of any electricity at the suit shop, the plaintiff also examined Rameshbhai Patel, at Exh.332, who was an employee of the Ahmedabad Electricity Company, as a Senior Clerk, for 12 years before his examination in court. He produced before the court statement of electric service number 149090 (of the suit shop) with his list Exh.74/1. He also produced other statements with lists, Exh.74/2 and Exh.74/3, containing record of metre readings of the suit premises showing electric consumption for different periods. He also referred to an application submitted by defendant no.1 for

transfer of electric service in his name and for resuming electric supply in the suit premises.

15. The explanation of defendant no.1 for non-consumption of electricity was that being a devout Jain he closed the shop at 5:30 P.M. before the day getting dark. He, therefore, did not need any electric light (or for that matter any electric fan) and hence, there was no consumption of electricity in his shop. The falsehood of the explanation, however, was exposed by the fact that the electric supply to the demised shop was disconnected for non-payment of the minimum charges. Defendant no.1 then made an application, Exh.198, for resumption of the supply and transfer of the service from the name of the landlady to his own name. On his application, the electric supply was restored in the year 1979 and then the monthly bills, Exh.199 and Exh.200, dated December, 2, 1980 and January 2, 1981 showed normal consumption of electricity in the suit shop. There was no explanation by defendant No.1 how and why the suit shop that showed no electric consumption in earlier years started showing normal electric consumption from December 1979. The resumption of electric consumption in the suit shop also lends credence to the case of the plaintiff that after remaining closed for two-three years, the shop was sublet by defendant no. 1 to defendant no. 2 who used it for his milk business.

16. The appellate court also referred to the book of account, in the form of "Rojmel" produced by defendant no.1 in support of his claim that the suit shop was in his occupation and he carried on his grocery business from there. The appellate court on a detailed examination of the entries made in the "Rojmel" found that it was a crude and clumsy fabrication made for the purpose of the suit.

17. Thus, in addition to its own finding on the question of subletting, the appellate court, on a careful consideration of all the materials on record, affirmed the finding recorded by the trial judge that the suit premises were not used by the appellant-

tenant for the purpose for which it was let for a continuous period of more than six months immediately preceding the date of the suit. It, accordingly, confirmed the decree of eviction passed by the trial court.

18. Against the order passed by the appellate court defendant no.1 filed a revision before the High Court and the High Court, we are sorry to say, taking a rather perfunctory view of the matter interfered with and set aside the findings of fact arrived at by the appellate court in a very well reasoned judgment. On the issue of non-user of the suit premises, the High Court made the following observations:

> "….It appears that the Trial Court as well as the Appellate Bench of the Small Causes Court have taken the pieces of the fact which are segregated and placed them in the juxtaposition, and from that the Appellate Bench inferred and presumed that the suit shop was closed for continuous period of six months prior to the filing of the suit; and this is the error of law apparent on the face of the record, and it goes to the root of the cause. It is a celebrated principle of law that the word "continuous" applied in Section 13(1)(k) of the Bombay Rent Act clearly denotes that the premises must not have been opened for a day even, and what is found from the evidence is that the day on which the Commissioner visited the suit shop was found closed. The photographs taken by the photographer on a stray day shows that the suit shop was found closed and the oral evidence of the plaintiff was believed."

19. In our view, the criticism by the High Court of the appellate court judgment is unwarranted. The appellate court did not arrive at its finding on a juxtaposition of segregated pieces of fact but it took into consideration the overall picture emerging from all the material facts and circumstances relating to the case. The appellate court expressly said that the two sets of photographs would only show that the shop was closed

on the dates the pictures were taken and those pictures alone were not sufficient to prove non-user of the suit premises over a period of six months and they could, at best, be used as corroborative evidence. It, however, took into consideration the circumstance that apart from the suit premises defendant No.1 had set up another shop called "Mahavir Provision Stores" at Sardar Patel Colony and yet another shop in Chandlodia area. It also took into consideration that when the Court Commissioner visited the suit shop on July 23, 1977 it was found closed. What is of greater significance in that regard, however, is that defendant no.1 gave a false explanation for not opening the shop, stating that it was not opened due to the death of his maternal uncle even though the other shop at Sardar Patel Colony was not only open but he was also personally present there on that date. The court also took into consideration the false "Rojmel" filed by defendant No.1 in support of the plea that he continued to run the grocery business at the suit premises through an employee. The court also noticed that another Court Commissioner had gone to the suit premises on September 22, 1981. He did not find in the shop any grocery articles but found there articles belonging to defendant no.2 who carried on his milk business from the adjoining shop. Besides all this, the appellate court had taken into consideration the electricity bills that showed that there was no consumption of electricity over a period of six months immediately preceding the filing of the suit.

20. As regards the electricity bills, the High Court had to make the following comments:

> "Defendant No.1 has offered his explanation for this that he being a Jain, before the sun set, he closes his shop. The defendant No.1 has also produced electric bills of six months prior to the six months prior to the date of the filing of the suit. These bills have not been considered by any of the courts below properly. In those six months bills, which the defendant No.1 has produced, the charges of the

electricity are minimum and there is no consumption. On the contrary, from this explanation of the defendant No.1 that he is not using the electricity……".

21. Here again, the High Court failed to appreciate all the material facts and circumstances. The High Court thought that the electricity bills showing no consumption of electricity for the period of six months immediately preceding the filing of the suit were of no consequence because the bills for even the period prior to the period of six months preceding the suit showed no consumption of electricity. The High Court overlooked the fact that even though in terms of Section 13(1)(k) of the Bombay Rent Act, the plaintiff was required to prove non-user of the shop premises for a period of six months immediately preceding the filing of the suit, as a matter of fact, the case of the plaintiff was that defendant No.1 was not using the shop and keeping it closed for a much longer period starting from or about June, 1976. Thus, the bills produced by defendant no.1 showing no consumption of electricity in fact supported the case of the plaintiff. The High Court also overlooked that later on in the year 1979 defendant no.1 had got the electricity connection to the suit shop restored and thereafter the electricity bills were showing normal consumption of electricity. The High Court also overlooked that defendant no.1 had resorted to many falsehoods in his attempt to wriggle out of facts and circumstances established by the plaintiff's evidence.

22. In the same way on the issue of subletting the High Court was dismissive of the finding of the appellate court observing as follows:-

"On scrutinizing the record, it is clearly found that reliance has been placed on the testimony of the plaintiff's power of attorney holder and panchnama prepared by the Court Commissioner. What is found by the Court Commissioner is only some milk cans in the suit premises. Some of the milk cans carried the name of defendant No.2 and also some sweet boxes. From this mere fact, a very serious

presumption of the exclusive possession of the defendant No.2 has been drawn by both the courts below. The finding of the exclusive possession must be based on evidence and that factum of possession must be proved. From this only, no prudent man can infer the presence of a third party."

23. We are unable to subscribe to the view taken by the High Court. On the basis of the materials available on record, as discussed in detail in the judgment of the appellate court, it was perfectly justified in arriving at the finding of subletting against defendant no.1. On a careful consideration of the matter, we find that the High Court, in exercise of its revisional jurisdiction, committed a mistake in interfering with and setting aside the findings of fact properly arrived at by the courts below. The judgment and order passed by the High Court is unsustainable by any reckoning. We, accordingly, set aside the judgment of the High Court and restore the decree passed by the trial court as affirmed by the appellate court.

24. In the result, the appeal is allowed with costs throughout.

B.B.B. Appeal allowed.

STATE OF ORISSA & ORS.
v.
BHAGYADHAR DASH
(Civil Appeal No. 4933 of 2011)

JULY 04, 2011

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

Arbitration and Conciliation Act, 1996 – s.11 – Clause 10 of the conditions of contract (forming part of the agreements between the State and the contractors) related to power of the Engineer-in-Chief to make additions and alterations in the drawings and specifications and execution of non-tendered additional items of work – The last sentence of the proviso to clause 10 provided that where in regard to a non-tendered additional work executed by the contractor, if the contractor was not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer – Disputes raised by contractors against the State Government – Applications filed by contractors u/s.11 – Chief Justice of High Court held that the last sentence of the proviso to the said clause 10 was an arbitration agreement and appointed arbitrators to decide the disputes – On appeal, held: The last sentence of the proviso to clause 10 did not make the decision of the Superintending Engineer binding on either party – The decision of Superintending Engineer was not a judicial determination, but decision of one party which was open to challenge by the other party in a court of law – That clause 10 was never intended to be an arbitration agreement is evident from the contract itself – The Standard Conditions of Contract of the state government, as originally formulated consisted of a provision (Clause 23) relating to settlement of disputes by arbitration – The said clause was deleted by the State Government from the Standard

Conditions of Contract by official Memorandum dated 24.12.1981 – Contracts entered by the State Government subsequent to 24.12.1981, as in the instant cases, did not have the said arbitration clause, though the other Conditions of Contract remained the same – When the State Government consciously and intentionally deleted the provision for arbitration from its contracts, it will be a travesty of justice to read another clause in the contract providing for execution of non-tendered items and the method of determination of the rates therefor, as a provision for arbitration – Orders of the High Court appointing the arbitrator set aside and applications for appointment of arbitrator dismissed.

Clause 10 of the conditions of contract (forming part of the agreements between the State and the contractors) related to power of the Engineer-in-Chief to make additions and alterations in the drawings and specifications and execution of non-tendered additional items of work. The last sentence of the proviso to clause 10 provided that where in regard to a non-tendered additional work executed by the contractor, if the contractor was not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. The Chief Justice of Orissa High Court held that the last sentence of the proviso to clause 10 was an arbitration agreement and allowed the applications filed by the contractors under Section 11 of the Arbitration and Conciliation Act 1996 and appointed arbitrators to decide the disputes raised by them against the State Government.

The appellants challenged the said orders on the ground that there was no arbitration agreement and therefore the applications under section 11 of the Act filed by the contractors ought to have been dismissed.

The question that therefore arose for consideration in the present appeal was whether the said clause 10 of the conditions of contract was an arbitration agreement.

Allowing the appeals, the Court

HELD:1.1. The clause for consideration in the instant case i.e. Clause 10 of the Conditions of Contract provides for the following: a) that the Engineer-in-charge could make additions and alterations in the drawings/ specifications; and that such alterations and additions will not invalidate the contract, but will entitle the contractor to extension of time for completion of work proportionately; b) that if the additional work be executed is an item for which the rate is not specified in the contract (or in the schedule of rates for the district), the contractor shall specify the rate and the Engineer-in-charge may either accept the rate or cancel the order to execute that particular work; and c) that if the contractor commences the work with reference to an item for which there is no rate in the contract and there is no agreement in regard to the rate for execution of such work, he shall be paid at the rates fixed by the Engineer-in -Charge; and d) that if the contractor disputes the rate fixed by the Engineer-in-Charge, the decision of the Superintending Engineer in regard to rate for such non-scheduled item shall be final. [Para 14] [987-A-F]

1.2. The last sentence of the proviso to clause 10 does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the

Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-Charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. It is a provision made with the intention to avoid future disputes regarding rates for non-tendered item. It is not a provision for reference of future disputes or settlement of future disputes. The decision of superintending Engineer is not a judicial determination, but decision of one party which is open to challenge by the other party in a court of law. The said clause can by no stretch of imagination be considered to be an arbitration agreement. The said clause is not, and was never intended to be, a provision relating to settlement of disputes. [Para 15] [987-G-H; 988-A-E]

1.3. That clause 10 was never intended to be an arbitration agreement is evident from the contract itself. The Standard Conditions of Contract of the state government, as originally formulated consisted of a provision (Clause 23) relating to settlement of disputes by arbitration. The said clause was deleted by the State Government from the Standard Conditions of Contract by official Memorandum dated 24.12.1981. Contracts entered by the State Government thereafter did not have the said arbitration clause, though the other Conditions of Contract remained the same. The contracts in all these cases are of a period subsequent to 24.12.1981 and the Conditions of Contract forming part of these contracts do not contain the arbitration clause. When the State Government has consciously and intentionally deleted

the provision for arbitration from its contracts, it will be a travesty of justice to read another clause in the contract providing for execution of non-tendered items and the method of determination of the rates therefor, as a provision for arbitration. In *Executive Engineer RCO vs. Suresh Chandra Panda***, this Court considered the effect of the said clause relating to execution of non-tendered items, vis-à-vis clause 23 in a pre-1981 contract. This court held that the said clause (then numbered as clause 11, numbered as clause 10 in subsequent contracts) was a provision which excluded the issue relating to finality of rates, from the scope of arbitration agreement contained in clause 23. Thus, even when the Standard Conditions of Contract contained a provision for arbitration (vide clause 23), clause 10 was considered to be a provision dealing with a matter excepted from arbitration. The proviso to clause 10, which provides that the decision of the Superintending Engineer is 'final', merely discloses an intention to exclude the rates for extra items decided by the Superintending Engineer from the scope of arbitration, as an excepted matter, when there was an arbitration agreement (clause 23) in the contract. When the arbitration agreement was deleted, provision dealing with non-tendered items cannot be described as an arbitration agreement. [Paras 16, 17] [988-F; 989-D-H; 990-G-H; 991-A]**

1.4. The orders of the High Court appointing the arbitrator are therefore set aside and the applications for appointment of arbitrator are dismissed. [Para 18] [991-B]

K K Modi vs. K N Modi **1998 (3) SCC 573: 1998 (1) SCR 601;** *Bihar State Mineral Development Corporation v. Encon Builders (IP) Ltd.*- **2003 (7) SCC 418: 2003 (2) Suppl. SCR 812;** *Jagdish Chander vs. Ram Chandra* **2007 (5) SCC 719: 2007 (5) SCR 720;** *State of Uttar Pradesh vs. Tipper Chand*

1980 (2) SCC 341; *State of Orissa vs. Damodar Das* **1996 (2) SCC 216: 1995 (6) Suppl. SCR 800 and** *Bharat Bhushan Bansal vs. Uttar Pradesh Small Industries Corporation Ltd., Kanpur* **1999 (2) SCC 166: 1999 (1) SCR 181;** *Rukmanibai Gupta v. Collector, Jabalpur* **1980 (4) SCC 566;** *Punjab State v. Dina Nath* **2007 (5) SCC 28: 2007 (6) SCR 536;** *Mallikarjun v. Gulbarga University* **2004 (1) SCC 372: 2003 (5) Suppl. SCR 272 and** *Executive Engineer RCO vs. Suresh Chandra Panda* **1999 (9) SCC 92 – referred to.**

Hudson on 'Building and Engineering Contracts' **11th Edition, Volume II and *Russell on Arbitration* 19th Edn. – referred to.**

Case Law Reference:

1998 (1) SCR 601	**referred to**	**Para 3**
2003 (2) Suppl. SCR 812	**referred to**	**Paras 3, 11**
2007 (5) SCR 720	**referred to**	**Para 4**
1980 (2) SCC 341	**referred to**	**Para 7**
1995 (6) Suppl. SCR 800	**referred to**	**Para 8**
1999 (1) SCR 181	**referred to**	**Para 9**
1980 (4) SCC 566	**referred to**	**Para 10**
2007 (6) SCR 536	**referred to**	**Para 11**
2003 (5) Suppl. SCR 272	**referred to**	**Para 12**
1999 (9) SCC 92	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4933 of 2011.

From the Judgment & Order dated 15.02.2008 of the High Court of Orissa at Cuttack in Arbitration Application No. 36 of 2005.

WITH

C.A. Nos. 4935, 4936, 4934, 4937, 4939, 4940, 4941. 4942, 4943, 4944, 4945, 4946 of 2011.

S.B. Upadhyay, Shibashish Misra, R.C. Kohli, Ashok Kumar Singh, Sapam Biswajit Meitei, Surender Dutt Sharma, Param Kr. Mishra, Pawan Kishore Singh, Rana S. Biswas, Mattugupta Mishra, Amitab Narendra, Sunil Sharma, Anurag Sharma, K.N. Tripathy, Manoj K. Das, Nikilesh Ramachandran, M.R. Mishra, Rutwik Panda for the appearing parties.

The Judgment of the Court was delivered by

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

2. These appeals by special leave are by the State of Orissa aggrieved by the orders of the Chief Justice of Orissa High Court allowing the applications filed under Section 11 of the Arbitration and Conciliation Act 1996 ('Act' for short) filed by contractors and appointing arbitrators to decide the disputes raised by them against the State Government. The learned Chief Justice held that the last sentence of the proviso to clause 10 of the conditions of contract (forming part of the agreements between the state and the contractors) is an arbitration agreement. The appellants challenge the said orders on the ground that there is no arbitration agreement and therefore the applications under section 11 of the Act filed by the contractors ought to have been dismissed. Therefore the short question that arises for our consideration in these appeals is whether the said clause is an arbitration agreement.

The essentials of an arbitration agreement

3. In *K K Modi vs. K N Modi* [1998 (3) SCC 573] this court enumerated the following attributes of a valid arbitration agreement :

"(1) The arbitration agreement must contemplate that the

decision of the Tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner, with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law, and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal."

Following *K.K. Modi and other cases, Bihar State Mineral Development Corporation v. Encon Builders (IP) Ltd.* - 2003 (7) SCC 418, this court listed the following as the essential elements of an arbitration agreement:

"(i) There must be a present or a future difference in connection with some contemplated affair;

(ii) There must be the intention of the parties to settle such difference by a private tribunal;

(iii) The parties must agree in writing to be bound by the decision of such tribunal; and

(iv) The parties must be ad idem."

4. In *Jagdish Chander vs. Ram Chandra* [2007 (5) SCC 719], this Court, after referring to the cases on the issue, set out the following principles in regard to what constitutes an arbitration agreement :

"(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred

to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a

further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

5. The following passage from Russell on Arbitration (19th Edn. Page 59) throws some light on this issue:

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such case is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of setting them when they have arisen".

Cases where the tests were applied to different clauses to find out whether they could be termed as 'arbitration agreement'

6. In K.K. Modi, the clause that arose for consideration was as under :

"9. Implementation will be done in consultation with the financial institutions. For all disputes, clarification etc., in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups".

This Court held that the said clause was not an arbitration agreement on the following reasoning:

"Therefore our Courts have laid emphasis on (1) existence

of disputes as against intention to avoid future dispute; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive.

The purport of Clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. *This clause does not contemplate any judicial determination by the Chairman of the IFCI.* . . Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated…"

(emphasis supplied)

7. In *State of Uttar Pradesh vs. Tipper Chand* - 1980 (2) SCC 341, the following clause fell for consideration:

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise

concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the Contractor, shall also be final, conclusive and binding on the Contractor".

The High Court held that the clause was not an arbitration agreement, as it merely conferred power on the Superintending Engineer to take a decision on his own and did not authorise parties to refer any matter to his decision. This court clarified that in the absence of a provision for reference of disputes between parties for settlement, clause merely stating that the "decision of the Superintending Engineer shall be final" was not an arbitration agreement. This Court clarified that an arbitration agreement can either be in express terms or can be inferred or spelt out from the terms of the clause; and that if the purpose of the clause is only to vest in the named Authority, the power of supervision of the execution of the work and administrative control over it from time to time, it is not an arbitration agreement. It also held that the clause did not contain any express arbitration agreement, nor spelt out by implication any arbitration agreement as it did not mention any dispute or reference of such dispute for decision.

8. In *State of Orissa vs. Damodar Das* [1996 (2) SCC 216], a three Judge Bench of this court considered whether the following clause is an arbitration agreement:

"25. Decision of Public Health Engineer to be final.-- Except where otherwise specified in this contract, the decision of the public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material use 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, 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 the sooner determination thereof of the contract".

Following the decision in Tipper Chand, this Court held that the said clause did not amount to an arbitration agreement, on the following reasoning:

"It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that *there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio.* It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties."

(emphasis supplied)

9. In *Bharat Bhushan Bansal vs. Uttar Pradesh Small Industries Corporation Ltd., Kanpur* [1999 (2) SCC 166], the following clauses fell for consideration of this Court:

"Decision of the Executive Engineer of the UPSIC to be final on certain matters

Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as

to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of for relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the Contractor shall be final and conclusive and binding on the Contractor.

Decision of the MD of the UPSIC on all other matters shall be final

Except as provided in Clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the Contractor and in respect of all other matter arising out of this contract and not specifically mentioned herein".

This Court held that the said clauses did not amount to arbitration agreement on the following reasoning:

"In the present case, reading Clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. *Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act*".

(emphasis supplied)

This Court while noting the distinction between a 'Preventer of disputes' and an 'adjudicator of disputes', observed that the Managing Director under clause 24 of the agreement, was more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract and the object of his decision is to avoid disputes and not decide disputes in a quasi-judicial manner. This court also referred to an illustration given in *Hudson on 'Building and Engineering Contracts'* (11th Edition, Volume II, para 18.067) stating that the following clause was not an arbitration clause and that the duties of the Engineer mentioned therein were administrative and not judicial:

"(E)ngineer shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender specifications, schedule and drawings of the Contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contract, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties".

10. We may next refer to the three decisions of this Court relied on by the respondents, where on interpretation, clauses though not described as ‘arbitration clauses’, were held to be arbitration clauses, by applying the tests as to what constitute an arbitration agreement. In *Rukmanibai Gupta v. Collector, Jabalpur* - 1980 (4) SCC 566, this Court considered whether the following clause amounted to an arbitration agreement :

"15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in

difference shall be decided by the lessor whose decision shall be final".

This Court held that Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration; and if the answer was in the affirmative, then such an arrangement would spell out an arbitration agreement. Applying the said test, this court held that the aforesaid clause is an arbitration agreement, as it (a) made a provision for referring any doubt, difference or dispute to a specified authority for decision and (b) it made the "decision" of such authority final. While we respectfully agree with the principle stated, we have our doubts as to whether the clause considered would be an arbitration agreement if the principles mentioned in the said decision and the tests mentioned in the subsequent decision of a larger bench in *Damodar Das* are applied. Be that as it may. In fact the larger bench in *Damodar Das* clearly held that the decision in *Rukmanibai Gupta* was decided on the special wording of the clause considered therein. "The ratio in *Rukmanibai Gupta vs. Collector* does not assist the respondent. From the language therein this court inferred, by implication, existence of a dispute or difference for arbitration."

11. In *Encon Builders* (supra), this court proceeded on the assumption that the following clause was an arbitration agreement, as that issue was not disputed:

> "In case of any dispute arising out of the agreement the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding."

The clause specifically provided for 'disputes being referred to the Managing Director' and made the said authority's decision not only final, but also binding on the parties. Therefore it can

be said that it answers the tests of an arbitration agreement. The issue considered therein was whether the High Court committed an error in refusing to refer the dispute to arbitration, even after finding the clause to be an arbitration agreement, by presuming bias in view of the fact that the named arbitrator was an employee of one of the parties to the dispute. This Court held that disputes were arbitrable in terms of the said clause. Be that as it may. A similar clause was also considered in *Punjab State Vs. Dina Nath* [2007 (5) SCC 28] and held to be arbitration agreement.

12. In *Mallikarjun v. Gulbarga University* – 2004 (1) SCC 372, this court held the following clause was a valid arbitration agreement :

> "The decision of the Superintending Engineer of the Gulbarga Circle for the time being *shall be final, conclusive, and binding on all parties* to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material 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 those conditions, or otherwise concerning the works of the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of *dispute arising between the contractor and. Gulbarga University.*"

This court after referring to the essentials of an arbitration agreement laid down in *Encon Builders* held that the above clause is an arbitration agreement as it answered the test of reference of dispute for decision and made the decision of the authority final and binding. This court held :

> "Applying the aforesaid principle to the present case,

Clause 30 requires that the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Further we also find that the agreement postulates present or future differences in connection with some contemplated affairs inasmuch as also there was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the tribunal. The parties were also ad idem."

The clause for consideration in this case

13. Clause 10 of the Conditions of Contract which is the subject of controversy reads thus:

"Clause 10: The Engineer-in-Charge shall have power to make any alterations in or additions to the original specifications, drawings, designs and instructions that may appear to him necessary and advisable during the progress of work, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge and such alterations shall not invalidate the contract, and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. And if the additional work includes any class of work for which no rate is specified in this contract, then such class of work

shall be carried out at the rates entered in the sanctioned schedule of rates of the locality during the period when the work is being carried on and if such last mentioned class of work is not entered in the schedule of rates of the district then the contractor shall within seven days of the date of the rate which it is his intention to charge for such class of work, and if the Engineer-in-Charge does not agree to this rate he shall be noticed in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable.

No deviations from the specifications stipulated in the contract nor additional items of work shall ordinarily be carried out by the contractor, nor shall any altered, additional or substituted work be carried out by him, unless the rates of the substituted, altered or additional items have been approved and fixed in writing by the Engineer-in-Charge, the contractor shall be bound to submit his claim for any additional work done during any month on or before the 15th days of the following month accompanied by a copy of the order in writing of the Engineer-in-Charge for the additional work and that the contractor shall not be entitled of any payment in respect of such additional work if he fails to submit his claim within the aforesaid period.

Provided always that if the contractor shall commence work or incur any expenditure in respect thereof before the rates shall have been determined as lastly hereinbefore mentioned, in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rates as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. *In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final."*

(emphasis supplied)

14. A reading of the said clause shows that it is a clause relating to power of the Engineer-in-Chief to make additions and alterations in the drawings and specifications and execution of non-tendered additional items of work (that is items of work which are not found in the bill of quantities or schedule of work). It provides for the following:

(a) that the Engineer-in-charge could make additions and alterations in the drawings/specifications; and that such alterations and additions will not invalidate the contract, but will entitle the contractor to extension of time for completion of work proportionately;

(b) that if the additional work be executed is an item for which the rate is not specified in the contract (or in the schedule of rates for the district), the contractor shall specify the rate and the Engineer-in-charge may either accept the rate or cancel the order to execute that particular work;

(c) that if the contractor commences the work with reference to an item for which there is no rate in the contract and there is no agreement in regard to the rate for execution of such work, he shall be paid at the rates fixed by the Engineer-in -Charge; and

(d) that if the contractor disputes the rate fixed by the Engineer-in-Charge, the decision of the Superintending Engineer in regard to rate for such non-scheduled item shall be final.

15. We may next examine whether the last sentence of the proviso to clause 10 could be considered to be an arbitration agreement. It does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either

party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-Charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. It is a provision made with the intention to avoid future disputes regarding rates for non-tendered item. It is not a provision for reference of future disputes or settlement of future disputes. The decision of superintending Engineer is not a judicial determination, but decision of one party which is open to challenge by the other party in a court of law. The said clause can by no stretch of imagination be considered to be an arbitration agreement. The said clause is not, and was never intended to be, a provision relating to settlement of disputes.

16. That clause 10 was never intended to be an arbitration agreement is evident from the contract itself. It is relevant to note the Standard Conditions of Contract of the state government, as originally formulated consisted a provision (Clause 23) relating to settlement of disputes by arbitration, which is extracted below :

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before 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, drawing,

specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, or the execution, or 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* a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be refereed to the sole arbitration of Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. *The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this Contract."*

The said clause was deleted by the State Government from the Standard Conditions of Contract by official Memorandum dated 24.12.1981. Contracts entered by the State Government thereafter did not have the said arbitration clause, though the other Conditions of Contract remained the same. The contracts in all these cases are of a period subsequent to 24.12.1981 and the Conditions of Contract forming part of these contracts do not contain the arbitration clause. When the State Government has consciously and intentionally deleted the provision for arbitration from its contracts, it will be a travesty of justice to read another clause in the contract providing for execution of non-tendered items and the method of determination of the rates therefor, as a provision for arbitration.

17. In fact, in *Executive Engineer RCO vs. Suresh Chandra Panda* [1999 (9) SCC 92], this Court considered the effect of the said clause relating to execution of non-tendered items, vis-à-vis clause 23 in a pre-1981 contract. This court held that the said clause (then numbered as clause 11, numbered as clause 10 in subsequent contracts) was a provision which excluded the issue relating to finality of rates, from the scope of arbitration agreement contained in clause 23 on the following

reasoning :

"Under Clause 11 of the contract, there is an elaborate provision dealing with the power of the Engineer-in Charge to make any alterations or additions to the original specifications, drawings, designs and instructions. It, inter alia, provides that if for such alterations or additions no rate is specified in the contract, then the rates which are entered in the sanctioned schedule of rates of the locality during the period when the work is being carried out, would be paid. However, if this class of work, not provided for in the sanctioned schedule of rates then the contractor has the right, in the manner specified in that clause, to inform the Engineer-in-Charge of the rate at which he intends to carry out that work. If the Engineer-in-Charge does not agree to this rate he is given the liberty to cancel his order and arrange to carry out such class of work in such manner as he may consider advisable. The clause further provides that if the contractor commences such additional work or incurs any expenditure in respect of it before the rate are determined as specified in that clause, then the rate or rates shall be as fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintendent Engineer of the circle will be final. Under Clause 23, except as otherwise provided in the contract, all disputes are arbitrable as set out in that clause. The finality of rates, therefore, under Clause 11 is a provision to the contrary in the contract which is excluded from Clause 23."

Thus, even when the Standard Conditions of Contract contained a provision for arbitration (vide clause 23), clause 10 was considered to be a provision dealing with a matter excepted from arbitration. Be that as it may. The proviso to clause 10, which provides that the decision of the Superintending Engineer is 'final', merely discloses an intention to exclude the rates for extra items decided by the Superintending Engineer from the scope of arbitration, as an excepted matter, when there was

an arbitration agreement (clause 23) in the contract. When the arbitration agreement was deleted, provision dealing with non-tendered items can not be described as an arbitration agreement. Be that as it may.

18. We therefore allow these appeals, set aside the orders of the High Court appointing the arbitrator and dismiss the applications for appointment of arbitrator.

B.B.B. Appeals allowed.

RAMESHWARI DEVI & ORS.
v.
NIRMALA DEVI & ORS.
(Civil Appeal Nos. 4912-4913 of 2011)

JULY 4, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Administration of justice – Civil litigation – Delay in disposal of civil cases/Uncalled for and frivolous litigation – Curbing of – Held: Steps to be taken by trial courts while dealing with criminal trials – Stated.

Code of Civil Procedure, 1908:

Actual or realistic costs – Determination of – Held: Pragmatic realities are to be taken into consideration and courts have to be realistic to what the defendants or the respondents had to actually incur in contesting the litigation before different courts – Prevalent fee structure of the lawyers and other miscellaneous expenses are to be taken into consideration – It is to be seen that for how long the defendants or respondents were compelled to contest and defend the litigation in various courts – On facts, appellants harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts – They also wasted judicial time of the various courts for the last 40 years – Thus, the appeals are dismissed with costs, quantified as Rs.2,00,000/- alongwith the costs imposed by the High Court which is Rs. 75,000/-, payable by the appellants to the respondents.

Ex-parte ad interim injunctions – When to be granted – Held: The court should grant interim injunction or stay order only after hearing the defendants or the respondents – In case the court has to grant ex-parte injunction in exceptional cases,

then it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner would pay full restitution, actual or realistic costs and mesne profits – If an ex-parte injunction order is granted, then the court should dispose of the application for injunction as expeditiously as may be possible, as soon as the defendant appears in the court – It should be granted only for a short period – If party obtains an injunction based on false averments and forged documents, he should be prosecuted.

Framing of issues – Duty of the court – Held: Framing of issues is a very important stage in the civil litigation – Due care, caution, diligence and attention must be bestowed by the Presiding Judge while framing of issues – On facts, the trial court ought not to have framed an issue on a point which was finally determined upto this Court – The same was exclusively barred by the principles of res judicata – Doctrines/Principles.

'RP' was allotted a house and on humane considerations of shelter, he allowed his brothers-appellants to reside with him. The appellants filed a suit for partition in the year 1977, which was dismissed. Thereafter, they filed a Regular First Appeal. During pendency, 'RP' filed a suit against the appellants for mandatory injunction to remove them and for recovery of mesne profits. Meanwhile, 'RP' sold part of his property. Thereafter, RFA was dismissed. The Special Leave Petition filed thereagainst was also dismissed. The suit for mandatory injunction stood revived. Thereafter, applications after applications were filed by the appellants at every stage raising various claims. The issues were framed. Finally, the High Court dismissed the Civil Miscellaneous Petition which was filed in the year 2010, rendered at the preliminary hearing and imposed cost of Rs. 75,000/-. The Review Petition filed thereagainst was also dismissed. Thus, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 If the remedial measures and suggestions to improve the aspect of delay in disposal of civil cases are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent. [Para 32] [1017-H; 1018-A]

"Justice, Courts and Delays" **by Dr. Arun Mohan – referred to.**

1.2 90% of the time and resources of the Indian courts are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrong- doer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system. In the Indian legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in the courts and that operates as the main motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied. [Paras 33 and 34] [1018-A-F]

1.3 Lesser the court's attention towards full restitution and realistic costs, which translates as profit for the wrongdoer, the greater would be the generation

of uncalled for litigation and exercise of skills for achieving delays by impurity in presentation and deployment of obstructive tactics. The cost (risk) - benefit ratio is directly dependent on what costs and penalties will the court impose on him; and the benefit will come in as: the other 'succumbing' en route and or leaving a profit for him, or even if it is a fight to the end, the court still leaving a profit with him as unrestituted gains or unassessed short levied costs. Litigation perception of the probability of the other party getting tired and succumbing to the delays and settling with him and the court ultimately awarding what kind of restitution, costs and fines against him - paltry or realistic. This perception ought to be the real risk evaluation. [Paras 35, 36] [1018-G-H; 1019-A-B]

1.4 If the appellants had the apprehension of imposition of realistic costs or restitution, then this litigation perhaps would not have been filed. Ideally, having lost up to the highest court (2001), the appellants (defendants in the suit) ought to have vacated the premises and moved out on their own, but the appellants seem to have acted as most parties do–calculate the cost (risk)-benefit ratio between surrendering on their own and continuing to contest before the court. Procrastinating litigation is common place because, in practice, the courts are reluctant to order restitution and actual cost incurred by the other side. [Para 37] [1019-C-D]

1.5 Every lease on its expiry, or a license on its revocation cannot be converted itself into litigation. Unfortunately, the courts are flooded with these cases because there is an inherent profit for the wrong- doers in our system. It is a matter of common knowledge that domestic servants, gardeners, watchmen, caretakers or security men employed in a premises, whose status is that of a licensee indiscriminately file suits for injunction not to be dispossessed by making all kinds of averments

and may be even filing a forged document, and then demands a chunk of money for withdrawing the suit. It is happening because it is the general impression that even if ultimately unauthorized person is thrown out of the premises the court would not ordinarily punish the unauthorized person by awarding realistic and actual mesne profits, imposing costs or ordering prosecution. [Para 38] [1019-E-G; 1020-A]

1.6 It is a matter of common knowledge that lakhs of flats and houses are kept locked for years, particularly in big cities and metropolitan cities, because owners are not certain that even after expiry of lease or licence period, the house, flat or the apartment would be vacated or not. It takes decades for final determination of the controversy and wrongdoers are never adequately punished. Pragmatic approach of the courts would partly solve the housing problem of this country. The courts have to be extremely careful in granting ad-interim ex-parte injunction. If injunction has been granted on the basis of false pleadings or forged documents, then the concerned court must impose costs, grant realistic or actual mesne profits and/or order prosecution. This must be done to discourage the dishonest and unscrupulous litigants from abusing the judicial system. In substance, the incentive or profit for the wrongdoer is to be removed. While granting ad interim ex-parte injunction or stay order the court must record undertaking from the plaintiff or the petitioner that he will have to pay mesne profits at the market rate and costs in the event of dismissal of interim application and the suit. [Paras 39, 40 and 41] [1020-B-E]

1.7 In the instant case, the court should have first examined the pleadings and then not only granted leave to amend but directed amendment of the pleadings so that the parties were confined to those pleas which still survived the High Court's decision. Secondly, it should have directed discovery and production of documents

and their admission/denial. Thirdly, if the civil judge on 6.10.2004, which was three and a half years after the dismissal of the Special Leave Petition, instead of framing the issues that he did, had, after recording the statements of the parties and partially hearing the matter should have passed the order that the pleadings were not sufficient to raise an issue for adverse possession and that the pleadings and contentions before the High Court had the effect of completely negating any claim to adverse possession. [Para 42] [1020-F-H; 1021-A-B]

1.8 Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the Presiding Judge while framing of issues. In the instant case, when the entire question of title had been determined by the High Court and the Special Leave Petition against that judgment was dismissed by this Court, thereafter, the trial court ought not to have framed such an issue on a point which has been finally determined upto this Court. In any case, the same was exclusively barred by the principles of res judicata. That clearly demonstrates total non-application of mind. [Paras 43 and 44] [1021-C-D]

1.9 Unless it is ensured that wrong- doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. [Para 45] [1021-E-F]

1.10 Usually the court should be cautious and extremely careful while granting ex-parte ad interim

injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits. If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court. [Paras 46 and 47] [1021-G-H; 1022-A-C]

1.11 It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. The common impression is to be dispelled that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in the courts because they have

hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. [Para 48] [1022-D-G]

1.12 With regard to the issue of curbing the prevailing delay in civil litigation, the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings

fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

The aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the said steps, but once it is observed across the country, then prevailing system of adjudication of civil courts is bound to improve. [Para 53] [1023-G-H; 1024-A-H; 1025-A-H; 1026-A]

1.13 While imposing costs the pragmatic realities are to be taken into consideration and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different courts. The prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc. are to be also broadly taken into consideration. It should not be forgotten while imposing costs that for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years. [Paras 54 and 55] [1026-B-E]

1.14 On consideration of totality of the facts and circumstances of the instant case, there is no infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which is quantified as Rs.2,00,000/- (Rupees Two Lakhs only). The costs are imposed not out of anguish but by following the fundamental principle that wrongdoers should not get

benefit out of frivolous litigation. The appellants are directed to pay the costs imposed by this Court along with the costs imposed by the High Court to the respondents within the stipulated period. The suit pending before the trial court is at the final stage of the arguments, therefore, the said suit is directed to be disposed of as expeditiously as possible. [Paras 56, 57 and 58] [1026-F-H]

1.15 It is made abundantly clear that the trial court should not be influenced by any observation or finding arrived at by this Court in dealing with these appeals as the matter has not been decided on merits of the case. [Para 59] [1027-B]

Swaran Singh v. State of Punjab **(2000) 5 SCC 668: 2000 (3) SCR 572;** *Mahila Vinod Kumari v. State of Madhya Pradesh* **(2008) 8 SCC 34: 2008 (10) SCR 869 – referred to.**

Case Law Reference:

2000 (3) SCR 572	**Referred to**	**Para 48**
2008 (10) SCR 869	**Referred to**	**Para 51**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4912-4913 of 2011.

From the Judgment & Order dated 01.09.2010 of the High Court of Delhi at New Delhi in Civil Misc. (Main) No. 1084 of 2010 and order dated 25.10.2010 in Review Petition No. 429 of 2010.

Dr. Arun Mohan, (A.C.), Vikas Mahajan, Vinod Sharma, Tulika Prakash, Kuber Giri for the Appellants.

R.P. Sharma for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. These appeals are directed against the judgment and order dated 01.09.2010 passed in Civil Miscellaneous Petition (Main) No. 1084 of 2010 and the order dated 25.10.2010 passed in Review Petition No. 429 of 2010 in Civil Miscellaneous Petition (Main) No. 1084 of 2010 by the High Court of Delhi at New Delhi.

3. The apparent discernible question which requires adjudication in this case seems to be a trivial, insignificant and small one regarding imposition of costs, but in fact, these appeals have raised several important questions of law of great importance which we propose to deal in this judgment. Looking to the importance of the matter we requested Dr. Arun Mohan, a distinguished senior advocate to assist this court as an Amicus Curiae.

4. This is a classic example which abundantly depicts the picture of how the civil litigation moves in our courts and how unscrupulous litigants (appellants in this case) can till eternity harass the respondents and their children by abusing the judicial system.

5. The basic facts which are necessary to dispose of these appeals are recapitulated as under:-

6. In the year 1952, almost about half a century ago, the government allotted a residential house bearing nos. 61-62, I-Block, Lajpat Nagar-I, measuring 200 yards to Ram Parshad. The Lease Deed was executed in his favour on 31.10.1964.

7. On humane considerations of shelter, Ram Parshad allowed his three younger brothers – Madan Lal, Krishan Gopal and Manohar Lal to reside with him in the house. On16.11.1977, these three younger brothers filed a Civil Suit No.993 of 1977 in the High Court of Delhi claiming that this Lajpat Nagar property belonged to a joint Hindu Family and sought partition of the property on that basis.

8. The suit was dismissed by a judgment dated

18.01.1982 by the learned Single Judge of the High Court of Delhi. The appellants (younger brothers) of Ram Parshad, aggrieved by the said judgment preferred a Regular First Appeal (Original Side) 4 of 1982 which was admitted to hearing on 09.03.1982. During the pendency of the appeal, Ram Parshad on 15.01.1992 filed a suit against his three younger brothers for mandatory injunction to remove them and for recovery of mesne profits. In 1984 Ram Parshad sold western half (No.61) to an outsider. That matter is no longer in dispute.

9. The first appeal filed by the other three younger brothers of Ram Parshad against Ram Parshad was dismissed on 09.11.2000. Against the concurrent findings of both of the judgments, the appellants filed a Special Leave Petition No.3740 of 2001 in this court which was also dismissed on 16.03.2001.

10. In the suit filed by Ram Parshad (one of the respondents) (now deceased) against the appellants in these appeals the following issues were framed:

1. Whether the suit is liable to be stayed under Section 10 CPC as alleged in para no.1 of Preliminary Objection?

2. Whether defendants are licencees in the suit premises and if so whether the plaintiff is entitled to recover possession of the same from them?

3. Whether suit of plaintiff is time barred?

4. Whether suit has been properly valued for the purpose of court fees and jurisdiction?

5. Whether the suit property is joint family property of parties?

6. Whether the plaintiff is entitled to mesne profits for

use and occupation of the suit property by the defendants and if so at what rate and for which period?

7. Whether defendants have become the owner of three-fourth share of the suit property by adverse possession?

8. Relief.

and fixed the matter for evidence on 22.11.2004.

11. The defendants in the suit contended that inasmuch as Regular First Appeal (Original Side) 4 of 1982 was still pending, therefore, Ram Parshad's suit be stayed under section 10 of the Code of Civil Procedure. Accepting the contention, on 20.07.1992, the 1992 suit was ordered to be stayed.

12. The Regular First Appeal was dismissed on 9.11.2000 and the Special leave petition against the said appeal was also dismissed on 16.3.2001. Consequently, the suit filed by Ram Parshad for mandatory injunction and for mesne profit stood revived on 05.12.2001.

13. In the first round of litigation from 16.11.1977 to 16.3.2001 it took about twenty four years and thereafter it had taken 10 years from 16.3.2001. In the 1992 suit, the defendants (appellants herein) sought amendment of the written statement which was refused on 28.07.2004. Against this order, a Civil Miscellaneous (Main) 1153 of 2004 was filed in the High Court which was disposed of on 02.09.2004 with liberty to move an application before the trial court for framing an additional issue. The additional issue regarding the claim of adverse possession by the three younger brothers was framed on 6.10.2004. The issue was whether the defendants have become the owner of three-fourth share of the suit property by adverse possession and the case was fixed up for recording of the evidence. According to the learned Amicus Curiae, the court before framing Issue Number 7 and retaining the other issues, ought

to have recorded the statement of defendants under Order 10 Rule 2 of the Code of the Civil Procedure (for short, CPC) and then re-cast the issues as would have been appropriate on the pleadings of the parties as they would survive after the decision in the previous litigation.

14. According to the learned Amicus Curiae, the practice of mechanically framing the issues needs to be discouraged. Framing of issues is an important exercise. Utmost care and attention is required to be bestowed by the judicial officers/ judges at the time of framing of issues. According to Dr. Arun Mohan, twenty minutes spent at that time would have saved several years in court proceedings.

15. In the suit, on 6.11.2004 the application seeking transfer of the suit from that court was filed which was dismissed by the learned District Judge on 22.3.2005. The trial commenced on 22.11.2004, adjournment was sought and was granted against costs. The plaintiffs' evidence was concluded on 10.2.2005.

16. On 28.5.2005 the defendants failed to produce the evidence and their evidence was closed. Against that order, Civil Miscellaneous (Main) 1490 of 2005 was filed in the Delhi High Court. Stay was granted on 15.7.2005 and the application was dismissed on 17.12.2007 with liberty to move an application for taking on record further documents.

17. On 12.2.2008, an application under Order 18 Rule 17A of the CPC was moved. On 'No Objection' from the plaintiff, it was allowed on 31.7.2008 and the documents and affidavits were taken on record. On 23.10.2009, the matter was fixed for evidence. The appellants filed an application under Order 7 Rule 11 (b) of the CPC for rejection of the 1992 plaint on the ground of not paying ad valorem court fees on the market value of property and for under-valuation of relief. This application was dismissed by the Civil Judge on 09.07.2010 by the following order :-

"M-61/2006
09.07.2010
Present : Ld. Counsel for plaintiff
Ld. Counsel for defendant

Application under section 151 CPC is filed by defendant for treating Issue No.4 as preliminary issue. It pertains to court fees and jurisdiction. It is pertinent to mention that suit is at the stage of final arguments and both the parties have led the entire evidence. Ld. Counsel for defendant submits that this application has been filed by the defendant in view of the liberty granted to the defendant by the Hon'ble High Court vide order dated 26.4.2010 dismissing the Civil Revision Petition application no.76/10 as withdrawn against the order dated 12.10.2006 passed by this court. It is pointed out to the counsel for defendant that case is at the stage of final arguments and law enjoins upon the court to return finding on all the issues. Counsel for the defendant filing this application seeks disposal of the same. Perused the application and gone through record. Order 20 Rule 5 clearly states that court has to return finding on each issue. Even Order 14 Rule 2 CPC states that the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed off on preliminary issue. Sub Rule 2 refers to the discretion given to the court where the court may try issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues. But there is no such case. Entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate to the point pertaining to Sub Rule 2. Neither it relates to bar created by any law nor the jurisdiction of the court to entertain the suit. It is averments made in the plaint. Contention of the applicant for treating the issue as preliminary issue is against the spirit of law

as referred in Order 20 Rule 5 and Order 14 Rule 5 CPC. I do not see any merit in this application and the same is dismissed with the costs of Rs.2000/-.

To come up for payment of cost and final arguments.

Put up on 09.08.2010

(Vipin Kumar Rai)
ACJ/ARC(W)"

18. Aggrieved by the order dated 23.10.2009, the defendants (appellants herein) preferred a Civil Revision Petition No.76 of 2010 in the High Court of Delhi. At the preliminary hearing, the petition was allowed to be withdrawn, leaving the trial court at liberty to consider the request of the appellants to treat Issue Number 4 regarding court fee as a preliminary issue.

19. On 09.07.2010, the defendants filed an application before the Civil Judge for treating Issue Number 4 as a preliminary issue. This application was rejected by the Civil Court on 9.7.2010 with costs. The matter is at the stage of final arguments before the trial court. At this stage, against the order of the Civil Judge, on 7.8.2010, the appellants filed a petition being Civil Miscellaneous (Main) No.1084 of 2010 under Article 227 of the Constitution in the High Court which came up for preliminary hearing on 26.8.2010. On 1.9.2010, the High Court dismissed the Civil Miscellaneous (Main) No.1084 of 2010 by a detailed judgment rendered at the preliminary hearing and imposed cost of Rs.75000/- to be deposited with the Registrar General. Review Petition No. 429 of 2010 was filed which was dismissed on 25.10.2010.

20. These appeals have been filed against the order imposing costs and dismissing the review petition.

21. The learned Single Judge observed that the present appellants belong to that category of litigants whose only motive is to create obstacles during the course of trial and not to let

the trial conclude. Applications after applications are being filed by the appellants at every stage, even though orders of the trial court are based on sound reasoning. Moreover, the appellants have tried to mislead the court also by filing wrong synopsis and incorrect dates of events.

22. The High Court further observed that the purpose of filing of brief synopsis with list of dates and events is to give brief and correct summary of the case and not to mislead the court. Those litigants or their advocates who mislead the courts by filing wrong and incorrect particulars (the list of dates and events) must be dealt with heavy hands.

23. In the list of dates and events, it is stated that the respondents filed a suit for mandatory injunction and recovery of Rs.36,000/- on 22nd September, 2003. In fact, as per typed copy of the plaint placed on record, the suit was filed by the predecessor-in-interest of the respondents in 1992. Written statement was filed by the predecessor-in-interest of the appellants in 1992. Thus, the appellants tried to mislead the court by mentioning wrong date of 22nd September, 2003 as the date of filing.

24. The High Court has also dealt with number of judgments dealing with the power of the High Court under Article 227 of the Constitution. According to the High Court, the suit was filed in the trial court in 1992. The written statement was filed as far back on 15th April, 1992. On pleadings, Issue Number 4 was framed with regard to court fee and jurisdiction. The appellants never pressed that Issue Number 4 be treated as a preliminary issue. Both the parties led their respective evidence. When the suit was fixed before the trial court for final arguments, application in question was filed. The appellants argued that Issue Number 4 would also be determined along with other issues.

25. In the impugned judgment, it is also observed that it is revealed from the record that the appellants have been moving

one application after the other, though all were dismissed with costs.

26. It may be pertinent to mention that the appellants also moved transfer application apprehending adverse order from the trial judge, which was also dismissed by the learned District Judge. This conduct of the appellants demonstrates that they are determined not to allow the trial court to proceed with the suit. They are creating all kinds of hurdles and obstacles at every stage of the proceedings.

27. The learned Single Judge observed that even according to Order 14 Rule 2 CPC the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed of on preliminary issue. Order 14 Rule 2 of the CPC is reads as under:

> "ORDER XIV: SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.
>
> … … …
> … … …
>
> 2. Court to pronounce judgment on all issues: (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
>
> … … …
> … … …"

28. Sub Rule 2 refers to the discretion given to the court where the court may try issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues, but there is no such case. The entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate

to the point pertaining to Sub Rule 2. Neither it relates to bar created by any law nor the jurisdiction of the court to entertain the suit. It is just an averment made in the plaint. Contention of the appellants for treating the said issue as preliminary issue is against the spirit of law as referred in Order 20 Rule 5 and Order 14 Rule 5 of the CPC. These observations of the courts below are correct and in pursuance of the provisions of the Act. The High Court properly analysed the order of the trial court and observed as under:-

> "Looking from any angle, no illegality or infirmity can be found in the impugned order. The only object of petitioners is just to delay the trial, which is pending for the last more than 18 years. To a large extent, petitioners have been successful in delaying the judicial proceedings by filing false, frivolous and bogus applications, one after the other.
>
> It is well settled that frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigations.
>
> Dismissed
>
> List for compliance on 7th October, 2010."

29. We have carefully examined the impugned judgment of the High Court and also order dated 9.7.2010 passed by the learned Civil Judge, Delhi.

30. It is abundantly clear from the facts and circumstances of this case that the appellants have seriously created obstacles at every stage during the course of trial and virtually prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantankerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

31. The learned Amicus Curiae has taken great pains in

giving details of how the case has proceeded in the trial court by reproducing the entire court orders of 1992 suit. In order to properly comprehend the functioning of the trial courts, while dealing with civil cases, we deem it appropriate to reproduce the order sheets of 1992 suit. This is a typical example of how a usual civil trial proceeds in our courts. The credibility of entire judiciary is at stake unless effective remedial steps are taken without further loss of time. Though original litigation and the appeal which commenced from 1977 but in order to avoid expanding the scope of these appeals, we are dealing only with the second litigation which commenced in 1992. The order sheets of the suit of 1992 are reproduced as under :-

Proceedings of Suit - 1992

17.01.1992	Summons to Defendants on plaintiff and RC
28.02.1992	Fresh summons to Defendants 1 & 2. Defendant No. 3 refused service. Proceeded ex-parte
30.03.1992	Time sought to file Written Statement for all the Defendants. Allowed.
20.04.1992	Written Statement filed. Fixed on 30.04.1992 for replication, admission/denial and framing of issues.
01.05.1992	Plaintiff sought time to file replication.
11.05.1992	Replication filed. Adjourned for admission/ denial on joint request.
26.05.1992	No document for admission/denial. Issues framed. Fixed for arguments on 17.07.1992.
17.07.1992	Arguments heard on preliminary issue.
20.07.1992	Suit stayed. Plaintiff granted liberty to

	make application for revival after disposal of RFA (OS) 4/82.
01.06.2001	File sent to District Judge for transferring the case to proper court.
04.06.2001	District Judge marked to case to the court of Shri Naipal Singh, Additional District Judge.
02.07.2001	Presiding Officer is on vacation leave. Fixed for 03.07.2001.
03.07.2001	Miscellaneous application notice issued to the respondent. Main Suit 47/92 summoned.
23.08.2001	Suit file be summoned. Notice of application to Defendant on PF & RC.
16.10.2001	Copy of application given to all the Defendants. Adjourned for reply to application and further proceedings.
05.12.2001	Suit has to proceed for the decision on merits.
28.02.2002	Application under Order 6 Rule 17 moved by Defendant for amendment of Written Statement. Adjourned for reply and arguments on the application.
16.04.2002	As the value of the suit is below 3 lakhs, the suit transferred to the court of Civil Judge.
23.04.2002	Reply to application filed. Summons to Defendants other than Defendant No. 3.
21.08.2002	Counsel for the parties not present.
28.11.2002	Presiding Officer on leave.

07.12.2002	At joint request, adjourned. Last opportunity.
22.09.2003	None present. Adjourned for arguments on Order 6 Rule 17. File transferred to the court of Shri Prashant Kumar, Civil Judge.
12.11.2003	Son of the Plaintiff stated that the Plaintiff has expired. Adjourned.
06.12.2003	Presiding Officer not available.
16.01.2004	Copy of application under Order 22 Rule 3 supplied. As requested, adjourned.
16.02.2004	Reply not filed. Counsel for the Defendant seeks time to file reply.
01.03.2004	Reply filed. Counsel for the Defendant objected that the addresses of Legal Representatives are not correct.
24.03.2004	Application Order 22 Rule 3 is allowed. Right to sue survives. Order 6 Rule 17 pending for disposal.
27.04.2004	Arguments heard.
22.05.2004	Plaintiff wants to file written submissions with regard to clarification. Allowed.
03.07.2004	None for Defendants. Written submissions filed by Plaintiff.
28.07.2004	Present none. Order 6 Rule 17 dismissed.
02.09.2004	None for Defendants. Fixed for PE to 06.10.2004
28.09.2004	Defendant moved application Order 14 Rule 5. Notice issued.

06.10.2004	Issues reframed. Defendant sought time to cross-examine PW.
22.11.2004	PW present. Defendant prayed for adjournment. Defendant moved application for transfer of the case. Last opportunity for cross-examination.
21.12.2004	PW present. Previous cost not pressed for. PW sought time for obtaining copies of documents.
10.02.2005	PW cross-examined. PE closed.
15.03.2005	No DW present
19.04.2005	Affidavit of DW filed. However DW stated that he is not feeling well. Adjourned.
28.05.2004	Defendant stated that he does not want to lead evidence. DE closed. Fixed for final arguments.
15.07.2005	Stay by the High Court in CM (Main) 1490/ 2005.
18.07.2005	Counsel for the Defendant states that the High Court has stayed the matter. Directed to file the copy of the order.
25.08.2005	No copy of the order is filed.
29.10.2005	Matter under stay by High Court.
30.01.2006	Fresh suit received by transfer. Adjourned for proper orders.
02.05.2006	Notice to Defendants.
31.05.2006	Counsel for the Defendants served but none appeared. Adjourned for final arguments.

21.08.2006	File not traceable. Adjourned.
09.12.2006	Present: Counsel for the plaintiff. Adjourned for final arguments.
19.02.2007	Counsel for the plaintiff. Proceedings stayed by the High Court.
21.08.2007	Counsel for the Plaintiff. Matter under stay by the High Court.
17.12.2007	CM (Main) 1490/2005 dismissed by the High Court. Stay vacated.
10.01.2008	Counsel for the Plaintiff. None for the Defendant. Adjourned.
12.02.2008	Defendant filed application O18 R17A. Copy supplied. Adjourned for reply and arguments.
30.04.2008	Reply filed by the Plaintiff. Application allowed to cost of Rs.7,000/-, out of which Rs.1,000/- to be deposited in Legal Aid. Adjourned for DE.
31.07.2008	Defendant sought adjournment on the ground that witness is not feeling well.
29.09.2008	Plaintiff moved application Order 6 Rule 17. Copy supplied.
23.12.2008	Reply filed. Come up for arguments on the application.
21.05.2009	Part arguments heard.
22.07.2009	Plaintiff does not press for the application. Dismissed. To come up for DE.
05.10.2009	Defendants witness not present. Application for exemption allowed. Affidavit already filed.

23.10.2009	Application under Order 7 Rule 1 CPC filed. Dismissed. Affidavit of Kishan Gopal tendered as DW1, and he is cross-examined and discharged. No other witness. DE closed.
11.01.2010	Presiding Officer on leave.
23.03.2010	Defendant seeks adjournment on the ground that main counsel not available.
03.05.2010	Adjournment sought on behalf of the parties.
26.05.2010	File not traceable.
09.07.2010	Application under Section 151 CPC for treating No. 4 as preliminary issue. Dismissed with cost of Rs.2,000/-
09.08.2010	Application for adjournment filed.
27.09.2010	Presiding Officer on leave.
23.10.2010	For final arguments.
18.12.2010	For final arguments.
22.01.2011	For final arguments.
05.02.2011	For final arguments.
26.02.2011	Sought adjournment on the ground that the matter regarding cost is pending in Hon'ble Supreme Court.

32. Dr. Arun Mohan, learned amicus curiae, has written an extremely useful, informative and unusual book *"Justice, Courts and Delays".* This book also deals with the main causes of delay in the administration of justice. He has also suggested some effective remedial measures. We would briefly deal with the aspect of delay in disposal of civil cases and some remedial

measures and suggestions to improve the situation. According to our considered view, if these suggestions are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent.

33. According to the learned author, 90% of our court time and resources are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrong- doer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system.

34. According to Dr. Mohan, in our legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in our courts and that operates as the main motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied.

35. According to the learned author lesser the court's attention towards full restitution and realistic costs, which translates as profit for the wrongdoer, the greater would be the generation of uncalled for litigation and exercise of skills for achieving delays by impurity in presentation and deployment of obstructive tactics.

36. According to him the cost (risk) – benefit ratio is directly dependent on what costs and penalties will the court impose on him; and the benefit will come in as: the other 'succumbing'

en route and or leaving a profit for him, or even if it is a fight to the end, the court still leaving a profit with him as unrestituted gains or unassessed short levied costs. Litigation perception of the probability of the other party getting tired and succumbing to the delays and settling with him and the court ultimately awarding what kind of restitution, costs and fines against him – paltry or realistic. This perception ought to be the real risk evaluation.

37. According to the learned Amicus Curiae if the appellants had the apprehension of imposition of realistic costs or restitution, then this litigation perhaps would not have been filed. According to him, ideally, having lost up to the highest court (16.03.2001), the appellants (defendants in the suit) ought to have vacated the premises and moved out on their own, but the appellants seem to have acted as most parties do–calculate the cost (risk)-benefit ratio between surrendering on their own and continuing to contest before the court. Procrastinating litigation is common place because, in practice, the courts are reluctant to order restitution and actual cost incurred by the other side.

Profits for the wrongdoer

38. According to the learned Amicus Curiae, every lease on its expiry, or a license on its revocation cannot be converted itself into litigation. Unfortunately, our courts are flooded with these cases because there is an inherent profit for the wrong-doers in our system. It is a matter of common knowledge that domestic servants, gardeners, watchmen, caretakers or security men employed in a premises, whose status is that of a licensee indiscriminately file suits for injunction not to be dispossessed by making all kinds of averments and may be even filing a forged document, and then demands a chunk of money for withdrawing the suit. It is happening because it is the general impression that even if ultimately unauthorized person is thrown out of the premises the court would not ordinarily punish the unauthorized person by awarding realistic and actual mesne

profits, imposing costs or ordering prosecution.

39. It is a matter of common knowledge that lakhs of flats and houses are kept locked for years, particularly in big cities and metropolitan cities, because owners are not certain that even after expiry of lease or licence period, the house, flat or the apartment would be vacated or not. It takes decades for final determination of the controversy and wrongdoers are never adequately punished. Pragmatic approach of the courts would partly solve the housing problem of this country.

40. The courts have to be extremely careful in granting ad-interim ex-parte injunction. If injunction has been granted on the basis of false pleadings or forged documents, then the concerned court must impose costs, grant realistic or actual mesne profits and/or order prosecution. This must be done to discourage the dishonest and unscrupulous litigants from abusing the judicial system. In substance, we have to remove the incentive or profit for the wrongdoer.

41. While granting ad interim ex-parte injunction or stay order the court must record undertaking from the plaintiff or the petitioner that he will have to pay mesne profits at the market rate and costs in the event of dismissal of interim application and the suit.

42. According to the learned Amicus Curiae the court should have first examined the pleadings and then not only granted leave to amend but directed amendment of the pleadings so that the parties were confined to those pleas which still survived the High Court's decision. Secondly, it should have directed discovery and production of documents and their admission/denial. Thirdly, if the civil judge on 6.10.2004, which was three and a half years after the dismissal of the Special Leave Petition on 16.3.2001, instead of framing the issues that he did, had, after recording the statements of the parties and partially hearing the matter should have passed the following order:

"In my prima facie view, your pleadings are not sufficient to raise an issue for adverse possession, secondly how can you contend adverse possession of three-fourth share? And thirdly, your pleadings and contentions before the High Court had the effect of completely negating any claim to adverse possession. …"

43. Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the learned Presiding Judge while framing of issues.

44. In the instant case when the entire question of title has been determined by the High Court and the Special Leave Petition against that judgment has been dismissed by this court, thereafter the trial court ought not to have framed such an issue on a point which has been finally determined upto this Court. In any case, the same was exclusively barred by the principles of res judicata. That clearly demonstrates total non-application of mind.

45. We have carefully examined the written submissions of the learned Amicus Curiae and learned counsel for the parties. We are clearly of the view that unless we ensure that wrong- doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

46. Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim

injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant *ex-parte* injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and *mesne* profits.

47. If an exparte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

48. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the *ex*-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining *ex-parte* injunction orders or stay orders may not find encouragement. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In *Swaran Singh v. State of Punjab* (2000) 5 SCC 668 this court was constrained to observe that perjury has become a way of life in our courts.

49. It is a typical example how a litigation proceeds and continues and in the end there is a profit for the wrongdoer.

50. Learned amicus articulated common man's general impression about litigation in following words:

> "Make any false averment, conceal any fact, raise any plea, produce any false document, deny any genuine document, it will successfully stall the litigation, and in any case, delay the matter endlessly. The other party will be coerced into a settlement which will be profitable for me and the probability of the court ordering prosecution for perjury is less than that of meeting with an accident while crossing the road."

This court in *Swaran Singh* (Supra) observed as under:

> "… … …Perjury has also become a way of life in the law courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340 (3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure."

51. In a recent judgment in the case of *Mahila Vinod Kumari v. State of Madhya Pradesh* (2008) 8 SCC 34 this court has shown great concern about alarming proportion of perjury cases in our country.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

53. According to us, these aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the aforesaid steps, but once it is observed across the country, then prevailing system of adjudication of civil courts is bound to improve.

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs.2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.

57. The appellants are directed to pay the costs imposed by this court along with the costs imposed by the High Court to the respondents within six weeks from today.

58. The suit pending before the trial court is at the final stage of the arguments, therefore, the said suit is directed to be disposed of as expeditiously as possible and in any event

within three months from the date of the communication of the order as we have not decided the matter on merits of the case.

59. We make it abundantly clear that the trial court should not be influenced by any observation or finding arrived at by us in dealing with these appeals as we have not decided the matter on merits of the case.

60. Before parting with this case we would like to record our deep appreciation for extremely valuable assistance provided by the learned amicus curiae. Dr. Arun Mohan did not only provide valuable assistance on the questions of law but inspected the entire record of the trial court and for the convenience of the court filed the entire court proceedings, other relevant documents, such as the plaint, written statement and relevant judgments. It is extremely rare that such good assistance is provided by the amicus curiae. In our considered view, learned amicus curiae has discharged his obligation towards the profession in an exemplary manner.

61. These appeals are accordingly disposed of in terms of the aforementioned directions.

N.J. Appeals disposed of.

NANDINI SUNDAR AND ORS.

v.

STATE OF CHATTISGARH

(Writ Petition (Civil) No. 250 of 2007)

JULY 05, 2011

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Constitution of India, 1950:

Constitutional norms and values – Held: Constitution promises to each and every citizen, complete justice-social, economic and political – Such a promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population – On facts, violation of human rights of people of Dantewada District and its neighbouring areas in the State of Chattisgarh – Approach of lawless violence(counter-insurgency operations) in response to violence by the Maoist/Naxalite insurgency in the State of Chattisgarh, has not, and will not, solve the problems, and instead it would only perpetuate the cycles of more violent, both intensive and extensive, insurgency and counter-insurgency.

Articles 14 and 21 – Public interest litigation – Counter-insurgency operations launched by the State of Chattisgarh against Maoist/Naxalites extremists in the State of Chattisgarh – Violation of human rights of people of Dantewada District and its neighbour areas in the State of Chattisgarh – Writ Petition – Allegation that State of Chattisgarh was actively promoting criminal activities of Salwa Judum, or sometimes called Koya Commandos, thereby further exacerbating the ongoing struggle, and leading to further widespread violation of human rights; and that barely literate tribal youth are appointed as Special Police Officers (SPO) and given

firearms to undertake tasks that only formal police force could undertake – Direction by Supreme Court to Union of India to file an affidavit regarding its role in the appointment of SPOs – Affidavit filed by the Union of India to the effect that its role is limited only to approving the total number of SPOs and the extent of reimbursement of honourarium paid to them and thus, the Union of India abdicated its responsibilities – State of Chattisgarh and the Union of India acknowledged that the SPOs are actually involved in combat with the Maoist/ Naxalites and are placed in direct danger of attacks without adequate safety that formal security would possess – Given their educational levels, the training provided to them is not adequate – Manner of use of firearm is not consonant with the concept of self-defence – Involving ill-equipped barely literate youngsters in counter-insurgency activities cannot be said to be creating livelihood for them – They (SPOs) are expected to perform all the duties of police officers, yet paid only an honorarium – Appointment of SPOs is temporary and once it is over, their life would be in danger – Thus, the appointment of tribal youth as SPOs in counter-insurgency activities has endangered and will necessarily endanger the human rights of the others in the society – It is violative of Article 21 and 14 – Thus, Central Bureau of Investigation directed to immediately take over the investigation as also take appropriate legal action against all individuals responsible for the said incidents – The State of Chattisgarh directed to immediately cease and desist from using SPOs in controlling, countering, mitigating or eliminating Maoist/ Naxalite activities in the State; to make every effort to recall all firearms issued to any of the SPOs; to make arrangements to provide appropriate security, and take necessary measures to protect those who had been employed as SPOs previously, or given any initial orders of selection/appointment; and to take all appropriate measures to prevent the operation of any group, including but not limited to Salwa Judum and Koya Commandos – Union of India also not to use any of its funds in supporting the recruitment of SPOs for engaging in any

form of counter-insurgency activities – CBI directed to submit its preliminary status report within six weeks – The State of Chattisgarh and the Union of India also directed to submit compliance reports with respect to all the orders and directions issued within six weeks.

Olga Tellis v Bombay Municipal Corporation **(1985) 3 SCC 545 - referred to.**

State policies designed to combat terrorism and extremism – Interference with – Held: It can be interfered with, for security considerations – State necessarily has the obligation, moral and constitutional, to combat terrorism, extremism, and provide security to the people of the country – This is a primordial necessity – Judiciary intervenes in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life.

G.V.K Industries v. ITO **(2011) 4 SCC 36 - referred to.**

Almadani v. Ministry of Defense **H.C. 3451/02, 56(3) P.D - referred to.**

Counter-insurgency operations against Maoist/Naxalites extremists in the State of Chattisgarh – Violation of human rights of people of Dantewada District and its neighbour areas in the State of Chattisgarh – Allegations by civil society leader with regard to the incidents of violence in three villages, as well as incidents of violence allegedly perpetrated by people, including SPOs, Koya Commandos, and/or members of Salwa Judum, against him and others travelling with him in March 2011 to provide humanitarian aid to victims of violence in the said villages – Affidavit filed by the State of Chattisgarh – Held: Affidavit wherein the State admitted about the incident is nothing more than an attempt at self-justification and rationalization, rather than an acknowledgment of the constitutional responsibility to take such instances of violence seriously – Offer/measure by State of Chattisgarh to constitute

an Inquiry Commission, headed by a sitting or a retired judge of the High Court, are inadequate – These may prevent such incidents in the future, however, they do not fulfill the requirement of the law: that crimes against citizens be fully investigated and those engaging in criminal activities be punished by law – Public interest litigation.

Chattisgarh Police Act, 2007 – s. 23(1)(h) and 23(1)(i) – Special Police Officers – Appointment of, to perform any of the duties of regular police officers, other than those specified in s.23(1)(h) and s.23(1)(i) – Held: Is unconstitutional – Tribal youth, previously engaged as SPOs in counter-insurgency activities against Maoists/Naxalites may be employed as SPOs to perform duties limited to those enumerated in s. 23(1)(h) and 23(1)(i), provided they have not engaged in any activities, as SPOs or in their own individual/private capacities, violative of human rights of other individuals or of any disciplinary code or criminal laws.

Case Law Reference:

(2005) 5 SCC 517	**Relied on**	**Para 78**
(1985) 3 SCC 545	**Referred to**	**Para 62**
(2011) 4 SCC 36	**Referred to**	**Para 68**
H.C. 3451/02, 56(3) P.D	**Referred to**	**Para 70**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 250 of 2007.

Under Article 32 of the Constitution of India.

WITH

W.P. (Crl.) Nos. 119 of 2007 & 103 of 2009.

Gopal Subramanium, S.G. , H.P. Raval, A.S. G., Ashok Desai, Colin Gonsalves, T.S. Doabia, M.N. Krishnamani, Rajendra Sachachar, Nitya Ramakrishnan, Menaka

Guruswamy, Suhasini Sen, Bipin Aspatwar, Rahul Kripalani, Sumita Hazarika, Divya Jyoti Jaipuriar, Jyoti Mendiratta, Sunita Sharma, Sushma Suri, Anitha Shenoy, Dr. Manish Singhvi, Atul Jha, Dharmendra Kumar Sinha, Amit Kumar, A. Dasaratha, Naveen R. Nath, Subhash Kaushik, T.A. Khan, P.K. Dey, Arvind Kumar Sharma, Padmalaxmi, Shreekant N. Terdal for the appearing parties.

The following Order of the Court was delivered

O R D E R

I

1. We, the people as a nation, constituted ourselves as a sovereign democratic republic to conduct our affairs within the four corners of the Constitution, its goals and values. We expect the benefits of democratic participation to flow to us – all of us -, so that we can take our rightful place, in the league of nations, befitting our heritage and collective genius. Consequently, we must also bear the discipline, and the rigour of constitutionalism, the essence of which is accountability of power, whereby the power of the people vested in any organ of the State, and its agents, can only be used for promotion of constitutional values and vision. This case represents a yawning gap between the promise of principled exercise of power in a constitutional democracy, and the reality of the situation in Chattisgarh, where the Respondent, the State of Chattisgarh, claims that it has a constitutional sanction to perpetrate, indefinitely, a regime of gross violation of human rights in a manner, and by adopting the same modes, as done by Maoist/Naxalite extremists. The State of Chattisgarh also claims that it has the powers to arm, with guns, thousands of mostly illiterate or barely literate young men of the tribal tracts, who are appointed as temporary police officers, with little or no training, and even lesser clarity about the chain of command to control the activities of such a force, to fight the battles against alleged Maoist extremists.

2. As we heard the instant matters before us, we could not but help be reminded of the novella, "Heart of Darkness" by Joseph Conrad, who perceived darkness at three levels: (1) the darkness of the forest, representing a struggle for life and the sublime; (ii) the darkness of colonial expansion for resources; and finally (iii) the darkness, represented by inhumanity and evil, to which individual human beings are capable of descending, when supreme and unaccounted force is vested, rationalized by a warped world view that parades itself as pragmatic and inevitable, in each individual level of command. Set against the backdrop of resource rich darkness of the African tropical forests, the brutal ivory trade sought to be expanded by the imperialist-capitalist expansionary policy of European powers, Joseph Conrad describes the grisly, and the macabre states of mind and justifications advanced by men, who secure and wield force without reason, sans humanity, and any sense of balance. The main perpetrator in the novella, Kurtz, breathes his last with the words: "The horror! The horror!"[1] Conrad characterized the actual circumstances in Congo between 1890 and 1910, based on his personal experiences there, as "the vilest scramble for loot that ever disfigured the history of human conscience."[2]

3. As we heard more and more about the situation in Chattisgarh, and the justifications being sought to be pressed upon us by the respondents, it began to become clear to us that the respondents were envisioning modes of state action that would seriously undermine constitutional values. This may cause grievous harm to national interests, particularly its goals of assuring human dignity, with fraternity amongst groups, and the nations unity and integrity. Given humanity's collective experience with unchecked power, which becomes its own principle, and its practice its own raison d'etre, resulting in the

1. Joseph Conrad — Heart of Darkness and Selected Short Fiction (Barnes and Noble Classics, 2003).

2. Joseph Conrad "Geography and Some Explorers", National Geography magazine, Vol 45, 1924.

eventual dehumanization of all the people, the scouring of the earth by the unquenchable thirst for natural resources by imperialist powers, and the horrors of two World Wars, modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate state's violence against any one, much less its own citizens, unchecked by law, and notions of innate human dignity of every individual. Through the course of these proceedings, as a hazy picture of events and circumstances in some districts of Chattisgarh emerged, we could not but arrive at the conclusion that the respondents were seeking to put us on a course of constitutional actions whereby we would also have to exclaim, at the end of it all: "the horror, the horror."

4. People do not take up arms, in an organized fashion, against the might of the State, or against fellow human beings without rhyme or reason. Guided by an instinct for survival, and according to Thomas Hobbes, a fear of lawlessness that is encoded in our collective conscience, we seek an order. However, when that order comes with the price of dehumanization, of manifest injustices of all forms perpetrated against the weak, the poor and the deprived, people revolt. That large tracts of the State of Chattisgarh have been affected by Maoist activities is widely known. It has also been widely reported that the people living in those regions of Chattisgarh have suffered grievously, on account of both the Maoist insurgency activities, and the counter insurgency unleashed by the State. The situation in Chattisgarh is undoubtedly deeply distressing to any reasonable person. What was doubly dismaying to us was the repeated insistence, by the respondents, that the only option for the State was to rule with an iron fist, establish a social order in which every person is to be treated as suspect, and any one speaking for human rights of citizens to be deemed as suspect, and a Maoist. In this bleak, and miasmic world view propounded by the respondents in the instant case, historian Ramchandra Guha, noted academic Nandini Sunder, civil society leader Swami Agnivesh,

and a former and well reputed bureaucrat, E.A.S. Sarma, were all to be treated as Maoists, or supporters of Maoists. We must state that we were aghast at the blindness to constitutional limitations of the State of Chattisgarh, and some of its advocates, in claiming that any one who questions the conditions of inhumanity that are rampant in many parts of that state ought to necessarily be treated as Maoists, or their sympathizers, and yet in the same breath also claim that it needs the constitutional sanction, under our Constitution, to perpetrate its policies of ruthless violence against the people of Chattisgarh to establish a Constitutional order.

5. The problem, it is apparent to us, and would be so to most reasonable people, cannot be the people of Chattisgarh, whose human rights are widely acknowledged to being systemically, and on a vast scale, being violated by the Maoists/Naxalites on one side, and the State, and some of its agents, on the other. Nor is the problem with those well meaning, thoughtful and reasonable people who question those conditions. The problem rests in the amoral political economy that the State endorses, and the resultant revolutionary politics that it necessarily spawns. In a recent book titled "The Dark Side of Globalization" it has been observed that:

> "[*T]he persistence of "Naxalism", the Maoist revolutionary politics, in India after over six decades of parliamentary politics is a visible paradox in a democratic "socialist" India…. India has come into the twenty-first century with a decade of departure from the Nehruvian socialism to a free-market, rapidly globalizing economy, which has created new dynamics (and pockets) of deprivation along with economic growth. Thus the same set of issues, particularly those related to land, continue to fuel protest politics, violent agitator politics, as well as armed rebellion…. Are governments and political parties in India able to grasp the socio-economic dynamics encouraging these politics or are they stuck with a security-oriented approach that further fuels them?"*[3]

6. That violent agitator politics, and armed rebellion in many pockets of India have intimate linkages to socio-economic circumstances, endemic inequalities, and a corrupt social and state order that preys on such inequalities has been well recognized. In fact the Union of India has been repeatedly warned of the linkages. In a recent report titled "Development Challenges in Extremist Affected Areas"[4], an expert group constituted by the Planning Commission of India makes the following concluding observations:

> "*The development paradigm pursued since independence has aggravated the prevailing discontent among the marginalized sections of the society…. The development paradigm as conceived by policy makers has always imposed on these communities…. causing irreparable damage to these sections. The benefits of this paradigm have been disproportionately cornered by the dominant sections at the expense of the poor, who have borne most of the costs. Development which is insensitive to the needs of these communities has inevitably caused displacement and reduced them to a sub-human existence. In the case of tribes in particular it has ended up in destroying their social organization, cultural identity and resource base…. which cumulatively makes them increasingly vulnerable to exploitation…. The pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy sections of the larger society intent on grabbing their resources*

3. Ajay K. Mehra "Maoism in a globalizing India" in " The Dark Sid of Globalization" eds, Jorge Heine & Ramesh Thakur (United Nations University Press, 2011)

4. Report of an Export Group to Planning Commission, Government of India (New Delhi, April, 2008)

and violating their dignity." [paras 1.18.1 and 1.18.2, emphasis supplied]

7. It is also a well known fact that Government reports understate, in staid prose, the actuality of circumstances. That an expert body constituted by the Planning Commission of India, Government of India, uses the word "rapacious", connoting predation for satisfaction of inordinate greed, and subsistence by capture of living prey, is revelatory of the degree of human suffering that is being visited on vast sections of our fellow citizens. It can only be concluded that the expert body, in characterizing the state of existence of large numbers of our fellow citizens, in large tracts of India, as "sub-human," is clearly indicating that such an existence is not merely on account of pre-existing conditions of significant material deprivation, but also that significant facets that are essential to human dignity have been systematically denied by the forces and mechanisms of the developmental paradigm unleashed by the State. Equally poignantly, and indeed tragically because the State in India seems to repeatedly insist on paying scant attention to such advice, the Expert Group further continues and advises:

"*This concludes our brief review of various disturbing aspects of the socio-economic context that prevails in large parts of India today, and that may (and can) contribute to politics such as that of the Naxalite movement or erupt as other forms of violence. It should be recognized that there are different kinds of movements, and that calling and treating them generally as unrest, a disruption of law and order, is little more than a rationale for suppressing them by force. It is necessary to contextualize the tensions in terms of social, economic and political background and bring back on the agenda the issues of the people – the right to livelihood, the right to life and a dignified and honourable existence. The State itself should feel committed to the democratic and human rights and humane objectives that are inscribed*

in the Preamble, the Fundamental Rights and Directive Principles of the Constitution. The State has to adhere strictly to the Rule of Law. Indeed, the State has no other authority to rule…. It is critical for the Government to recognize that dissent or expression of dissatisfaction is a positive feature of democracy, that unrest is often the only thing that actually puts pressure on the government to make things work and for the government to live up to its own promises. However, the right to protest, even peacefully, is often not recognized by the authorities, and even non-violent agitations are met with severe repression…. What is surprising is not the fact of unrest, but the failure of the State to draw right conclusions from it. While the official policy documents recognize that there is a direct correlation between what is termed as extremism and poverty…. or point to the deep relationship between tribals and forests, or that the tribals suffer unduly from displacement, the governments have in practice treated unrest merely as a law and order problem. It is necessary to change this mindset and bring about congruence between policy and implementation. There will be peace, harmony and social progress only if there is equity, justice and dignity for everyone." [paras 1.18.3 and 1.18.4, emphasis supplied]

8. Rather than heeding such advice, which echoes the wisdom of our Constitution, what we have witnessed in the instant proceedings have been repeated assertions of inevitability of muscular and violent statecraft. Such an approach, informing the decisions of the Government of Chattisgarh with respect to the situations in Dantewada, and its neighbouring districts, seemingly also blinds them to the fact that lawless violence, in response to violence by the Maoist/ Naxalite insurgency, has not, and will not, solve the problems, and that instead it will only perpetuate the cycles of more violent, both intensive and extensive, insurgency and counter-insurgency. The death toll revealed by the Government of

Chattisgarh is itself indicative of this. The fact that the cycles of violence and counter-violence have now lasted nearly a decade ought to lead a reasonable person to conclude that the prognosis given by the expert committee of the Planning Commission to be correct.

9. The root cause of the problem, and hence its solution, lies elsewhere. The culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever increasing spirals of consumption leading to economic growth that will lift everyone, under-gird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general, and Chattisgarh in particular. It has been reported that:

> "Among the rapidly growing urban middle class, the corporate world is in a hurry to expand its manufacturing capacity. That means more land for manufacturing and trading. The peasants and tribals are the natural victims of acquisitions and displacements. The expanded mining activities encroach upon the forest domain…. Infrastructure development needs more steel, cement and energy…. Lacking public sector capacities, the income-poor but resource-rich states of eastern India are awarding mining and land rights to Indian and multinational companies…. Most of these deposits lie in territory inhabited by poor tribals and that is where Naxals operate. Chattisgarh, a state of eastern India, has 23 per cent of India's iron ore deposits and abundant coal. It has signed memoranda of understanding and other agreements worth billions with Tata Steel and ArcelorMittal, De Beers Consolidated Mines, BHP Billion and Rio Tinto. Other states inviting big business and FDI have made similar deals…. The appearance of mining crews, construction workers and truckers in the forest has seriously alarmed the tribals who have lived in these regions from time immemorial."[5]

5. Ajay K. Mehra, supra note 1.

10. The justification often advanced, by advocates of the neo-liberal development paradigm, as historically followed, or newly emerging, in a more rapacious form, in India, is that unless development occurs, via rapid and vast exploitation of natural resources, the country would not be able to either compete on the global scale, nor accumulate the wealth necessary to tackle endemic and seemingly intractable problems of poverty, illiteracy, hunger and squalor. Whether such exploitation is occurring in a manner that is sustainable, by the environment and the existing social structures, is an oft debated topic, and yet hurriedly buried. Neither the policy makers nor the elite in India, who turn a blind eye to the gross and inhuman suffering of the displaced and the dispossessed, provide any credible answers. Worse still, they ignore historical evidence which indicates that a development paradigm depending largely on the plunder and loot of the natural resources more often than not leads to failure of the State; and that on its way to such a fate, countless millions would have been condemned to lives of great misery and hopelessness.

11. The more responsible thinkers have written at length about "resource curse," a curious phenomenon wherein countries and regions well endowed with resources are often the worst performers when it comes to various human development indicia. In comparison with countries dependant on agricultural exports, or whose development paradigm is founded upon broad based development of human resources of all segments of the population, such countries and regions suffer from "unusually high poverty, poor health care, widespread malnutrition, high rates of child mortality, low life expectancy and poor educational performance."[6]

12. Predatory forms of capitalism, supported and promoted by the State in direct contravention of constitutional norms and values, often take deep roots around the extractive industries.

6. Joseph E. Stiglitz, Making Natural Resources into a Blessing rather than a Curse, in "Covering Oil", eds., Svetlana Tsalik Arya Schiffrin, Open Society Institute (2005).

In India too, we find a great frequency of occurrence of more volatile incidents of social unrest, historically, and in the present, in resource rich regions, which paradoxically also suffer from low levels of human development. The argument that such a development paradigm is necessary, and its consequences inevitable, is untenable. The Constitution itself, in no uncertain terms, demands that the State shall strive, incessantly and consistently, to promote fraternity amongst all citizens such that dignity of every citizen is protected, nourished and promoted. The Directive Principles, though not justiciable, nevertheless "fundamental in the governance of the Country", direct the State to utilize the material resources of the community for the common good of all, and not just of the rich and the powerful without any consideration of the human suffering that extraction of such resources impose on those who are sought to be dispossessed and disempowered. Complete justice – social, economic and political -, is what our Constitution promises to each and every citizen. Such a promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population.

13. Policies of rapid exploitation of resources by the private sector, without credible commitments to equitable distribution of benefits and costs, and environmental sustainability, are necessarily violative of principles that are "fundamental to governance", and when such a violation occurs on a large scale, they necessarily also eviscerate the promise of equality before law, and equal protection of the laws, promised by Article 14, and the dignity of life assured by Article 21. Additionally, the collusion of the extractive industry, and in some places it is also called the mining mafia, and some agents of the State, necessarily leads to evisceration of the moral authority of the State, which further undermines both Article 14 and Article 21. As recognized by the Expert Committee of the Planning Commission, any steps taken by the State, within the paradigm of treating such volatile

circumstances as simple law and order problems, to perpetrate large scale violence against the local populace, would only breed more insurgency, and ever more violent protests. Some scholars have noted that complexities of varieties of political violence in India are rooted:

> "*as much in the economic relations of the country as in its stratified social structure.... [E]ntrenched feudal structures, emerging commercial interests, new alliances and the nexus between entrenched order, new interests, political elites and the bureaucracy, and deficient public infrastructure and facilities perpetuate exploitation. The resulting miseries have made these sections of the population vulnerable to calls for revolutionary politics....India's development dichotomy has also had a destabilizing impact on people's settled lives. For decades, the Indian state has failed to provide alternative livelihoods to those displaced by developmental projects. According to an estimate, between 1951 and 1990, 8.5 million members of ST's were displaced by developmental projects. Representing over 40 per cent of all the displaced people, only 25 per cent of them were rehabilitated.... Although there are no definitive data, Dalits and Adivasis have been reported to form a large proportion of the Maoists' foot soldiers.... A study of atrocities against these two sections of society reveals correspondence between the prevalence and spread of Naxalism and the geographic location of atrocities.... The susceptibility of the vulnerable continues under the new emerging context of the liberalization, marketization and globalization of the Indian economy, which have added new dominance structures to the existing ones*."[7]

14. What is ominous, and forebodes grave danger to the security and unity of this nation, the welfare of all of our people, and the sanctity of our constitutional vision and goals, is that

7. Ajay K. Mehra, supra note 1.

the State is drawing the wrong conclusions, as pointed out by the Expert Group of the Planning Commission cited earlier. Instead of locating the problem in the socio-economic matrix, and the sense of disempowerment wrought by the false developmental paradigm without a human face, the powers that be in India are instead propagating the view that this obsession with economic growth is our only path, and that the costs borne by the poor and the deprived, disproportionately, are necessary costs. Amit Bhaduri, a noted economist, has observed:

> "*If we are to look a little beyond our middle class noses, beyond the world painted by mainstream media, the picture is less comforting, less assuring…. Once you step outside the charmed circle of a privileged minority expounding on the virtues of globalization, liberalization and privatization, things appear less certain…. According to the estimate of the Ministry of Home Affairs, some 120 to 160 out of a total of 607 districts are "Naxal infested". Supported by a disgruntled and dispossessed peasantry, the movement has spread to nearly one-fourth of Indian territory. And yet, all that this government does is not to face the causes of the rage and despair that nurture such movements; instead it considers it a menace, a law-and-order problem…. that is to be rooted out by the violence of the state, and congratulates itself when it uses violence effectively to crush the resistance of the angry poor…. For the sake of higher growth, the poor in growing numbers will be left out in the cold, undernourished, unskilled and illiterate, totally defenceless against the ruthless logic of a global market…. [T]his is not merely an iniquitous process. High growth brought about in this manner does not simply ignore the question of income distribution, its reality is far worse. It threatens the poor with a kind of brutal violence in the name of development, a sort of 'developmental terrorism', violence perpetrated on the poor in the name of development by the state primarily in the interest of corporate aristocracy, approved by the*

> *IMF and the World Bank, and a self-serving political class…. Academics and media persons have joined the political chorus of presenting the developmental terrorism as a sign of progress, an inevitable cost of development. The conventional wisdom of our time is that, There Is No Alternative…. And yet this so widely agreed upon model of development is fatally flawed. It has already been rejected and will be rejected again by the growing strength of our democratic polity, and by direct resistance of the poor threatened with 'developmental terrorism'*".

15. As if the above were not bad enough, another dangerous strand of governmental action seems to have been evolved out of the darkness that has begun to envelope our policy makers, with increasing blindness to constitutional wisdom and values. On the one hand the State subsidises the private sector, giving it tax break after tax break, while simultaneously citing lack of revenues as the primary reason for not fulfilling its obligations to provide adequate cover to the poor through social welfare measures. On the other hand, the State seeks to arm the youngsters amongst the poor with guns to combat the anger, and unrest, amongst the poor.

16. Tax breaks for the rich, and guns for the youngsters amongst poor, so that they keep fighting amongst themselves, seems to be the new mantra from the mandarins of security and high economic policy of the State. This, apparently, is to be the grand vision for the development of a nation that has constituted itself as a sovereign, secular, socialist and democratic republic. Consequently, questions necessarily arise as to whether the policy makers, and the powers that be, are in any measure being guided by constitutional vision, values, and limitations that charge the State with the positive obligation of ensuring the dignity of all citizens.

17. What the mandarins of high policies forget is that a society is not a forest where one could combat an accidental forest fire by starting a counter forest fire that is allegedly

controlled. Human beings are not individual blades of dry grass. As conscious beings, they exercise a free will. Armed, the very same groups can turn, and often have turned, against other citizens, and the State itself. Recent history is littered with examples of the dangers of armed vigilante groups that operate under the veneer of State patronage or support.

18. Such misguided policies, albeit vehemently and muscularly asserted by some policy makers, are necessarily contrary to the vision and imperatives of our constitution which demands that the power vested in the State, by the people, be only used for the welfare of the people – all the people, both rich and the poor -, thereby assuring conditions of human dignity within the ambit of fraternity amongst groups of them. Neither Article 14, nor Article 21, can even remotely be conceived as being so bereft of substance as to be immune from such policies. They are necessarily tarnished, and violated in a primordial sense by such policies. The creation of such a miasmic environment of dehumanization of youngsters of the deprived segments of our population, in which guns are given to them rather than books, to stand as guards for the rapine, plunder and loot in our forests, would be to lay the road to national destruction. It is necessary to note here that this Court had to intercede and order the Government of Chattisgarh to get the security forces to vacate the schools and hostels that they had occupied; and even after such orders, many schools and hostels still remain in the possession and occupancy of the security forces. Such is the degree of degeneration of life, and society. Facts speak for themselves.

19. Analyzing the causes for failure of many nation-states, in recent decades, Robert I. Rotberg, a professor of the Kennedy School, Harvard University, posits the view that "[N]ation- states exist to provide a decentralized method of delivering political (public) goods to persons living within designated parameters (borders)…. They organize and channel the interests of their people, often but not exclusively in

furtherance of national goals and values." Amongst the purposes that nation-states serve, that are normatively expected by citizenries, are included the task of buffering or manipulation of "external forces and influences," and mediation between "constraints and challenges" of the external and international forces and the dynamics of "internal economic, political, and social realities." In particular he notes:

> "States succeed or fail across all or some of these dimensions. But it is according to their performance – according to the levels of their effective delivery of the most crucial political goods – that strong states may be distinguished from weak ones, and weak states from failed or collapsed states…. There is a hierarchy of political goods. None is as crucial as the supply of security, especially human security. Individuals alone, almost exclusively in special or particular circumstances, can attempt to secure themselves. Or groups of individuals can band together to organize and purchase goods or services that maximize their sense of security. Traditionally, and usually, however, individuals and groups cannot easily or effectively substitute private security for the full spectrum of public security. The state's prime function is to provide that political good of security – to prevent cross-border invasions and infiltrations, to eliminate domestic threats to or attacks upon the national order and social structure… and *to stabilize citizens to resolve their disputes with the state and with their fellow human inhabitants without recourse to arms or other forms of physical coercion."*[8]

20. The primary task of the State is the provision of security to all its citizens, without violating human dignity. This would necessarily imply the undertaking of tasks that would prevent the emergence of great dissatisfaction, and disaffection, on

8. "The Failure and Collapse of Nation-States-BREAKDOWN, PREVENTION AND FAILURE" in "WHEN STATES FAIL: CAUSES AND CONSEQUENCS" Robert I. Rotberg, Ed., Princeton University Press (2004).

account of the manner and mode of extraction, and distribution, of natural resources and organization of social action, its benefits and costs. Our Directive Principles of State Policy explicitly recognize this. Our Constitution posits that unless we secure for our citizens conditions of social, economic and political justice for all who live in India, we would not have achieved human dignity for our citizens, nor would we be in a position to promote fraternity amongst groups of them. Policies that run counter to that essential truth are necessarily destructive of national unity and integrity. To pursue socio-economic policies that cause vast disaffection amongst the poor, creating conditions of violent politics is a proscribed feature of our Constitution. To arrive at such a situation, in actuality on account of such policies, and then claim that there are not enough resources to tackle the resulting socio-political unrest, and violence, within the framework of constitutional values amounts to an abdication of constitutional responsibilities. To claim that resource crunch prevents the State from developing appropriate capacity in ensuring security for its citizens through well trained formal police and security forces that are capable of working within the constitutional framework would be an abandonment of a primordial function of the State. To pursue policies whereby guns are distributed amongst barely literate youth amongst the poor to control the disaffection in such segments of the population would be tantamount to sowing of suicide pills that could divide and destroy society. Our youngsters are our most precious resource, to be nurtured for a better tomorrow. Given the endemic inequalities in our country, and the fact that we are increasingly, in a demographic sense, a young population, such a policy can necessarily be expected to lead to national disaster.

21. Our constitution is most certainly not a "pact for national suicide."[9] In the least, its vision does enable us, as constitutional adjudicators to recognize, and prevent, the emergence, and the

9. Aharon Barack, "The Judge in a Democracy" (Princeton University Press, 2006).

institutionalization, of a policing paradigm, the end point of which can only mean that the entire nation, in short order, might have to gasp: "The horror! The horror!"

22. It is in light of the above that we necessarily have to examine the issues discussed below, and pass appropriate orders. We have heard at length the learned senior counsel, Shri. Ashok H. Desai, appearing on behalf of the petitioners, and learned senior counsel, Shri. Harish N. Salve and Shri. M.N. Krishnamani appearing for the State of Chattisgarh. We have also heard learned Solicitor General of India, Shri Gopal Subrahmanyam, appearing for the Union of India.

II

Brief Facts and History of Instant Matters

23. The instant writ petition was filed, in 2007, by: (i) Dr. Nandini Sunder, a professor of Sociology at Delhi School of Economics, and the author of "Subalterns and Sovereigns: An Anthropological History of Bastar" (2nd Ed. 2007); (ii) Dr. Ramachandra Guha, a well known historian, environmentalist and columnist, and author of several books, including "Savaging the Civilised: Verrier Elwin, His Tribals and India" (1999) and "India After Gandhi" (2007); and (iii) Mr. E.A.S. Sarma, former Secretary to Government of India, and former Commissioner, Tribal Welfare, Government of Andhra Pradesh. The petitioners have alleged, inter-alia, widespread violation of human rights of people of Dantewada District, and its neighboring areas in the State of Chhattisgarh, on account of the on going armed Maoist/Naxalite insurgency, and the counter-insurgency offensives launched by the Government of Chattisgarh. In this regard, it was also alleged that the State of Chattisgarh was actively promoting the activities of a group called "Salwa Judum", which was in fact an armed civilian vigilante group, thereby further exacerbating the ongoing struggle, and was leading to further widespread violation of human rights.

24. This Court, had previously passed various orders as appropriate at the particular stage of hearing. It had previously noted that it would be appropriate for the National Human Rights Commission ("NHRC") to verify the serious allegations made by the Petitioners, by constituting a committee for investigation, and make the report available to this Court. On 25-08-2008 the NHRC filed its report. This Court then directed that the Government of Chattisgarh consider the recommendations. This Court also directed that appropriate First Information Reports ("FIRs") be filed with respect to killings or other acts of violence and commission of crimes, where the FIRs had not been registered. The Government of Chattisgarh was further directed, in the case of finding the dead body of a person, to ensure that a magisterial enquiry follow, and file an "Action Taken Report." In the order dated 18-02-2010, this Court stated that "[I]t appears that about 3000 SPOs," (Special Police Officers) "have been appointed by the State Government to take care of the law and order situation, in addition to the regular police force. We make it clear that the appointment of SPOs shall be done in accordance with law." The Court also specifically recorded that "[I]t is also denied emphatically by the State that private citizens are provided with arms."

25. In the course of the continuing hearings, before us, a number of allegations have been made, certain of the findings of NHRC stressed, and some contested. Three aspects were particularly dealt by us, and they relate to: (i) the issue of schools and hostels in various districts of Chattisgarh being occupied by various security forces, in a manner that precludes the proper education of students of such schools; (ii) the issue of nature of employment of SPOs, also popularly known as Koya Commandos, the manner of their training, their status as police officers, the fact that they are provided with firearms, and the various allegations of the excessive violence perpetrated by such SPOs.; and (iii) fresh allegations made, this time by Swami Agnivesh, that some 300 houses were burnt down in the villages of Morpalli, Tadmetla and Timmapuram, of women

raped and three men killed sometime in March, 2011. It was also alleged that when Swami Agnivesh, along with some other members of the civil society, tried to visit the said villages to distribute humanitarian aid, and gain firsthand knowledge of the situation, they were attacked by members of "Salwa Judum" in two separate incidents, and that, notwithstanding assurances by the Chief Minister of Chattisgarh that they will be provided all the security to be able to undertake their journey and complete their tasks, and notwithstanding the presence of security forces, the attacks were allowed to be perpetrated. Swami Agnivesh, it is also reported, and prima facie appears, is a social activist, of some repute, advocating the path of peaceful resolution of social conflict. It also appears that Swami Agnivesh has actually worked towards the release of some police personnel who had been kidnapped by Naxalites in Chattisgarh, and the same has also been acknowledged by a person no less than the Chief Minister of Chattisgarh.

26. With respect to the issue of the schools and hostels occupied by the security forces, it may be noted that the State of Chattisgarh had categorically denied that any schools, hospitals, ashrams and anganwadis were continuing to be occupied by security forces, and in fact all such facilities had been vacated. However, during the course of the hearings before this bench it has turned out that the facts asserted in the earlier affidavit were erroneous, and that in fact a large number of schools had continued to be occupied by security forces. It was only upon the intervention, and directions, of this Court did the State of Chattisgarh begin the process of releasing the schools and hostels from the occupation by the security forces. That process is, in fact, still on going. We express our reservations at the manner in which the State of Chattisgarh has conducted itself in the instant proceedings before us. It was because of the earlier submissions made to this Court that schools, hospitals, ashrams and anganwadis have already been vacated, this Court had passed earlier orders with respect to other aspects of the recommendations of the NHRC, and did

not address itself to the issue of occupancy by security forces of such infrastructure and public facilities that are necessary and vital for public welfare. A separate affidavit has been filed by the State of Chattisgarh seeking an extension of time to comply with the directions of this Court. This is because a large number of schools and hostels still continue to be occupied by the security forces. We will deal with the said matter separately.

27. It is with respect to the other two matters, i.e., (i) appointment of SPOs; and (ii) incidents alleged by Swami Agnivesh which we shall deal with below.

28. At this point it is also necessary to note that the ongoing armed insurgency in Chattisgarh, and in various other parts of the country, have been referred to as both Maoist and Naxal or Naxalite activities, by the Petitioners as well as the Respondents. Such terms are used interchangeably, and refer to, broadly, armed uprisings of various groups of people against the State, as well as individual or groups of citizens. In this order, we refer to Maoist activities, and the Naxal or Naxalite activities interchangeably.

III

Appointment and conditions of service of the SPOs.

29. A number of allegations with regard to functioning of "Koya Commandos" had been made by the Petitioners, and upon being asked by this Court to explain who or what Koya Commandos were, the State of Chattisgarh, through two separate affidavits, and one written note, stated, asserted and/or submitted:

(i) that, between 2004 to 2010, 2298 attacks by Naxalites occurred in the State, and 538 police and para military personnel had been killed; that in addition 169 Special Officers, 32 government employees (not police) and 1064 villagers had also been killed in such attacks; that the "SPOs form an integral part of the overall security

apparatus in the naxal affected districts of the State;" and that the Chintalnar area of Dantewada District is the worst affected area, with 76 security personnel killed in one incident.

(ii) that, as stated previously, in other affidavits, by the State of Chattisgarh, Salwa Judum has run its course, and has ceased as a force, existing only symbolically; that the Petitioners' and Shri. Agnivesh's claim that Salwa Judum is still active in the form of SPOs and Koya Commandos is misconceived; that the phrase "Koya Commando" is not an official one, and no one is appointed as a Koya Commando; that some of the SPOs are from Koya tribe, and hence, loosely, the term "Koya Commando" is used; that previously SPOs used to be appointed by the District Magistrate under section 17 of the Indian Police Act 1861 ("IPA"); that the SPOs appointed under said statute drew their power, duties and accountability under Section 18 of the IPA; and that with the enactment of the Chattisgarh Police Act, 2007 ("CPA 2007"), SPOs are now appointed under Section 9 of CPA 2007; that SPOs are paid a monthly honourarium of Rs 3000, of which 80% is contributed by Government of India; that the SPOs are appointed to act as guides, spotters and translators, and work as a source of intelligence, and firearms are provided to them for their self defence; that many other states have also appointed SPOs, and Naxals oppose the SPOs because their familiarity with local people, dialect and terrain make them effective against them; that the total number of SPOs appointed in Chattisgarh, and approved by the Union of India, were 6500 as of 28-03-2011. (It may be noted that an year ago the State of Chattisgarh had informed this Court that the total number of SPOs appointed in Chattisgarh were 3000. The much higher figure of appointed SPOs, as revealed by the latest affidavit implies that the number been more than doubled in the span of one year.)

30. Upon the submission of the affidavit containing the above details, we pointed out a number of issues which had not been addressed by the State of Chattisgarh. Some of the important queries raised by us, with directions to State of Chattisgarh and Union of India to answer, inter alia, included: (i) the required qualifications for such an appointment; (ii) the manner and extent of their training, especially given the fact that they were to wield firearms; (iii) the mode of control of the activities of such SPOs by the State of Chattisgarh; (iv) what special provisions were made to protect the SPOs and their families in the event of serious injuries or death while performing their "duties"; and (v) what provisions and modalities were in place for discharge of an appointed SPO from duty and the retrieval of the firearms given to them in line of their duties, and also with regard to their safety and security after performing their duties as SPOs for a temporary period. In this regard, the State of Chattisgarh submitted an additional affidavit filed on 03-05-2011, and subsequently after we had reserved this matter for orders, submitted a Written Note dated 11-03-2011 on 16-05-2011. The same are summarized briefly below.

(i)That the Union of India approves the upper limit of the number of SPOs for each state for the purposes of reimbursement of homourarium under the Security Rated Expenditure (SRE) Scheme.

(ii) That currently the State of Chattisgarh recruits the SPOs under Section 9(1) of the Chattisgarh Police Act, 2007 ("CPA 2007"), and that the SPOs, pursuant to Section 9(2) of the CPA 2007, enjoy the "same powers, privileges and perform same duties as coordinate constabulary and subordinate of the Chattisgarh Police;" that the SPOs are an integral part of the police force of Chattisgarh, and they are "under the same command, control and supervision of the Superintendant of Police as any other police officer. The SPOs are subjected to the same discipline and are regulated by the same legal framework as any other police

officer…;" that 1200 SPOs have been suspended, and even their tenure not renewed or extended if found to be derelict in the performance of their duties. (However, in the Written Note it has been stated that SPOs "are" appointed under Section 17 of IPA 1861).

(iii) That SPOs serve as "auxiliary force and force multiplier;" that appointments of SPOs has been recommended by the Second Administrative Reforms Commission under the Chairmanship of Mr. M. Veerappa Moily.

(iv) That SPOs serve a critical role in mitigating the problem of inadequacy of regular police and other security forces in Chattisgarh; that a three man committee appointed by the Government of Chattisgarh, in 2007, to prepare an action plan to combat the Naxalite problem, had calculated the requirement to be seventy (70) battalions; as against this, at present the State only has a total of 40 battalions, of which 24 are Central Armed Police Force, 6 Indian Reserve, and 10 State battalions; that the shortfall is 30 battalions.

(v) That the appointment of SPOs is necessary because of the attacks against relief camps for displaced villagers by Naxals; that the total number of attacks by Maoists between 2005 to 2011 were 41, in which 47 persons were killed and 37 injured, with figures in Dantewada being 24 attacks, 37 persons killed and 26 injured; that tribal youth are joining the ranks of SPOs "motivated by the urge for self protection and to defend their family members/villages from violent attacks;" that "[T]he victims of naxal violence and youth from naxal affected areas having knowledge of the local terrain, dialects, naxalites and their sympathizers and who voluntarily come forward and expressed their willingness are recruited as SPOs after character verification;" and that such tribal youth are recruited as SPOs on a temporary basis, by the Superintendant of the

Police on the recommendation of the concerned station in-charge and gazetted police officers.

(vi) That even though IPA 1861 and CPA 2007 do not prescribe any qualifications, "preference is given to those who have passed fifth standard" in the appointment of SPOs; that persons aged over 18 and aware of the local geography are appointed; and that the same is done in accordance with prescribed guidelines.

(vii) That a total training of two months is provided to such tribal youth appointed as SPOs, including: (a) musketry weapon handling, (b) first aid and medical care; (c) field and craft drill; (d) UAC and Yoga training; and that apart from the foregoing, "basic elementary knowledge" of various subjects are also included in the training curriculum - (e) Law (including IPC, CRPC, Evidence Act, Minor Act etc.) in 24 periods; (f) Human Rights and other provisions of Constitution of India in 12 periods; (g) use of scientific & forensic aids in policing in 6 periods; (h) community policing in 6 periods; and (i) culture and customs of Bastar in 9 periods; that timetable of such training, in which each period was shown to be one hour of class room instruction, submitted to this Court, is evidence of the same.

(viii) That upon training, the SPOs are deployed in their local areas and work under police leadership, and that the District Superintendant of Police commands and controls these SPOs through SHO/SDOP/Addl SP; that in the past, 1200 SPOs have been discharged from service, for absence from duty and other indiscipline; that FIR's have been registered against 22 SPOs for criminal acts, and action taken as per law.

(ix) That "between the year 2005 to April 2011", *173 SPOs "have sacrificed their lives while performing their duties and 117 SPOs received injuries;*" that certain provisions have been made to give relief and rehabilitation to SPOs

next of kin in case of death and/or injuries, such as payment of ex-gratia.

(x) That in as much as most of the security personnel in Chattisgarh, engaged in fighting Naxalites, are from outside the State, lack of knowledge about local terrain, geography, culture and information regarding who is a Naxal sympathizer, a Naxal etc., is hampering the State; that local SPOs prove to be invaluable because of their local knowledge; and that as local officers on duty in relief camps etc., SPOs have been able to thwart more than a dozen Maoist attacks on relief camps and have also been instrumental in saving lives of regular troops.

(xi) That SPOs are "looked after as part of regular force and their welfare is taken care off by the State;" and that by way of examples and evidence of the same, may be cited the special relaxation given to victims of Naxal violence in recruitment of constables by Chattisgarh Government, and the fact that more than 700 SPOs who have passed the recruitment test have been appointed as constables.

(xii) That State of Chattisgarh has framed Special Police Officers (Appointment, Training & Conditions of Service) Regulatory Procedure 2011 dated *06-05-201.* ("New Regulatory Procedures").

31. It should be noted at this stage itself that the said rules, in the New Regulatory Procedures, have been framed after this Court had heard the matter and reserved it for directions. It is claimed in the Written Note of May 16, 2011 that "the idea behind better schedule of training for the SPOs is to make the SPOs more sensitized to the problems faced by local tribals. The SPOs also play a crucial role in bringing back alienated tribals back to the mainstream." It is also further argued in the written note that the "disbanding of SPOs as sought by the Petititioners would wreak havoc with law & order in the State

of Chattisgarh" and that the State of Chattisgarh "intends to improve the training programme imparted to the SPOs so as to have an effective and efficient police force" and that the New Regulatory Procedures have been framed to achieve the same.

32. The State of Chattisgarh also placed great reliance on the affidavit submitted by the Union of India, dated 03-05-2011, with regard to the appointment, service and training of SPOs, and also the broad policy statements made by Union of India as to how the Left Wing Extremism ("LWE") ought to be tackled. To this effect, the affidavit of Union of India is briefly summarized below:

(i) Police and Public order are State subjects, and the primary responsibility of State Government; however, in special cases the Central Government supplements the efforts of the State governments through the SRE scheme. The scheme it is said has been developed to help States facing acute security problems, including LWE, that at present it covers 83 districts in nine states, including Chattisgarh. Under the said SRE scheme, the Union of India reimburses certain security related activities by the State to enable "capacity building". It is also stated that the "honourarium" paid to SPOs varies from state to state, with varying percentages of reimbursement of actual paid honorarium. The highest amount reimbursed is Rs 3000 and the lower range is around Rs 1500.

(ii) The Union of India also categorically asserted, as far as appointment and functioning of SPOs are concerned, that its role is "limited to the approval of upper limit of the number of SPOs for each state for the purpose of reimbursement of the honourarium under the SRE scheme" and that the "appointment, training, deployment, role and responsibility" of the SPOs are determined by the State Governments concerned. The Union of India categorically states that the State Governments "may appoint SPOs in accordance with law irrespective of Government of India, Ministry of Home Affairs approval."

(iii) The Union of India asserted that "historically SPOs have played an important role in law and order and insurgency situations in different states". In this regard, in the context of Left Wing Extremism, the Union of India, in its affidavit also pointedly remarks that the *"Peoples Liberation Guerilla Army… has raised and uses an auxiliary force known as 'Jan Militia' recruited from amongst the local people, who have knowledge of the local terrain, dialect, and also have the familiarity with the local population. The logic behind State Governments recruiting SPOs is to counter the advantage since the SPOs are also locally recruited and are familiar with the terrain, dialect and the local population"* and that Government of India partially reimburses honorarium of around 70,046 SPOs appointed by different States under the SRE scheme.

33. It would be necessary to note at this stage that it is not clear from the affidavit of Union of India as to what stance it takes with respect to specific aspects of the use of SPOs in Chattisgarh – arming SPOs with arms, the nature of training provided to them, and the duties assigned to them. In a markedly vague manner, the Union of India's affidavit asserts that SPOs are "force multipliers" not explaining what is involved in such a concept, nor how "force" is multiplied, or not, depending on various duties of the SPOs, their training, and whether they carry arms or not. Without explaining that concept, the Union of India asserts that SPOs have played a useful role in collection of intelligence, protection of local inhabitants and ensuring security of property in disturbed areas. Giving examples of what Union of India claims to be indicia of the usefulness of SPOs, the Union of India makes three other assertions:

(i) that the "assistance to District Police is crucial since they have a stable presence unlike Army/CPMFs which are

withdrawn/relocated frequently";

(ii) that the Union of India requires that the SPOs be treated, legally, "on par with ordinary Police officers in respect of matters such as powers, penalties, subordination etc;" and

(iii) that the "role of SPOs has great relevance in operational planning by the State Governments in counter insurgency and counter terrorism situations as well as in law and order situations."

34. In addition, it was also further asserted by the Union of India that "it is necessary to enhance the capacity of security forces in the affected States. Despite the many steps taken by the State Governments concerned, the CPI (Maoist) has indulged in indiscriminate and wanton violence." To this effect, the Union of India states that in the year 2010 a total of 1,003 people, comprising 718 civilians and 285 personnel of the security forces were killed by Naxalite groups all over India; and of the civilians killed, 323 were killed on being branded as "police informers."

35. For good measure, the Union of India ends its affidavit with the following:

"Government of India is committed to respecting the human rights of innocent citizens. The Government of India has always impressed upon the State Governments that while dealing with violence perpetrated by CPI (Maoist), the security forces should act with circumspection and restraint. The Government of India will issue advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training, impart instruction on human rights; and direct the supervisory officers to enforce strict discipline and adherence to the law among constables and SPOs while conducting operations in affected areas."

Analysis:

36. At this stage it is necessary to note the main statutory provisions under which it is asserted that SPOs are appointed and which govern their role, duties etc. They are:

Section 17 of Indian Police Act, 1861:

"Special Police-officers: When it shall appear that any unlawful assembly or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that the police force ordinarily employed for preventing the peace is not sufficient for its prevention and for the protection of the inhabitants and security of property in the place where such unlawful assembly or riot or disturbance of the peace has occurred, or it is apprehended, it shall be lawful for any police-officer, not below the rank of Inspector, to apply to the nearest Magistrate, to appoint so many of the residents of the neighborhood as such police-officer may require, to act as special police-officers for such time and within such limits as he shall deem necessary, and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application."

Section 18 of Indian Police Act, 1861:

"Powers of special police-officers: Every special police-officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of police."

Section 19 of Indian Police Act 1861:

"Refusal to serve as special police-officers: If any person, being appointed as special police-officers as aforesaid, shall without sufficient excuse, neglect or refuse to serve

as such, or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable, upon conviction before a Magistrate, to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience."

37. In the year 2007, the State of Chattisgarh enacted the Chattisgarh Police Act, 2007 and some relevant portions of the same are noted below.

Section 1(2): "It shall come into force from the date of its publication in the Official Gazette;

Section 2(n): "Police Officer" means any member of the Police Force appointed under this Act or appointed before the commencement of this Act for the State and includes members of the Indian Police Service or members of any other police organization on deputation to the State Police, serving for the State and persons appointed under Section 9 or 10 of this Act;

Section 2(k) "Prescribed means prescribed by rules;

Section 2(o) "Rules" means the rules made under the Act;

Section 9(1): Subject to Rules prescribed in this behalf, the Superintendant of Police may at any time, by an order in writing, appoint any person to act as a Special Police Officer for a period as specified in the appointment order.

Section 9(2): Every special police officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of the police.

Section 23: The following shall be the functions and responsibilities of a police officer:

(1) (a) To enforce the law, and to protect life, liberty, property, rights and dignity of the people;

(b) To prevent crime and public nuisance;

(c) To maintain public order;

(d) To preserve internal security, prevent and control terrorist activities and to prevent breach of public peace;

(e) To protect public property;

(f) To detect offences and bring the offenders to justice;

(g) To arrest persons whom he os legally authorized to arrest and for whose arrest sufficient grounds exist;

(h) To help people in situations arising out of mutual or man-made disasters, and to assist other agencies in relief measures;

(i) To facilitate orderly movement of people and vehicles, and to control and regulate traffic;

(j) To gather intelligence relating to matters affecting public peace and crime;

(k) To provide security to public authorities in discharging their functions;

(l) To perform all such duties and discharge such responsibilities as may be enjoined upon him by law or by an authority empowered to issue such directions under any law.

Section 24: Every police officer shall be considered to be always on duty, when employed as a police officer in the State or deployed outside the State.

Section 25: No police officer may engage in an employment or office whatsoever, other than his duties under this Act, unless expressly permitted to do so in writing by the State Government.

Section 50 (1) The State government may make rules for carrying out the purposes of this Act: Providing that existing State Police regulations shall continue to be in force till altered or repealed.

Section 50(2) All rules made under this Act shall be laid before the State Legislature as soon as possible.

Section 53 (1) The Indian Police Act (no. 5 of 1861) in its applicability to the State of Chattisgarh is hereby repealed.

38. It is noted that neither Section 9(1) nor Section 9(2) specify the conditions or circumstances under which the Superintendant of Police may appoint "any person" as a "Special Police Officer". That would be a grant of discretion without any indicia or specification of limits, either as to the number of SPOs who could be appointed, their qualifications, their training or their duties. Conferment of such unguided & uncanalised power, by itself, would clearly be in the teeth of Article 14, unless the provisions are read down so as to save them from the vice of unconstitutionality. The provisions of Section 9(1) and 9(2) of CPA 2007 may be contrasted with Section 17 of IPA, a British era legislation, which sets forth the circumstances under which such appointments could be made, and the conditions to be fulfilled. No such description of circumstances has been made in Section 9(1) or Section 9(2) of CPA 2007. In the same manner, the functions and responsibilities as provided in Section 23 of CPA 2007, so far as they are construed as being the responsibilities that may be undertaken by SPOs, except those contained in Section 23(1)(a)(h) and Section 23(1)(a)(i) have also to be read down.

39. Even though the State of Chattisgarh has submitted its New Regulatory Procedures, notified, after this Court had heard the matter at length, we have reviewed the same. We are neither impressed by the contents of the New Regulatory Procedures, nor have such New Regulatory Procedures inspired any confidence that they will make the situation any better.

40. Some of the features of these new rules are summarized as follows. The circumstances specified for appointment of SPOs include the occurrence of "terrorist/extremist" incidents or apprehension that they may occur. With regard to eligibility, the rules state that, if other qualifications are same, "person having passed 5th class shall be given preference." Furthermore, the rules specify that the SPO should be "capable of assisting the police in prevention and control of the particular problem of the area." In as much as "terrorist/extremist" incidents and activities are included in the circumstances, i.e., the particular problem of the area, it is clear that SPOs are intended to be appointed with the responsibilities of engaging in counter-insurgency activities. In point of fact, the language of the rules now indicate that their role need not be limited only to being spotters, and guides and the like, but may also include direct combat role with terrorists/extremists. Furthermore, training is to be given to those appointed as SPOs if and only if the Superintendant of the Police is "of the opinion that training is essential for him," and in any case training will be imparted only if the appointed person has been appointed for a minimum period of one year and is to be given firearms for self defence. Such training will be in "Arms, Human Rights and Law" for a minimum period of three months. The appointment is to be "totally temporary in nature", and the appointment may be terminated, "without giving any reason" by the Superintendant of Police. The SPOs are to only receive an honorarium and other benefits as "sanctioned by the State Government from time to time."

41. We must at this point also express our deepest dismay at the role of Union of India in these matters. Indeed it is true that policing, and law and order, are state subjects. However, for the Union of India to assert that its role, with respect to SPOs being appointed by the State of Chattisgarh, is limited only to approving the total number of SPOs, and the extent of reimbursement of "honourarium" paid to them, without issuing directions as to how those SPOs are to be recruited, trained and deployed for what purposes is an extremely erroneous interpretation of its constitutional responsibilities in these matters. Article 355 specifically states that "[I]t shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution." The Constitution casts a positive obligation on the State to undertake all such necessary steps in order to protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity. Given the tasks and responsibilities that the Constitution places on the State, it is extremely dismaying that the Union of India, in response to a specific direction by this Court that it file an affidavit as to what its role is with respect to appointment of SPOs in Chattisgarh, claim that it only has the limited role as set forth in its affidavit. Even a cursory glance at the affidavit of the Union of India indicates that it was filed with the purpose of taking legal shelter of diminished responsibility, rather than exhibiting an appropriate degree of concern for the serious constitutional issues involved.

42. The fact of the matter is, it is the financial assistance being given by the Union that is enabling the State of Chattisgarh to appoint barely literate tribal youth as SPOs, and given firearms to undertake tasks that only members of the official and formal police force ought to be undertaking. Many thousands of them have been appointed, and they are being

paid an "honorarium" of Rs 3000 per month, which the Union of India reimburses. That the Union of India has not seen it fit to evaluate the capacities of such tribal youth in undertaking such responsibilities in counter-insurgency activities against Maoists, the dangers that they will confront, and their other service conditions, such as the adequacy of their training, is clearly unconscionable. The stance of the Union of India, from its affidavit, has clearly been that it believes that its constitutional obligations extend only to the extent of fixing an upper limit on the number of SPOs engaged, on account of the impact on its purse, and that how such monies are used by the state governments, is not their concern. In its most recent statement to this Court, much belated, the Union of India asserts that it will only issue "advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training. Impart instruction on human rights…" This leads us to conclude that the Union of India had abdicated its responsibilities in these matters previously. The fact that even now it sees its responsibilities as consisting of only issuing of advisories to the state governments does not lead to any confidence that the Union of India intends to take all the necessary steps in mitigating a vile social situation that it has, willy-nilly, played an important role in creating.

43. It is now clear to us, as alleged by the petitioners, that thousands of tribal youth are being appointed by the State of Chattisgarh, with the consent of the Union of India, to engage in armed conflict with the Maoists/Naxalites. The facts as stated in the affidavits of the State of Chattisgarh, and Union of India themselves reveal that, contrary to the assertions that the tribal SPOs are recruited only to engage in non-combatant roles such as those of spotters, guides, intelligence gatherers, and for maintenance of local law and order, they are actually involved in combat with the Maoists/Naxalites. The fact that both the State of Chattisgarh and the Union of India themselves acknowledge that the relief camps, and the remote villages, in

which these SPOs are recruited and directed to work in, have been subject to thousands of attacks clearly indicates that in every such attack the SPOs may necessarily have to engage in pitched battles with the Maoists. This is also borne out by the fact that both the Union of India and State of Chattisgarh have acknowledged that many hundreds of civilians have been killed by Maoists/Naxalites by branding them as "police informants." This would obviously mean that SPOs would be amongst the first targets of the Maoists/Naxalites, and not be merely occasional incidental victims of violence or subject to Maoist/Naxalite attacks upon accidental or chance discovery or infrequent discovery of their true role. The new rules in fact make the situation even worse, for they specify that the person appointed as an SPO "should be capable of assisting the police in prevention and control of the particular problem of the area," which include terrorist/extremist activities. There is no specification that they will be used in only non-combatant roles or roles that do not place them in direct danger of attacks by extremists/terrorists.

44. It is also equally clear to us, as alleged by the petitioners, that the lives of thousands of tribal youth appointed as SPOs are placed in grave danger by virtue of the fact that they are employed in counter-insurgency activities against the Maoists/Naxalites in Chattisgarh. The fact that 173 of them have "sacrificed their lives" in this bloody battle, as cynically claimed by the State of Chattisgarh in its affidavit, is absolute proof of the same. It should be noted that while 538 police and CAPF personnel have been killed, out of a total strength of 40 battalions of regular security forces, in the operations against Maoists in Chattisgarh between 2004 and 2011, 173 SPOs i.e., young, and by and large functionally illiterate, tribals, have been killed in the same period. If one were to take, roughly, the strength of each battalion to be 1000 to 1200 personnel, the ratio of deaths of formal security personnel to total security personnel engaged is roughly 538 to about 45000 to 50000 personnel. That itself is a cause for concern, and a continuing

tragedy. Given the fact that the strength of the SPOs till last year was only 3000 (and has now grown to 6500), the ratio of number of SPOs killed (173) to the strength of SPOs (3000 to 4000) is of a much higher order, and is unconscionable. Such a higher rate of death, as opposed to what the formal security forces have suffered, can only imply that these SPOs are involved in front line battles, or that they are, by virtue of their roles as SPOs, being placed in much more dangerous circumstances, without adequate safety of numbers and strength that formal security forces would possess.

45. It is also equally clear to us that in this policy, of using local youth, jointly devised by the Union and the States facing Maoist insurgency, as implemented in the State of Chattisgarh, the young tribals have literally become canon fodder in the killing fields of Dantewada and other districts of Chattisgarh. The training, that the State of Chattisgarh claims it is providing those youngsters with, in order to be a part of the counter-insurgency against one of the longest lasting insurgencies mounted internally, and indeed may also be the bloodiest, is clearly insufficient. Modern counter-insurgency requires use of sophisticated analytical tools, analysis of data, surveillance etc. According to various reports, and indeed the claims of the State itself, Maoists have been preparing themselves on more scientific lines, and gained access to sophisticated weaponry. That the State of Chattisgarh claims that these youngsters, with little or no formal education, are expected to learn the requisite range of analytical skills, legal concepts and other sophisticated aspects of knowledge, within a span of two months, and that such a training is sufficient for them to take part in counter-insurgency against the Maoists, is shocking.

46. The State of Chattisgarh has itself stated that in recruiting these tribal youths as SPOs "preference for those who have passed the fifth" standard has been given. This clearly implies that some, or many, who have been recruited as SPOs may not have even passed the fifth standard. Under the new

rules, it is clear that the State of Chattisgarh would continue to recruit youngsters with such limited schooling. It is shocking that the State of Chattisgarh then turns around and states that it had expected such youngsters to learn, adequately, subjects such as IPC, CRPC, Evidence Act, Minors Act etc. Even more shockingly the State of Chattisgarh claims that the same was achieved in a matter of 24 periods of instruction of one hour each. Further, the State of Chattisgarh also claims that in an additional 12 periods, both the concepts of Human Rights and "other provisions of Indian Constitution" had been taught. Even more astoundingly, it claims that it also taught them scientific and forensic aids in policing in 6 periods. The State of Chattisgarh also claims, with regard to the new rules, that "the idea behind better schedule of training for SPOs is to make them more sensitized to the problems faced by local tribes." This supposed to be achieved by increasing the total duration of training by an extra month, for youngsters who may or may not have passed the fifth class.

47. We hold that these claims are simply lacking in any credibility. Even if one were to assume, for the sake of argument, that such lessons are actually imparted, it would be impossible for any reasonable person to accept that tribal youngsters, who may, or may not, have passed the fifth standard, would possess the necessary scholastic abilities to read, appreciate and understand the subjects being taught to them, and gain the appropriate skills to be engaged in counter-insurgency movements against the Maoists.

48. The State of Chattisgarh accepts the fact that many, and for all we know most, of these young tribals being appointed as SPOs have been provided firearms and other accoutrements necessary to bear and use such firearms, and will continue to be so provided in the future under the new rules. While the State of Chattisgarh claims that they are being provided such arms only for self-defence, it is clear that given the levels of education that these tribal youth are expected to

have had, and the training they are being provided, they would simply not possess the analytical and cognitive skills to read and understand the complex socio-legal dimensions that inform the concept of self-defence, and the potential legal liabilities, including serious criminal charges, in the event that the firearms are used in a manner that is not consonant with the concept of self-defence. Even if we were to assume, purely for the sake of argument, that these youngsters were being engaged as gatherers of intelligence or secret informants, the fact that by assuming such a role they are potentially placed in an endangered position vis-à-vis attacks by Maoists, they are obviously being put in volatile situations in which the distinctions between self-defence and unwarranted firing of a firearm may be very thin and requiring a high level of discretionary judgment. Given their educational levels it is obvious that they simply will not have the skills to make such judgments; and further because of low educational levels, the training being provided to them will not develop such skills.

49. The State of Chattisgarh claims that they are only employing those tribal youth who volunteer for such responsibilities. It also claims that many of the youth who are coming forward are motivated to do so because they or their families have been victims of Naxal violence or want to defend their hearth and home from attacks by Naxals. We simply fail to see how, even assuming that the claims by State of Chattisgarh to be true, such factors would lessen the moral culpability of the State of Chattisgarh, or make the situation less problematic in terms of human rights violations of the youngsters being so appointed as SPOs.

50. First and foremost given that their educational levels are so low, we cannot, under any conditions of reasonableness, assume that they even understand the implications of engaging in counter-insurgency activities bearing arms, ostensibly for self-defence, and being subject to all the disciplinary codes and criminal liabilities that may arise on account of their actions.

Under modern jurisprudence, we would have to estimate the degree of free will and volition, with due respect to, and in the context of, the complex concepts they are being expected to grasp, including whether the training they are being provided is adequate or not for the tasks they are to perform. We do not find appropriate conditions to infer informed consent by such youngsters being appointed as SPOs. Consequently we will not assume that these youngsters, assuming that they are over the age of eighteen, have decided to join as SPOs of their own free will and volition.

51. Furthermore, the fact that many of those youngsters maybe actuated by feelings of revenge, and reasonably expected to have a lot of anger, would militate against using such youngsters in counter-insurgency activities, and entrusted with the responsibilities that they are being expected to discharge. In the first instance, it can be easily appreciated that given the increasing sophistication of methods used by the Maoists, counter-insurgency activities would require a cool and dispassionate head, and demeanour to be able to analyze the current and future course of actions by them. Feelings of rage, and of hatred would hinder the development of such a dispassionate analysis. Secondly, it can also be easily appreciated that such feelings of rage, and hatred, can easily make an individual highly suspicious of everyone. If one of the essential tasks of such tribal youth as SPOs is the identification of Maoists, or their sympathizers, their own mental make up, in all probability would or could affect the degree of accuracy with which they could make such identification. Local enmities, normal social conflict, and even assertion of individuality by others against over-bearing attitude of such SPOs, could be cause to brand persons unrelated to Maoist activities as Maoists, or Maoist sympathizers. This in turn would almost certainly vitiate the atmosphere in those villages, lead to situations of grave violation of human rights of innocent people, driving even more to take up arms against the state.

52. Many of these tribal youngsters, on account of the violence perpetrated against them, or their kith and kin and others in the society in which they live, have already been dehumanized. To have feelings of deep rage, and hatred, and to suffer from the same is a continuation of the condition of dehumanization. The role of a responsible society, and those who claim to be concerned of their welfare, which the State is expected to under our Constitution, ought to be one of creating circumstances in which they could come back or at least tread the path towards normalcy, and a mitigation of their rage, hurt, and desires for vengeance. To use such feelings, and to direct them into counter-insurgency activities, in which those youngsters are placed in grave danger of their lives, runs contrary to the norms of a nurturing society. That some misguided policy makers strenuously advocate this as an opportunity to use such dehumanised sensibilities in the fight against Maoists ought to be a matter of gravest constitutional concerns and deserving of the severest constitutional opprobrium.

53. It is abundantly clear, from the affidavits submitted by the State of Chattisgarh, and by the Union of India, that one of the primary motives in employing tribal youth as SPOs is to make up for the lack of adequate formal security forces on the ground. The situation, as we have said before, has been created, in large part by the socio-economic policies followed by the State. The policy of privatization has also meant that the State has incapacitated itself, actually and ideologically, from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed. To use those tribal youngsters, as SPOs to participate in counter-insurgency actions against Maoists, even though they do not have the necessary levels of education and capacities to learn the necessary skills, analytical tools and gain knowledge to engage in the such activities and the dangers that they are subjected to, clearly indicates that issues of finance have

overridden other considerations such as effectiveness of such SPOs and of constitutional values.

54. The State of Chattisgarh claims that in providing such "employment" they are creating livelihoods, and consequently promoting the values enshrined in Article 21. We simply cannot comprehend how involving ill equipped, barely literate youngsters in counter insurgency activities, wherein their lives are placed in danger could be conceived under the rubric of livelihood. Such a conception, and the acts of using such youngsters in counter-insurgency activities, is necessarily revelatory of disrespect for the lives of the tribal youth, and defiling of their human dignity.

55. It is clear to us, and indeed as asserted by the State of Chattisgarh, that these tribal youngsters, appointed as SPOs, are being given firearms on the ground that SPOs are treated "legally" as full fledged members of the police force, and are expected to perform the duties, bear the liabilities, and be subject to the same disciplinary code. These duties and responsibilities includes the duty of putting their lives on the line. Yet, the Union of India, and the State of Chattisgarh, believe that all that they need to be paid is an "honorarium," and this they claim is a part of their endeavour to promote livelihoods amongst tribal youth, pursuant to Article 21. We simply fail to see how Article 14 is not violated in as much as these SPOs are expected to perform all the duties of police officers, be subject to all the liabilities and disciplinary codes, as members of the regular police force, and in fact place their lives on the line, plausibly even to a greater extent than the members of the regular security forces, and yet be paid only an "honorarium".

56. The appointment of these tribal youngsters as SPOs to engage in counter-insurgency activities is temporary in nature. In fact the appointment for one year, and extendable only in increments of a year at a time, can only be described as of short duration. Under the new rules, freshly minted by the State

of Chattisgarh, they can be dismissed by the Superintendent of Police without giving any reasons whatsoever. The temporary nature of such appointments immediately raises serious concerns. As acknowledged by the State of Chattisgarh, and the Union of India, the Maoist activities in Chattisgarh have been going on from 1980's, and it seems have become more intense over the past one decade. The State of Chattisgarh also acknowledges that it has to give fire-arms to these tribal youngsters appointed as SPOs because they face grave danger, to their lives, from the Maoists. In fact, Maoists are said to kill even ordinary civilians after branding them as "police informants". Obviously, in such circumstances, it would only be reasonable to conclude that these tribal youth appointed as SPOs, and known to work as informants about who is a Maoist or a Maoist supporter, spotters, guides and providers of terrain knowledge, would become special targets of the Maoists. The State of Chattisgarh reveals no ideas as to how it expects these youngsters to protect themselves, or what special protections it offers, after serving as SPOs in the counter-insurgency efforts against the Maoists. Obviously, these youngsters would have to hand back their firearms to the police upon the expiry of their term. This would mean that these youngsters would become sitting ducks, to be picked off by Maoists or whoever may find them inconvenient. The State of Chattisgarh has also revealed that 1200 of SPOs appointed so far have been dismissed for indiscipline or dereliction of duties. That is an extraordinarily high number, given that the total SPOs appointed in the State of Chattisgarh until last year were only 3000, and the number now stands at 6500. The fact that such indiscipline, or dereliction of duties, has been the cause for dismissal from service of anywhere from 20% to 40% of the recruits has to be taken as a clear testimony of the fact that the entire selection policies, practices, and in fact the criteria for selection are themselves wrong. The consequence of continuation of such policies would be that an inordinate number of such tribal youth, after becoming marked for death by Maoists/Naxalites the very

instant they are appointed as SPOs, would be left out in the lurch, with their lives endangered, after their temporary appointment as SPOs is over.

57. The above cannot be treated as idle speculations. The very facts and circumstances revealed by the State of Chattisgarh leads us to the above as an inescapable conclusion. However, this tragic story does not end here either. It begins to get far worse, because it implicates grave danger to the social fabric in those regions in which these SPOs are engaged to work in anti-Maoist counter insurgency activities.

58. We specifically, and repeatedly, asked the State of Chattisgarh, and the Union of India as to how, and in what manner they would take back the firearms given to thousands of youngsters. No answer has been given so far. If force is used to collect such firearms back, without those youngsters being given a credible answer with respect to their questions regarding their safety, in terms of their lives, after their appointment ends, it is entirely conceivable that those youngsters refuse to return them. Consequently, we would then have a large number of armed youngsters, running scared for their lives, and in violation of the law. It is entirely conceivable that they would then turn against the State, or at least defend themselves using those firearms, against the security forces themselves; and for their livelihood, and subsistence, they could become roving groups of armed men endangering the society, and the people in those areas, as a third front.

59. Given the number of civil society groups, and human rights activists, who have repeatedly been claiming that the appointment of tribal youths as SPOs, sometimes called Koya Commandos, or the Salwa Judum, has led to increasing human rights violations, and further given that NHRC itself has found that many instances of looting, arson, and violence can be attributed to the SPOs and the security forces, we cannot but apprehend that such incidents are on account of the lack of control, and in fact the lack of ability and moral authority to

control, the activities of the SPOs. The appointment of tribal youth as SPOs, who are barely literate, for temporary periods, and armed with firearms, has endangered and will necessarily endanger the human rights of others in the society.

60. In light of the above, we hold that both Article 21 and Article 14 of the Constitution of India have been violated, and will continue to be violated, by the appointment of tribal youth, with very little education, as SPOs engaged in counter-insurgency activities. The lack of adequate prior education incapacitates them with respect to acquisition of skills, knowledge and analytical tools to function effectively as SPOs engaged in any manner in counter-insurgency activities against the Maoists.

61. Article 14 is violated because subjecting such youngsters to the same levels of dangers as members of the regular force who have better educational backgrounds, receive better training, and because of better educational backgrounds possess a better capacity to benefit from training that is appropriate for the duties to be performed in counter insurgency activities, would be to treat unequal as equals. Moreover, in as much as such youngsters, with such low educational qualifications and the consequent scholastic inabilities to benefit from appropriate training, can also not be expected to be effective in engaging in counter-insurgency activities, the policy of employing such youngsters as SPOs engaged in counter-insurgency activities is irrational, arbitrary and capricious.

62. Article 21 is violated because, notwithstanding the claimed volition on the part of these youngsters to appointment as SPOs engaged in counter-insurgency activities, youngsters with such low educational qualifications cannot be expected to understand the dangers that they are likely to face, the skills needed to face such dangers, and the requirements of the necessary judgment while discharging such responsibilities. Further, because of their low levels of educational

achievements, they will also not be in a position to benefit from an appropriately designed training program, that is commensurate with the kinds of duties, liabilities, disciplinary code and dangers that they face, to their lives and health. Consequently, appointing such youngsters as SPOs with duties, that would involve any counter-insurgency activities against the Maoists, even if it were claimed that they have been put through rigorous training, would be to endanger their lives. This Court has observed in *Olga Tellis v. Bombay Muncipal Corporation*[10] that:

> *" "Life", as observed by Field J., in Munn v. Illinois means something more than mere animal existence, and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed."*

63. Certainly, within the ambit of all those "limits and faculties by which life is enjoyed" also lies respect for dignity of a human being, irrespective of whether he or she is poor, illiterate, less educated, and less capable of exercising proper choice. The State, has been found to have the positive obligation, pursuant to Article 21, to necessarily undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity. The Preamble of our Constitution affirms as the goal of our nation, the promotion of human dignity. The actions of the State, in appointing barely literate youngsters, as SPOs engaged in counter-insurgency activities, of any kind, against the Maoists, who are incapable, on account of low educational achievements, of learning all the skills, knowledge and analytical tools to perform such a role, and thereby endangering their lives, is necessarily a denigration of their dignity as human beings.

64. To employ such ill equipped youngsters as SPOs engaged in counterinsurgency activities, including the tasks of identifying Maoists and non-Maoists, and equipping them with

10. (1985) 3 SCC 545.

firearms, would endanger the lives of others in the society. That would be a violation of Article 21 rights of a vast number of people in the society.

65. That they are paid only an "honorarium", and appointed only for temporary periods, are further violations of Article 14 and Article 21. We have already discussed above, as to how payment of honorarium to these youngsters, even though they are expected to perform the all of the duties of regular police officers, and place themselves in dangerous situations, equal to or even worse than what regular police officers face, would be a violation of Article 14. To pay only an honorarium to those youngsters, even though they place themselves in equal danger, and in fact even more, than regular police officers, is to denigrate the value of their lives. It can only be justified by a cynical, and indeed an inhuman attitude, that places little or no value on the lives of such youngsters. Further, given the poverty of those youngsters, and the feelings of rage, and desire for revenge that many suffer from, on account of their previous victimization, in a brutal social order, to engage them in activities that endanger their lives, and exploit their dehumanized sensibilities, is to violate the dignity of human life, and humanity.

66. It has also been analysed above as to how the temporary nature of employment of these youngsters, as SPOs engaged in counter-insurgency activities of any kind, endangers their lives, subjects them to dangers from Maoists even after they have been disengaged from duties of such appointment, and further places the entire society, and individuals and groups in the society, at risk. They are all clearly violations of Article 21.

67. It is in light of the above, that we proceed to pass appropriate orders. However, there are a few important matters that we necessarily have to address ourselves to at this stage. This necessity arises on account of the fact that the State of Chattisgarh, and the Union of India, claim that employing such

youngsters as SPOs engaged in counter-insurgency activities is vital, and necessary to provide security to the people affected by Maoist violence, and to fight the threat of Maoist extremism.

68. Indeed, we recognize that the State faces many serious problems on account of Maoist/Naxalite violence. Notwithstanding the fact that there may be social and economic circumstances, and certain policies followed by the State itself, leading to emergence of extremist violence, we cannot condone it. The attempt to overthrow the State itself and kill its agents, and perpetrate violence against innocent civilians, is destructive of an ordered life. The State necessarily has the obligation, moral and constitutional, to combat such extremism, and provide security to the people of the country. This, as we explained is a primordial necessity. When the judiciary strikes down state policies, designed to combat terrorism and extremism, we do not seek to interfere in security considerations, for which the expertise and responsibility lie with the executive, directed and controlled by the legislature. Judiciary intervenes in such matters in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life. Indeed, such expertise and responsibilities vest in the judiciary. In a recent judgment by a constitutional bench, G.V.K Industries v. ITO[11] this Court observed:

> "Our Constitution charges the various organs of the state with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation…. powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that such power is being used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the

11. (2011) 4 SCC 36.

> government in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. *Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge."*

69. As we heard the instant matters, we were acutely aware of the need to walk on that razors edge. In arriving at the conclusions we have, we were guided by the facts, and constitutional values. The primordial value is that it is the responsibility of every organ of the State to function within the four corners of constitutional responsibility. That is the ultimate rule of law.

70. It is true that terrorism and/or extremism plagues many countries, and India, unfortunately and tragically, has been subject to it for many decades. The fight against terrorism and/or extremism cannot be effectuated by constitutional democracies by whatever means that are deemed to be efficient. Efficiency is not the sole arbiter of all values, and goals that constitutional democracies seek to be guided by, and achieve. Means which may be deemed to be efficient in combating some immediate or specific problem, may cause damage to other constitutional goals, and indeed may also be detrimental to the quest to solve the issues that led to the problems themselves. Consequently, all efficient means, if indeed they are efficient, are not legal means, supported by constitutional frameworks. As Aharon Barak, the former President of the Supreme Court of Israel, while discussing the war on terrorism, wrote in his opinion in the case of *Almadani*

v. Ministry of Defense[12] opinion:

> "*….This combat is not taking place in a normative void…. The saying, "When the canons roar, the Muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. The foundations of this approach is not only pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law, and in the name of upholding the law. The terrorists fight against the law, and exploit its violation. The war against terror is also the law's war against those who rise up against it."*

71. As we remarked earlier, the fight against Maoist/Naxalite violence cannot be conducted purely as a mere law and order problem to be confronted by whatever means the State can muster. The primordial problem lies deep within the socio-economic policies pursued by the State on a society that was already endemically, and horrifically, suffering from gross inequalities. Consequently, the fight against Maoists/Naxalites is no less a fight for moral, constitutional and legal authority over the minds and hearts of our people. Our constitution provides the gridlines within which the State is to act, both to assert such authority, and also to initiate, nurture and sustain such authority. To transgress those gridlines is to act unlawfully, imperiling the moral and legal authority of the State and the Constitution. We, in this Court, are not unaware of the gravity that extremist activities pose to the citizens, and to the State. However, our Constitution, encoding eons of human wisdom, also warns us that ends do not justify all means, and that an essential and integral part of the ends to which the collective power of the people may be used to achieve has to necessarily keep the

12. H.C. 3451/02, 56(3) P.D., also cited in Aharon Back: "The Judge in a Democracy" (Princeton University Press, 2003)

means of exercise of State power within check and constitutional bounds. To act otherwise is to act unlawfully, and as Philip Bobbitt warns, in "Terror and Consent – The Wars for the Twenty First Century"[13], "if we act lawlessly, we throw away the gains of effective action." Laws cannot remain silent when the canon's roar.

72. The response of law, to unlawful activities such as those indulged in by extremists, especially where they find their genesis in social disaffection on account of socio-economic and political conditions has to be rational within the borders of constitutional permissibility. This necessarily implies a two-fold path: (i) undertaking all those necessary socially, economically and politically remedial policies that lessen social disaffection giving rise to such extremist violence; and (ii) developing a well trained, and professional law enforcement capacities and forces that function within the limits of constitutional action.

73. The creation of a cadre like groups of SPOs, temporarily employed and paid an honorarium, out of uneducated or undereducated tribal youth, many of who are also informed by feelings of rage, hatred and a desire for revenge, to combat Maoist/Naxalite activities runs counter to both those prescriptions. We have dealt with the same extensively hereinabove. We need to add one more necessary observation. It is obvious that the State is using the engagement of SPOs, on allegedly temporary basis and by paying "honoraria", to overcome the shortages and shortcomings of currently available capacities and forces within the formal policing structures. The need itself is clearly a long-run need. Consequently, such actions of the State may be an abdication of constitutional responsibilities to provide appropriate security to citizens, by having an appropriately trained professional police force of sufficient numbers and properly equipped on a permanent basis. These are essential state functions, and cannot be divested or discharged through the creation of

13. Penguin Book (Allen Lane) (2008).

temporary cadres with varying degrees of state control. They necessarily have to be delivered by forces that are and personnel who are completely under the control of the State, permanent in nature, and appropriately trained to discharge their duties within the four corners of constitutional permissibility. The conditions of employment of such personnel also have to hew to constitutional limitations. The instant matters, in the case of SPOs in Chattisgarh, represent an extreme form of transgression of constitutional boundaries.

74. Both the Union of India, and the State of Chattisgarh, have sought to rationalize the use of SPOs in Chattisgarh, in the mode and manner discussed at length above, on the ground that they are effective in combating Maoist/Naxalite activities and violence, and that they are "force multipliers." As we have pointed out hereinabove, the adverse effects on society, both current and prospective, are horrific. Such policies by the State violate both Article 14 and Article 21, of those being employed as SPOs in Chattisgarh and used in counter-insurgency measures against Maoists/Naxalites, as well as of citizenry living in those areas. The effectiveness of the force ought not to be, and cannot be, the sole yardstick to judge constitutional permissibility. Whether SPOs have been "effective" against Maoist/Naxalite activities in Chattisgarh it would seem to be a dubious, if not a debunked, proposition given the state of affairs in Chattisgarh. Even if we were to grant, for the sake of argument, that indeed the SPOs were effective against Maoists/Naxalites, the doubtful gains are accruing only by the incurrence of a massive loss of fealty to the Constitution, and damage to the social order. The "force" as claimed by the State, in the instant matters, is inexorably leading to the loss of the force of the Constitution. Constitutional fealty does not, cannot and ought not to permit either the use of such a force or its multiplication. Constitutional propriety is not a matter of throwing around arbitrarily selected, and inanely used, phrases such as "force multipliers." Constitutional adjudication, and protection of civil liberties, by this Court is a far, far more sacred a duty to

be swayed by such arguments and justifications.

Order:

75. We order that:

(i) The State of Chattisgarh immediately cease and desist from using SPOs in any manner or form in any activities, directly or indirectly, aimed at controlling, countering, mitigating or otherwise eliminating Maoist/Naxalite activities in the State of Chattisgarh;

(ii) The Union of India to cease and desist, forthwith, from using any of its funds in supporting, directly or indirectly the recruitment of SPOs for the purposes of engaging in any form of counter-insurgency activities against Maoist/Naxalite groups;

(iii) The State of Chattisgarh shall forthwith make every effort to recall all firearms issued to any of the SPOs, whether current or former, along with any and all accoutrements and accessories issued to use such firearms. The word firearm as used shall include any and all forms of guns, rifles, launchers etc., of whatever caliber;

(iv) The State of Chattisgarh shall forthwith make arrangements to provide appropriate security, and undertake such measures as are necessary, and within bounds of constitutional permissibility, to protect the lives of those who had been employed as SPOs previously, or who had been given any initial orders of selection or appointment, from any and all forces, including but not limited to Maoists/Naxalites; and

(v) The State of Chattisgarh shall take all appropriate measures to prevent the operation of any group,

including but not limited to Salwa Judum and Koya Commandos, that in any manner or form seek to take law into private hands, act unconstitutionally or otherwise violate the human rights of any person. The measures to be taken by the State of Chattisgarh shall include, but not be limited to, investigation of all previously inappropriately or incompletely investigated instances of alleged criminal activities of Salwa Judum, or those popularly known as Koya Commandos, filing of appropriate FIR's and diligent prosecution.

76. In addition to the above, we hold that appointment of SPOs to perform any of the duties of regular police officers, other than those specified in Section 23(1)(h) and Section 23(1)(i) of Chattisgarh Police Act, 2007, to be unconstitutional. We further hold that tribal youth, who had been previously engaged as SPOs in counter-insurgency activities, in whatever form, against Maoists/Naxalites may be employed as SPOs to perform duties limited to those enumerated in Sections 23(1)(h) and 23(1)(i) of CPA 2007, provided that they have not engaged in any activities, whether as a part of their duties as SPOs engaged in any form of counter-insurgency activities against Maoists/Naxalites, and Left Wing Extremism or in their own individual or private capacities, that may be deemed to be violations of human rights of other individuals or violations of any disciplinary code or criminal laws that they were lawfully subject to.

IV

Matters relating to allegations by Swami Agnivesh, and alleged incidents in March 2011.

77. We now turn our attention to the allegations made by Swami Agnivesh, with regard to the incidents of violence perpetrated against and in the villages of Morpalli, Tadmetla and Timmapuram, as well as incidents of violence allegedly

perpetrated by people, including SPOs, Koya Commandos, and/or members of Salwa Judum, against Swami Agnivesh and others travelling with him in March 2011 to provide humanitarian aid to victims of violence in the said villages.

78. In this regard we note the affidavit filed by the State of Chattisgarh in response to the above. We note with dismay that the affidavit appears to be nothing more than an attempt at self-justification and rationalization, rather than an acknowledgment of the constitutional responsibility to take such instances of violence seriously. The affidavit of the State of Chattisgarh is itself an admission that violent incidents had occurred in the above named three villages, and also that incidents of violence had been perpetrated by various people against Swami Agnivesh and his companions. We note that the State of Chattisgarh has offered to constitute an inquiry commission, headed by a sitting or a retired judge of the High Court. However, we are of the opinion that these measures are inadequate, and given the situation in Chattisgarh, as extensively discussed by us, unlikely to lead to any satisfactory result under the law. This Court had previously noted that inquiry commissions, such as the one offered by the State of Chattisgarh, may at best lead to prevention of such incidents in the future. They however do not fulfill the requirement of the law: that crimes against citizens be fully investigated and those engaging in criminal activities be punished by law. (See Sanjiv Kumar v State of Haryana[14] Consequently, we are constrained to order as below.

Order:

79. We order the Central Bureau of Investigation to immediately take over the investigation of, and taking appropriate legal actions against all individuals responsible for:

(i) The incidents of violence alleged to have occurred, in March 2011, in the three villages, Morpalli,

14. (2005) 5 SCC 517.

Tadmetla and Timmapuram, all located in the Dantewada District or its neighboring areas;

(ii) The incidents of violence alleged to have been committed against Swami Agnivesh, and his companions, during their visit to State of Chattisgarh in March 2011.

80. We further direct the Central Bureau of Investigation to submit its preliminary status report within six weeks from today.

We also further direct, the State of Chattisgarh and the Union of India, to submit compliance reports with respect to all the orders and directions issued today within six weeks from today.

81. List for further directions in the first week of September 2011.

N.J. Matter adjourned.

SPECIAL LAND ACQUISITION OFFICER AND ANR.
v.
M.K. RAFIQ SAHEB
(Civil Appeal No. 1086 of 2006)

JULY 05, 2011

[ASOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894:252

Compensation – Determination of market value of land – Comparative sales method – High Court relied upon exemplar Ex.P5 to determine the market value of compensation – Ex. P-5 related to a small piece of land, whereas the acquisition was of a larger piece of land – Whether Ex. P5 could be used to determine the market value of land – Held: It is not an absolute rule that when the acquired land is a large tract of land, sale instances relating to smaller pieces of land cannot be considered – There are certain circumstances when sale deeds of small pieces of land can be used to determine the value of acquired land which is comparatively large in area –The sale of land containing large tracks are generally very far and few – This limitation of sale transaction cannot operate to the disadvantage of the claimants – Thus, the Court should look into sale instances of smaller pieces of land while applying reasonable element of deduction – In the present case, the land acquired was 34 guntas and the notification under section 4 of the Act was issued on 17.7.1994 – The Reference Court had relied upon the compensation awarded for acquisition of land in the neighbouring villages, which had occurred 5 years prior to the present acquisition – However, the market value of the land acquired in the present case is much better reflected by exemplar Ex. P-5, which relates to sale of land just 2 kms. away from the acquired land and is

just a little over a year before the issuance of the s.4 notification in the present case – Thus, the sale deed Ex. P-5 was rightly relied upon by the High Court in determining compensation – However, High Court made 50% deduction since the sale instance Ex. P-5 related to a smaller piece of land – The said deduction should be increased to 60%, which would be fair, just and reasonable in the circumstances – Judgment of High Court modified to the extent of the said deduction.

Nature of acquired land – Whether the land in question was agricultural land or had it ceased to be so – Held: That the land had ceased to be agricultural land and was capable of being used as a residential or industrial site is a concurrent finding of fact by both the Courts below (Reference Court and the High Court) and is amply supported by the evidence on record – Appellant did not file any appeal impugning the finding of the Reference Court that the land could not be treated as agricultural land – Not having done so, it was not open to the appellant to question the finding of the High Court that the land is not agricultural land – Otherwise also, in light of the fact that the land in question was situated by the side of a residential locality and was in the midst of a highly developed industrial locality, the acquired land was capable of being used for non-agricultural purposes and should be considered as non-agricultural land in determination of compensation.

A notification was published under section 4(1) of the Land Acquisition Act, 1894 for acquisition of the respondents' land measuring 34 guntas (i.e. a large tract of land). The Special Land Acquisition Officer (SLAO) concluded that the lands in question were agricultural and passed award granting compensation at Rs.1,30,000/- per acre along with statutory benefits. Dissatisfied by the award of the SLAO, the respondent filed a reference under section 18 of the Act for enhancement of compensation. The Reference Court concluded that

though the land in question remained agricultural land on the records, it could not be said that the said land was agricultural land for all practical purposes since it was situated by the side of a residential locality and was in the midst of a highly developed industrial locality and no agricultural activities could be carried out on it. Relying upon sale instances in the neighbouring villages, which had occurred five years prior to the present acquisition, the Reference Court enhanced the compensation to Rs.4,00,000/- per acre and also awarded statutory benefits. The respondent, still dissatisfied with the compensation awarded, filed appeal before the High Court. The High Court accepted the finding of the Reference Court that the land had ceased to be agricultural land and was fit to be used as a housing site or an industrial site and thereafter further enhanced the compensation to Rs.35,17,470/- per acre by placing reliance upon exemplar Ex. P-5 – which related to sale of a small piece of non-agricultural land just 2 kms. away from the acquired land and just a little over a year before the issuance of the section 4 notification in the present case, and also awarded all other statutory benefits.

In the instant appeal, the question which arose for consideration was whether High Court was justified in enhancing the compensation. Two other related questions which arose for consideration were- a.) Whether the land in question was agricultural land or had it ceased to be so and b.) Whether Ex. P5 could be used to determine the market value of land.

Disposing of the appeal, the Court

HELD:1.1.The plea of appellant that the land in question was agricultural land is not acceptable. That the land had ceased to be agricultural land and was capable of being used as a residential or industrial site is a concurrent finding of fact by both the Courts below and

is amply supported by the evidence on record. The appellant did not file any appeal impugning the finding of the Reference Court that the land could not be treated as agricultural land. Not having done so, it is not open to the appellant to question the finding of the High Court that the land is not agricultural land. [Paras 14,15] [1097-E-G]

1.2. Otherwise also, in light of the fact that the land was situated by the side of a residential locality and was in the midst of a highly developed industrial locality, the acquired land was capable of being used for non-agricultural purposes and should be considered as non-agricultural land in determination of compensation. [Para 16] [1097-H; 1098-A-B]

Anjani Molu Dessai v. State of Goa and Anr. **(2010) 13 SCC 710: 2010 (14) SCR 997 – relied on.**

J. Narayan v. Land Acquisition Officer **(1980) 2 KLJ 441 – referred to.**

2. The High Court relied on Ex.P5 to determine the market value of compensation. The judgment of the High Court is well reasoned and well considered. The only issue is that Ex. P-5, which was relied upon by the High Court, relates to a small piece of land, whereas the acquisition is of a larger piece of land. However, it is not an absolute rule that when the acquired land is a large tract of land, sale instances relating to smaller pieces of land cannot be considered. There are certain circumstances when sale deeds of small pieces of land can be used to determine the value of acquired land which is comparatively large in area. [Paras 17, 18] [1098-E-H; 1099-A]

Land Acquisition Officer, Kammarapally Village, Nizamabad District, Andhra Pradesh v. Nookala Rajamallu and Ors. **(2003) 12 SCC 334: 2003 (6) Suppl. SCR 67;**

Bhagwathula Samanna and Ors. v. Special Tahsildar and Land Acquisition Officer **(1991) 4 SCC 506: 1991 (1) Suppl. SCR 172;** *Land Acquisition Officer, Revenue Divisional Officer, Chittoor v. Smt. L. Kamalamma (dead) by Lrs. and others* **AIR 1998 SC 781: 1998 (1) SCR 1153 – relied on.**

Smt. Basavva and Ors. v. Special Land Acquisition Officer and Ors **AIR 1996 SC 3168: 1996 (3) SCR 500 – referred to.**

3. In the normal course of events, it is hardly possible for a claimant to produce sale instances of large tracks of land. The sale of land containing large tracks are generally very far and few. Normally, the sale instances would relate to small pieces of land. This limitation of sale transaction cannot operate to the disadvantage of the claimants. Thus, the Court should look into sale instances of smaller pieces of land while applying reasonable element of deduction. [Para 23] [1100-G-H]

4. In the present case, the land acquired is 34 guntas and the notification under section 4 of the Act was issued on 17.7.1994. For the purposes of determining compensation, the acquired land should be considered to be non-agricultural land. Ex. P-5 is a sale deed for sale of a non-agricultural land dated 23.4.1993. The land covered by the sale deed is about 2 kms. away from the acquired land. In contrast, the Reference Court relied upon the compensation awarded for acquisition of land in the neighbouring villages, which had occurred 5 years prior to the present acquisition. The market value of the land acquired in the present case is much better reflected by exemplar Ex. P-5, which relates to sale of land just 2 kms. away from the acquired land and is just a little over a year before the issuance of the section 4 notification in the present case. Thus, the sale deed Ex. P-5 was rightly relied upon by the High Court in determining compensation. [Paras 24 to 26] [1101-A-E]

5. The High Court made a 50% deduction since the sale instance Ex. P-5 related to a smaller piece of land. This Court is of the considered view that the said deduction should be increased to 60%, which would be fair, just and reasonable in the circumstances. Hence, the judgment of the High Court is modified to the extent of the abovementioned deduction. All other findings of the High Court are sustained. [Paras27,28] [1101-F-G]

Case Law Reference:

(1980) 2 KLJ 441	**referred to**	**Para 7**
2010 (14) SCR 997	**relied on**	**Para 16**
2003 (6) Suppl. SCR 67	**relied on**	**Para 19**
1991 (1) Suppl. SCR 172	**relied on**	**Para 20**
1998 (1) SCR 1153	**relied on**	**Para 21**
1996 (3) SCR 500	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1086 of 2006.

From the Judgment & Order dated 17.06.2004 of the High Court of Karnataka, Bangalore in Misc. First Appeal No. 3832 of 1999.

P.P. Malhothra, ASG, Vimla Sinha, Sunita Sharma, Anil Katiyar for the Appellants.

Kiran Suri, Vijay Verma for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. The issue involved in the present case is whether the quantum of compensation awarded by the High Court in a land acquisition dispute is excessive or not.

2. A notification was published under section 4(1) of the

Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') on 17.7.1994 for the acquisition of the respondents land measuring 34 guntas in Sy. No. 6/2 of Binnamangala Mahavartha Kaval, K.R. Puram, Bangalore South Taluk.

3. The Special Land Acquisition Officer (hereinafter referred to as 'SLAO') passed an award on 26.9.1995 granting compensation at Rs.1,30,000/- per acre along with statutory benefits. The SLAO concluded that the lands were agricultural and no sale transactions relating to the same were available. Sale transactions were available in respect of non-agricultural lands but they could not be adopted for determining the valuation of agricultural land. Therefore, the SLAO chose to rely on acquisition proceedings in respect of lands in the vicinity for determining land value. Accordingly, it was found that in the neighbouring villages of Benniganahalli, B. Narayanapura and Kaggadasapura villages, land had been acquired in favour of DRDO complex where the government had approved awards fixing land value at Rs.1,30,000/-. The said valuation was thus adopted by the SLAO in the instant case.

4. Possession of the land was taken on 11.4.1996.

5. Dissatisfied by the award of the SLAO, the respondent filed a reference under section 18 of the Act for enhancement of compensation.

6. The Reference Court, vide judgment dated 28.5.1999, enhanced compensation to Rs.4,00,000/- per acre and also awarded statutory benefits. The Reference Court concluded that based on the evidence on record, it could not be said that the land in question was agricultural land for all practical purposes since it was situated by the side of a residential locality and was in the midst of a highly developed industrial locality. Thus, it held that though the land remained agricultural land on the records, it was not an agricultural land for all practical purposes and no agricultural activities could be carried out on it. The Court did not rely upon sale deeds Exhibit P3,

P4, P5, P6, P7 and P8. Exhibit P7 and P8 were not relied upon as the parties to the transaction had not been examined. Ex. P3 and P4 were corner sites, were not within vicinity of the acquired land and were sold in a public auction, and thus also held not reliable. The respondent had also produced Ex. P9, which was a gazette notification dated 20.1.1997 issued by the Revenue Secretariat, fixing the market value of the immovable property coming under the jurisdiction of several Sub-Registrar's office situated in Bangalore, for the purpose of collecting stamp duty. The Reference Court discarded the same on the reasoning that the Court did not know what was the basis of determination of market value for the purpose of collecting stamp duty in respect of immovable properties by the Sub Registrar.

7. Instead, the Reference Court proceeded to determine the market value of land on the basis of compensation awarded in the judgment and award dated 13.8.1998 made by the Reference Court in respect of land in the neighbouring villages of Kaggadasapura and Mahadevapura, pursuant to the preliminary notification dated 28.7.1988. In the said villages, about 110 acres of land had been acquired and market value was fixed at Rs.2,48,000/- per acre. The difference between dates of preliminary notifications in the abovesaid villages and in the instant case was 5 years and 15 days. Accordingly, the Reference Court gave a 10% enhancement for each year in respect of lands acquired in and around Bangalore city, relying on the judgment in *J. Narayan v. Land Acquisition Officer,* (1980) 2 KLJ 441, by which land value came to Rs.3,73,000/- per acre. However, the Reference Court found that the land had more potentiality and was situated in the midst of a heavy industrial area and in the immediate vicinity of an already developed residential locality. It was also in the vicinity of a road known as Old Madras road as well as the road leading to the airport. Hence, the Reference Court was of the opinion that the respondent was entitled to a higher market value than Rs.3,73,000/- per acre. Thus, the Reference Court held that

Rs.4,00,000/- per acre would be reasonable and fair market value in the instant case.

8. The respondent, still dissatisfied with the compensation awarded, filed an appeal before the High Court of Karnataka. The appellant also filed cross-objections under Order 41, Rule 22 of CPC.

9. The High Court, by way of impugned judgment dated 17.6.2004, enhanced the compensation to Rs.35,17,470/- per acre and also awarded all other statutory benefits.

10. The High Court accepted the finding of the Reference Court that the land in question was fit to be utilized as a non-agricultural site as it was fully supported by evidence on record. The High Court agreed with the Reference Court that the land had ceased to be agricultural land and was fit to be used as a housing site or an industrial site.

11. The High Court then went onto determination of quantum of compensation. It concurred with the Reference Court in rejecting Ex. P7, P8 and P9, stating that they could not be relied upon as they related to transactions which had happened after the issuance of the preliminary notification. Since other sale transactions were available, which had taken place within reasonable time prior to the issuance of the section 4(1) notification, post-dated sale transactions could not be considered. The High Court also concurred in rejecting Ex. P3 and P4 on ground that these sale transactions related to corner sites sold at a public auction. Corner sites fetched much more than other sites and when sold at a public auction, the price depended upon the whims and fancies of the bidders. Thus, Ex. P3 and P4 could not be relied upon to determine market value. Ex. P6 related to the sale of a site with a building and thus it was not accepted. The High Court was of the opinion that Ex. P5 could be used to determine market value. Ex. P5 was a sale deed dated 23.4.1993 of the market value of a site measuring around 30' X 40' fixed at Rs.2,50,000/-, which

worked out to Rs.182/- per square feet. The High Court also deducted 50% of the market value shown in Ex. P5 towards developmental charges, and market value of the acquired land was computed at Rs.95/- per sq. ft.

12. Being aggrieved by the enhancement in compensation granted by the High Court, the appellant approached this court by filing this appeal.

13. The point that arises for consideration before us is whether High Court has correctly enhanced compensation? Two related questions have to be answered to determine the same.

a. Whether the land is agricultural land or has it ceased to be so?

b. Whether Ex. P5, which relates to sale instance of a small piece of non-agricultural land, can be used to determine the market value of land?

14. The appellant has challenged the finding of the High Court that the land ceased to be agricultural land. It contended that the land was agricultural land, as was clearly seen from the records and no conversion charges were paid to convert it into non-agricultural land.

15. We reject this contention of the appellant. That the land has ceased to be agricultural land and is capable of being used as a residential or industrial site is a concurrent finding of fact by both the Courts below and is amply supported by the evidence on record. We uphold the same. The appellant did not file any appeal impugning the finding of the Reference Court that the land could not be treated as agricultural land. Not having done so, it is not open to the appellant to question the finding of the High Court that the land is not agricultural land.

16. Otherwise also, we are of the opinion that in light of the fact that the land was situated by the side of a residential

locality and was in the midst of a highly developed industrial locality, the acquired land was capable of being used for non-agricultural purposes and should be considered as non-agricultural land in determination of compensation. We find support in this reasoning from the judgment of this court in *Anjani Molu Dessai v. State of Goa and Anr.* reported in (2010) 13 SCC 710. The relevant portion of the said judgment is set out below:

> "5. The High Court has also referred to the situation of the property and has noted that the acquired lands are in a village where all basic amenities like primary health centre, high school, post office were available within a distance of 500 meters. It can therefore be safely concluded that the acquired lands are not undeveloped rural land, but can be urbanisable land situated near a developed semi-urban village with access to all infrastructure facilities."

17. We find that the High Court relied on Ex. P5 to determine the market value of compensation. It appears that the said sale instance relates to a small residential site measuring 30' X 43' (125.309 sq. mts). The acquired land in question measures 34 guntas. The Reference Court rejected Ex. P5 in determining market value of land since it found that the land covered by Ex. P5 was at a distance of 2 kms from the acquired land. We are of the opinion that the Reference Court erred in rejecting Ex. P-5 in determining compensation for the acquired land.

18. The judgment of the High Court is well reasoned and well considered. We find no perversity in its reasoning. The only issue is that Ex. P-5, which was relied upon by the High Court, relates to a small piece of land, whereas the acquisition is of a larger piece of land. It is not an absolute rule that when the acquired land is a large tract of land, sale instances relating to smaller pieces of land cannot be considered. There are certain circumstances when sale deeds of small pieces of land can be used to determine the value of acquired land which is

comparatively large in area, as can be seen from the judicial pronouncements mentioned hereunder.

19. It has been held in the case of *Land Acquisition Officer, Kammarapally Village, Nizamabad District, Andhra Pradesh v. Nookala Rajamallu and Ors.* reported in (2003) 12 SCC 334 that:

> "6. Where large area is the subject-matter of acquisition, rate at which small plots are sold cannot be said to be a safe criterion. Reference in this context may be made to few decisions of this Court in *Collector of Lakhimour v. Bhuban Chandra Dutta*: AIR 1971 SC 2015, *Prithvi Raj Taneja v. State of M.P. AIR 1977 SC 1560* and *Kausalya Devi Bogra v. Land Acquisition Officer* AIR 1984 SC 892.
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> 7. It cannot, however, be laid down as an absolute proposition that the rates fixed for the small plots cannot be the basis for fixation of the rate. For example, where there is no other material, it may in appropriate cases be open to the adjudicating Court to make comparison of the prices paid for small plots of land. However, in such cases necessary deductions/adjustments have to be made while determining the prices."

20. In the case of *Bhagwathula Samanna and Ors. v. Special Tahsildar and Land Acquisition Officer*, reported in (1991) 4 SCC 506, it was held:

> "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..."

21. In *Land Acquisition Officer, Revenue Divisional Officer, Chittoor v. Smt. L. Kamalamma (dead) by Lrs. and others,* AIR 1998 SC 781, this Court held as under:-

> "…when no sales of comparable land was available where large chunks of land had been sold, even land transactions in respect of smaller extent of land could be taken note of as indicating the price that it may fetch in respect of large tracts of land by making appropriate deductions such as for development of the land by providing enough space for roads, sewers, drains, expenses involved in formation of a lay out, lump sum payment as also the waiting period required for selling the sites that would be formed."

22. Further, it has also been held in the case of *Smt. Basavva and Ors. v. Special Land Acquisition Officer and Ors,* reported in AIR 1996 SC 3168, that the court has to consider whether sales relating to smaller pieces of land are genuine and reliable and whether they are in respect of comparable lands. In case the said requirements are met, sufficient deduction should be made to arrive at a just and fair market value of large tracks of land. Further, the court stated that the time lag for real development and the waiting period for development were also relevant factors to be considered in determining compensation. The court added that each case depended upon its own facts. In the said case, based on the particular facts and circumstances, this court made a total deduction of 65% in determination of compensation.

23. It may also be noticed that in the normal course of events, it is hardly possible for a claimant to produce sale instances of large tracks of land. The sale of land containing large tracks are generally very far and few. Normally, the sale instances would relate to small pieces of land. This limitation of sale transaction cannot operate to the disadvantage of the claimants. Thus, the Court should look into sale instances of smaller pieces of land while applying reasonable element of deduction.

24. In the present case, the land acquired is 34 guntas and the notification under section 4 of the Act was issued on 17.7.1994. We have already held that for the purposes of determining compensation, the acquired land should be considered to be non-agricultural land. Ex. P-5 is a sale deed for sale of a non-agricultural land dated 23.4.1993. The land covered by the sale deed is about 2 kms. away from the acquired land.

25. In contrast, the Reference Court relied upon the compensation awarded for acquisition of land in the neighbouring villages, which had occurred 5 years prior to the present acquisition. We are of the opinion that market value of the land acquired in the present case is much better reflected by exemplar Ex. P-5, which relates to sale of land just 2 kms. away from the acquired land and is just a little over a year before the issuance of the section 4 notification in the present case. All other sale deeds presented before this Court could be relied upon and were rightly rejected by both the Reference Court and the High Court for the reasons given above.

26. Thus, we are of the opinion that the sale deed Ex. P-5 was rightly relied upon by the High Court in determining compensation.

27. The High Court made a 50% deduction since the sale instance Ex. P-5 related to a smaller piece of land. We are of the considered view that the said deduction should be increased to 60%, which we find fair, just and reasonable in the circumstances.

28. Hence, the judgment of the High Court is modified to the extent of the abovementioned deduction. All other findings of the High Court are sustained.

29. The appeal is thus dismissed with the aforesaid modification.

30. No order as to costs.

B.B.B. Appeal disposed of.

CHANDNA IMPEX PVT. LIMITED

v.

COMMISSIONER OF CUSTOMS, NEW DELHI

(Civil Appeal No. 1383 of 2010)

JULY 06, 2011

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

Customs Act, 1962 – s.130 – Statutory appeal against the order of Customs Appellate Tribunal – Held: While dealing with an appeal under s.130, the High Court must examine each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and give its reasons for holding that question is not a substantial question of law.

The appellant, a body corporate, are importers of certain goods viz. plywood, MDF laminated boards and veneers etc. It was alleged that certain goods imported by the appellant had been under-valued. A show cause notice was issued to the appellant by the Directorate of Revenue Intelligence (DRI) under Section 124 of the Customs Act, 1962. Subsequently, the Commissioner of Customs (Import & General), ordered the confiscation of goods under Section 111 of the Act; confirmed demand under Section 28AB of the Act, and also levied a penalty under Section 114A of the Act on the appellant.

The appellant preferred an appeal to the Customs Excise and Service Tax Appellate Tribunal, which was dismissed. Thereafter the appellant filed an appeal under Section 130 of the Act before the High Court raising as many as 7 questions, stated to be substantial questions of law, for the opinion of the High Court. However, the High Court dismissed the appeal by a short order holding that no substantial question of law arose from the order

of the Appellate Tribunal, for its consideration.

In the instant appeal filed by appellant under Section 130-E of the Act, the appellant, while assailing the order passed by the High Court, urged that the High Court had committed a manifest error of law in dismissing the Statutory appeal *in limine* by a non-speaking order and therefore, the case deserves to be remitted back to the High Court for decision on merits of the questions proposed in the appeal. The appellant contended that all the questions, raised by the appellant in their appeal were substantial questions of law and therefore, the High Court ought to have examined each of the questions so framed instead of dismissing the appeal by a cryptic order, by merely observing that the Tribunal had dealt with each and every argument urged on behalf of the appellant and that they were in agreement with the reasons recorded by the Tribunal. Relying on a recent decision of this Court in *Commissioner of Customs v. Sayed Ali*, **the appellant asserted that in any event one of the questions: "whether the Addl. Director General in DRI is "proper officer" within the meaning of section 28 of the Act" is a substantial question of law, which should have been examined by the High Court.**

Partly allowing the appeal, the Court

HELD:1.1. There is some merit in the submission of the appellant that while dealing with an appeal under Section 130 of the Customs Act, 1962, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and given its reasons for holding that the question is not a substantial question of law. Every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer,

particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. [Para 8] [1110-A-D]

1.2. It was expected of the High Court to record some reason, at least briefly, in support of its opinion that the order of the Tribunal did not give rise to any substantial question of law. In this behalf, the language of Section 130 of the Act is also significant. It contemplates that on filing of an appeal under the said Section either by the Commissioner of Customs or the other party aggrieved, the High Court has to record its satisfaction as to whether or not "the case involves a substantial question of law". In the instant case, it is clear from the order of the High Court that it does not meet the requirement of stating reasons for coming to the conclusion that the order of the Tribunal did not give rise to any substantial question of law including the question "whether the Addl. Director General in DRI is "proper officer" within the meaning of section 28 of the Act". [Para 8] [1110-G-H; 1111-A-B]

State of Orissa v. Dhaniram Luhar **(2004) 5 SCC 568: 2004 (2) SCR 68 – relied on.**

2. The appellant had framed in their appeal before the High Court, as many as seven questions as substantial questions of law. It is manifest from a bare reading of the six questions, that none of the questions can be said to be a substantial question of law, in as much as they do not proceed on the premise that the decision of the Tribunal on the issues raised therein is perverse, in the sense that the findings of fact, arrived at by the Tribunal are not based on the material placed before it or that the relevant material has been ignored by it. It is trite law that

a finding of fact may give rise to a substantial question of law, *inter-alia*, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. [Para 9] [1111-D-G]

West Bengal Electricity Regulatory Commission v. CESC LTD. **(2002) 8 SCC 715;** *Metroark Ltd. v. Commissioner of Central Excise, Calcutta* **(2004) 12 SCC 505;** *Commissioner of Customs (Preventive) v. Vijay Dasharath Patel* **(2007) 4 SCC 118: 2007 (3) SCR 738;** *Narendra Gopal Vidyarthi v. Rajat Vidyarthi* **(2009) 3 SCC 287: 2008 (16) SCR 961 and** *Hero Vinoth (Minor) v. Seshammal* **(2006) 5 SCC 545: 2006 (2) Suppl. SCR 79 – relied on.**

Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd. **AIR 1962 SC 1314: 1962 Suppl. SCR 549 – referred to.**

3. The order of the Tribunal, wherein the material referred to by the Commissioner in his order has been extensively analysed, does not give rise to the five questions, proposed by the appellant in this appeal, as questions of law, much less substantial questions of law. None of the said questions seek to challenge the findings of the Tribunal or that of the Commissioner, on the issue raised in the questions, as perverse. It is not within the domain of the High Court, in appeal under Section 130 of the Act, to investigate the grounds on which the findings were arrived at by the Tribunal, the final court of fact. In that view of the matter, the Court did not consider it expedient to remit the case to the High Court, in so far as these five questions are concerned. [Para 11] [1112-F-G; 1113-A]

4. The issue relating to the jurisdiction of the DRI to issue a show cause notice under Section 28 of the Act as a "proper officer" is a substantial question of law, and requires to be examined afresh particularly in light of the decision of this Court in *Sayed Ali & Anr.*, where the question as to who is a "proper officer" in terms of Section 2(34) of the Act has been examined. [Para 13] [1113-D-F]

Commissioner of Customs v. Sayed Ali & Anr. **(2011) 3 SCC 537 – referred to.**

Case Law Reference:

(2011) 3 SCC 537	**referred to**	**Para 6, 13, 14**
2004 (2) SCR 68	**relied on**	**Para 8**
(2002) 8 SCC 715	**relied on**	**Para 9**
(2004) 12 SCC 505	**relied on**	**Para 9**
2007 (3) SCR 738	**relied on**	**Para 9**
2008 (16) SCR 961	**relied on**	**Para 9**
2006 (2) Suppl. SCR 79	**relied on**	**Para 10**
1962 Suppl. SCR 549	**referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1383 of 2010.

From the Judgment & Order dated 2.9.2009 of the High Court of Delhi at New Delhi in C.U.S.A.A. No.7 of 2009.

A.K. Sanghi, Bindu Saxena, Aparajita Swarup, Shailendra Swarup for the Appellant.

Bishwajit Bhattacharya, ASG, Harish Chander, T.A. Khan, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in this appeal under Section

130-E of the Customs Act, 1962 (for short "the Act"), by the importer, is to the final order dated 2nd September, 2009, passed by the High Court of Delhi at New Delhi in CUSAA No. 7/2009. By the impugned order the High Court has dismissed appellant's appeal under Section 130 of the Act on the ground that no substantial question of law arises from the order of the Customs Excise and Service Tax Appellate Tribunal (for short "the Tribunal") in appeal Nos.C/920-22/2005, for its consideration.

2. To appreciate the controversy involved a brief reference to the facts, as found by the Tribunal, would be necessary. These are:

The appellant, a body corporate, is engaged in the business of import of plywood, inlays, MDF laminated boards and veneer sheets etc. On 22nd May, 2000, one of the directors of the appellant, namely, Rakesh Chandna, was apprehended by the officers of the Customs department at Calcutta Airport. He was found in possession of US $45,000/- and Indian currency of Rs. 9,000/-, alongwith several incriminating documents, which fuelled further follow up action by the Directorate of Revenue Intelligence (for short "the DRI"). On 23rd May, 2000, in search operations, certain goods were seized from the premises of the appellant, as no documentary evidence was allegedly produced for their legal acquisition. The value of the goods so seized was determined at Rs. 24,26,234/-.

3. Statements of Rakesh Chandna and one Sanjeev Murgai, Manager of the appellant and also of some other persons were recorded, which revealed that the goods imported by the appellant viz. plywood, MDF boards and veneers etc. had been under-valued. Based on the incriminating documents recovered during the course of investigation, a show cause notice dated 16th May, 2001 was issued to the appellant by the DRI under Section 124 of the Act, detailing the Bills of Entry, wherein there was mis-declaration of quantity/

description and value of the goods. The appellant was asked to show cause as to why duty, amounting to Rs. 3,95,58,229/-, be not recovered; goods be not confiscated and a penalty be not levied on them. Taking into consideration the explanation furnished on behalf of the appellant in their written submissions and the documentary evidence available on record, including the fax messages sent by Rakesh Chandna to his overseas suppliers, the Commissioner of Customs (Import & General), vide order dated 17th September, 2004, ordered the confiscation of goods valued at Rs. 3,04,98,365/- under Section 111 of the Act; confirmed the demand, amounting to Rs. 1,45,85,446/- under Section 28AB of the Act, besides levying a penalty, amounting to Rs. 1,45,85,446/- under Section 114A of the Act on the appellant. The Commissioner also levied personal penalty of '10 lakh and '5 lakh on Rakesh Chandna and Sanjeev Murgai respectively.

4. Being aggrieved, the appellant preferred an appeal to the Tribunal, which was dismissed vide order dated 26th-27th June, 2007.

5. Having failed in their appeal before the Tribunal, as aforestated, the appellant filed an appeal under Section 130 of the Act before the High Court raising as many as 7 questions, stated to be substantial questions of law, for the opinion of the High Court. One of the questions so framed in para 3 of the application was as follows:

> "(a)-Whether the Addl. Director General in Directorate of Revenue Intelligence is "proper officer" within the meaning of section 28 of the Act?"

However, as already stated above, the High Court has dismissed the appeal of the appellant by a short order, which reads thus:

"We have heard the learned counsel at length and have

also gone through the orders passed by the Tribunal. The arguments before us are the same, as it was raised before the Tribunal. We find from the orders of the Tribunal that each and every argument has been dealt in detail and we agree with the reasons recorded by the Tribunal.

Therefore, we are of the opinion that there is no substantial question of law for our consideration in this case, which is accordingly dismissed."

6. Mr. A.K. Sanghi, learned senior counsel appearing for the appellant, while assailing the order passed by the High Court, strenuously urged that the High Court has committed a manifest error of law in dismissing the Statutory appeal *in limine* by a non-speaking order and therefore, the case deserves to be remitted back to the High Court for decision on merits of the questions proposed in the appeal. Learned counsel argued that all the questions, raised by the appellant in their appeal are substantial questions of law and therefore, the High Court ought to have examined each one of the questions so framed instead of dismissing the appeal by a cryptic order, by merely observing that the Tribunal has dealt with each and every argument urged on behalf of the appellant and they were in agreement with the reasons recorded by the Tribunal. Relying on the recent decision of this Court in *Commissioner of Customs Vs. Sayed Ali & Anr.*[1], th**e** learned counsel asserted that in any event the question extracted in para 5 (supra) is a substantial question of law, which should have been examined by the High Court.

7. *Per contra***,** Mr. Bishwajit Bhattacharya, learned Additional Solicitor General of India, submitted that the impugned order deserves to be affirmed as the questions now proposed in this appeal are pure questions of facts. Learned counsel submitted that in so far as the question of jurisdiction of the adjudicating authority is concerned, no such issue has been raised in the present appeal.

1. (2011) 3 SCC 537.

8. Having bestowed our anxious consideration on the facts at hand, we are of the opinion that there is some merit in the submission of learned counsel for the appellant that while dealing with an appeal under Section 130 of the Act, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and given its reasons for holding that question is not a substantial question of law. It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In *State of Orissa Vs. Dhaniram Luhar*[2] this Court, while reiterating that "reason is the heart beat of every conclusion and without the same, it becomes lifeless", observed thus :

> "8…….Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;……."

It was thus, expected of the High Court to record some reason, at least briefly, in support of its opinion that the order of the Tribunal did not give rise to any substantial question of law. In this behalf, the language of Section 130 of the Act is also significant. It contemplates that on filing of an appeal under the said Section either by the Commissioner of Customs or the other party aggrieved, the High Court has to record its satisfaction as to whether or not "the case involves a substantial

2. (2004) 5 SCC 568.

question of law". In the instant case, it is clear from the afore-extracted order of the High Court that it does not meet the requirement of stating reasons for coming to the conclusion that the order of the Tribunal did not give rise to any substantial question of law including the question extracted in para 5 above. Nevertheless, the next question for consideration is whether, having regard to the nature of the issues raised by the appellant in their appeal before the Tribunal, would it be worthwhile to remit the case back to the High Court to decide, in the first instance, question as to whether or not the questions proposed by the appellant in their application under Section 130 of the Act are substantial questions of law arising from the order of the Tribunal, before embarking upon their consideration on merits?

9. As stated above, the appellant had framed in their appeal before the High Court, as many as seven questions as substantial questions of law. It is manifest from a bare reading of the six questions, viz. (b) to (g), repeated in this appeal, that none of the questions can be said to be a substantial question of law, in as much as they do not proceed on the premise that the decision of the Tribunal on the issues raised therein is perverse, in the sense that the findings of fact, arrived at by the Tribunal are not based on the material placed before it or that the relevant material has been ignored by it. It is trite law that a finding of fact may give rise to a substantial question of law, *inter-alia*, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (Ref: *West Bengal Electricity Regulatory Commission Vs. CESC LTD.*[3]*;-Metroark Ltd. Vs. Commissioner of Central Excise, Calcutta*[4]*;- Commissioner*

3. (2002) 8 SCC 715.

4. (2004) 12 SCC 505.

of Customs (Preventive) Vs. Vijay Dasharath Patel[5] *& Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi*[6]*)*

10. In *Hero Vinoth (Minor) Vs. Seshammal*[7]*,* referring to the Constitution Bench decision of this Court in *Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spinning & Manufacturing Co. Ltd.*[8] as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised, is :

> "The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding".

11. Tested on the touchstone of the said legal principle, we are of the opinion that the order of the Tribunal, wherein the material referred to by the Commissioner in his order has been extensively analysed, does not give rise to the five questions, proposed by the appellant in this appeal, as questions of law, much less substantial questions of law. It would bear repetition that none of the said questions seek to challenge the findings of the Tribunal or that of the Commissioner, on the issue raised in the questions, as perverse. It is not within the domain of the

5. (2007) 4 SCC 118.

6. (2009) 3 SCC 287.

7. (2006) 5 SCC 545.

8. AIR 1962 SC 1314.

High Court, in appeal under Section 130 of the Act, to investigate the grounds on which the findings were arrived at by the Tribunal, the final court of fact. In that view of the matter, we do not consider it expedient to remit the case to the High Court, in so far as these five questions are concerned.

12. However, the question which still survives for consideration is that the appellant having raised the question of jurisdiction of the DRI issuing the show cause notice as also the Commissioner of Customs passing the order of adjudication, in its appeal before the High Court and the High Court having failed to apply its mind as to whether or not it was a substantial question of law, the appellant is barred from raising the said issue before us in this appeal.

13. Having carefully gone through the appeal, in particular ground (f), wherein the jurisdiction of the DRI to issue a show cause notice under Section 28 of the Act as a "proper officer" has been specifically questioned, we are of the view that the said issue is a substantial question of law, and requires to be examined afresh particularly in light of the decision of this Court in *Sayed Ali & Anr.* (supra), where the question as to who is a "proper officer" in terms of Section 2(34) of the Act has been examined.

14. Having so held, again the residual question would be whether, in the first instance, the High Court should be asked to examine the question relating to the jurisdiction of the adjudicating authority or to remit the matter to the Tribunal to reconsider the issue in light of the recent decision of this Court in *Sayed Ali & Anr.* (supra), wherein the decision of the Tribunal in *Konia Trading Co. Vs. Commissioner Of Customs, Jaipur*[9], relied upon by the Tribunal in the present case, has been considered. We are of the opinion that in order to avoid prolongation in the life of lis between the appellant and the revenue, it would be expedient to follow the latter option,

9. (2004) 170 E.L.T. 51 (Tri-LB)

because ultimately the High Court may also like to have the views of Tribunal on the impact of the said decision of this Court on the facts of the present case, since the said decision, was not available to the Tribunal when the appeal of the appellant was decided by it.

15. Consequently, the appeal is partly allowed to the extent indicated above and the decision of the Tribunal on the question of the jurisdiction of the adjudicating authority, which stood affirmed by the dismissal of appellant's appeal by the High Court, is set aside. The case is remanded to the Tribunal for fresh adjudication, confined to the question of jurisdiction of the adjudicating authority to pass order dated 17th September, 2004, after affording adequate opportunity of hearing to both the parties.

16. However, in the facts and circumstances of the case, there shall be no order as to costs.

B.B.B. Appeal partly allowed.

##NEXT FILE

UNION OF INDIA & ANR.

v.

ARULMOZHI INIARASU & ORS.

(Civil Appeal Nos. 4990-4991 of 2011)

JULY 06, 2011

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

Service Law – Recruitment – Part time contingent casual labourers – On purely temporary basis – Engaged as required on basis of need for which paid on hourly basis – Applications invited for post of Sepoy in the Department prescribing certain age limit – Casual labourers not allowed to participate in the selection process – Application before the Tribunal – Direction issued by the Tribunal to the Department to consider the case of the labourers by relaxing the age limit prescribed – Said order challenged – High Court modified the order of the Tribunal with regard to relaxation in the age limit with a condition that it would be applicable to the actual erstwhile employees of the Department – On appeal, held: Engagement of employees as casual labourers even for considerable long duration did not confer any legal right on them for seeking a mandamus for relaxation of age limit – Also terms of letter of appointment in unambiguous terms stated that appointments were temporary and would not confer any right to claim any permanent post in the department – Only because some similarly situated persons have been appointed/absorbed as Sepoys, same cannot be directed to be carried out – Thus, order of the High Court is set aside.

Constitution of India, 1950:

Article 141 – Precedent – Reliance on – Principles to be followed – Held: While applying precedents the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact

situation of the decision on which reliance is placed – Observations of courts are neither to be read as Euclid's theorems nor as provisions of Statute and that too taken out of their context – These observations must be read in the context in which they appear to have been stated – Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases.

Article 226 – Writ of mandamus – Issuance of – Held: Writ of mandamus can be issued by the High Court only when there exists a legal right in the writ petitioner and corresponding legal obligation in the State – Only because an illegality has been committed, the same cannot be directed to be perpetuated – There cannot be equality in illegality – On facts, it cannot be said that the action of the appellants is highly discriminatory in as much as some similarly situated persons have been appointed/absorbed as Sepoys.

Administrative law – Doctrine of legitimate expectation – Applicability of – Plea of employees (part time contingent casual labourers) for permanent absorption/regularisation in the Department on account of their alleged uninterrupted engagement for long durations ranging between 8-14 years – Held: Doctrine of legitimate expectation is not applicable – Letter of appointment was to the effect that the appointments were temporary and would not confer any right to claim any permanent post in the department – Also no promise was made to the employees that they would be absorbed as regular employees of the Department.

Respondents were engaged as part-time contingent casual labourers, purely on temporary basis in the Excise Department. They were engaged on basis of the need of the office for which they were paid on hourly basis. In the year 1999, most of the respondents were in continuous

employment for a period ranging from 8 to 14 years. In the year 2005, the appellants dispensed with the services of all such casual labourers. The respondents filed an application before the Tribunal seeking regularisation of their services and the same was dismissed. The respondents filed a writ petition. The High Court directed the appellants to consider the matter afresh in light of the circulars issued by the Department. The Excise Department found that the respondents were not eligible for regularization of their services as they did not satisfy the criteria laid down in the case of ****Umadevi (3)* **and Office Memorandum. Thereafter, the Excise Department invited applications for recruitment to the posts of Sepoy prescribing the age limit. The applications of the respondents were rejected as age barred. The respondents filed applications before the Tribunal. The Tribunal directed the appellants to consider the case of the respondents for appointment by relaxing the age limit prescribed, if necessary, in view of the long service rendered by them. The appellants challenged the order of the Tribunal. The High Court disposed of the writ petition modifying of the order of Tribunal, holding that relaxation in the age limit could be up to 3 years for OBC candidates and 5 years for SC/ST candidates, subject to the condition that it would be applicable to those candidates who were actually erstwhile employees of the department. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 In the matter of applying precedents the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of Statute and that too taken out of their context. These

observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. [Para 12]

1.2 The observation in *****Nagendra Chandra's* **case cannot be said to be an exposition of general principle of law on the point that a long length of service, *dehors* the relevant recruitment rules for the post, is a relevant factor for waiver or relaxation of any eligibility criterion, including age limit, for future regular selections for the post. The observation, general in nature, was made by this Court in exercise of its jurisdiction under Article 142 of the Constitution of India and, therefore, cannot be treated as a binding precedent. It has to be confined to the peculiar facts of that case. [Para 13]

***Nagendra Chandra and Ors. vs. State of Jharkhand and Ors.* **(2008) 1SCC 798: 2007 (12) SCR 608 – distinguished.**

Secretary, State of Karnataka and Ors. vs. Umadevi (3) and Ors.* **(2006) 4 SCC 1: 2006 (3) SCR 953; *Bharat Petroleum Corpn. Ltd. and Anr. vs. N.R. Vairamani and Anr.* **(2004) 8 SCC 579: 2004 (4) Suppl. SCR 923;** *Sarva Shramiks anghatana (KV), Mumbai vs. State of Maharashtra and Ors.* **(2008) 1 SCC494: 2007 (12) SCR 645;** *Bhuwalka Steel Industries Limited vs.Bombay Iron and Steel Labour Board and Anr.* **(2010) 2 SCC 273: 2009 (16) SCR 618 – referred to.**

2.1 In the instant case, indubitably, the respondents were engaged as part time contingent casual labourers in the office of the Commissioner of Central Excise for doing all types of work as may be assigned to them by the office. Their part time engagement was need based for which they were to be paid on hourly basis. Though

their stand is that many a times they were required to work day and night but it is nowhere stated that they were recruited or ever discharged the duties of a 'sepoy' for which recruitment process was initiated vide public notice dated 14th January 2008 and the Tribunal as also the High Court directed the appellants to grant relaxation in age limit over and above what is stipulated in the recruitment rules/advertisement. In view of the facts, the engagement of the respondents as casual labourers even for considerable long duration did not confer any legal right on them for seeking a mandamus for relaxation of age limit. The impugned direction by the Tribunal, as affirmed by the High Court based on the *****Nagendra Chandra's* **case was clearly unwarranted. [Para 14]**

3.1 It is plain from the terms of the letter of appointment that the respondents were told in unambiguous terms that their appointments were temporary and would not confer any right to claim any permanent post in the department. It is not the case of the respondents that at any point of time, during their engagements with the appellants, a promise was held out to them by the appellants that they would be absorbed as regular employees of the department. In fact, no such promise could be held out in view of the Government O.M. dated 7th June, 1988 banning the employment of persons in regular posts. [Para 20]

3.2 The doctrine of legitimate expectation, is not attracted in the instant case. The plea relating to the legitimate expectation of the respondents of being permanently absorbed/regularised in the Excise Department on account of their alleged uninterrupted engagement for long durations ranging between 8-14 years is rejected. [Paras 15 and 22]

Sethi Auto Service Station and Anr. vs. Delhi Development Authority and Ors. **(2009) 1 SCC 180: 2008 (14) SCR 598 – relied on.**

Council of Civil Service Unions vs. Minister for Civil Service **1985 AC 374 : (1984) 3 All ER 935 (HL) – referred to.**

4. The submission that the action of the appellants is highly discriminatory in as much as some similarly situated persons have been appointed/absorbed as Sepoys cannot be accepted. A writ of mandamus can be issued by the High Court only when there exists a legal right in the writ petitioner and corresponding legal obligation in the State. Only because an illegality has been committed, the same cannot be directed to be perpetuated. There cannot be equality in illegality. [Para 23]

Sushanta Tagore and Ors. vs. Union of India and Ors. **(2005) 3 SCC**

16: 2005 (2) SCR 502; *U.P. State Sugar Corpn. Ltd. and Anr. vs. Sant Raj Singh and Ors.* **(2006) 9 SCC 82: 2006 (2) Suppl. SCR 636;** *State, CBI vs. Sashi Balasubramanian and Anr.* **(2006) 13 SCC 252: 2006 (7) Suppl. SCR 914;** *State of Orissa and Ors. vs. Prasana Kumar Sahoo* **(2007) 15 SCC 129: 2007 (5) SCR 697 – referred to.**

5. The impugned judgment cannot be sustained and is set aside. [Para 24]

Case Law Reference:

2006 (3) SCR 953	**Referred to**	**Para 13, 14, 21**
2007 (12) SCR 608	**Distinguished**	**Para 1, 14**
2004 (4) Suppl. SCR 923	**Referred to**	**Para 12**

2007 (12) SCR 645	**Referred to**	**Para 12**
2009 (16) SCR 618	**Referred to**	**Para 12**
(1984) 3 All ER 935 (HL)	**Referred to**	**Para 17**
2008 (14) SCR 598	**Relied on**	**Para 18**
2005 (2) SCR 502	**Referred to**	**Para 23**
2006 (2) Suppl. SCR 636	**Referred to**	**Para 23**
2006 (7) Suppl. SCR 914	**Referred to**	**Para 23**
2007 (5) SCR 697	**Referred to**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4990-4991 of 2011.

From the Judgment & Order dated 05.01.2010 of the High Court of Judicature at Madras in W.P. Nos. 27605 & 27606 of 2009.

B. Bhattacharya, Kiran Bhardadwaj, Rajiv Nanda, B. Krishna Prasad for the Appellants.

P.B. Krishnan, B. Raghunath, Vijay Kumar, P.B. Subramaniyan, R. Gopalakrishnan for the Respondents.

The Judgment of the Court was delivered by

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

2. These two appeals, by special leave, are directed against the judgment and final order dated 5th January, 2010 delivered by the High Court of Judicature at Madras, whereby the High Court, in slight modification of the order passed by the Central Administrative Tribunal, Madras Bench (for short "the Tribunal"), has directed that the respondents shall be given a relaxation of five years and three years respectively to SC/ ST and OBC candidates in age limit for being considered for

selection to the post of Sepoy in the Central Excise department, Ministry of Finance, Government of India. However, the High Court has directed that the said relaxation would be applicable to those candidates who were actually erstwhile employees of the said department.

3. Shorn of unnecessary details, the facts essential for adjudication of the present appeals may be stated as follows:

The respondents were engaged as part-time contingent casual labourers–purely on temporary basis in the Office of the Commissioner of Central Excise, Chennai Zone, in the year 1999. As per offer of appointment on record, they were required to work on the basis of the need of the office, for which they were to be paid @ '10/- per working hour with no guarantee as regards minimum number of hours in a month. In para 7 of the said letter, it was stated that the appointment letter would not confer any right to claim any permanent post in the department as also any automatic right to be considered for selection to any permanent post in the department. Most of them were in continuous employment for a period ranging from 8 to 14 years. It is common ground that none of the respondents fall within the purview of 1993 scheme, notified on 10th September, 1993, for conferring temporary status and regularisation of casual workers, who were in employment on 1st September, 1993, all of them having been engaged after the said date.

4. On 2nd May, 2005, in compliance with the directions issued by the Ministry of Finance, the appellants dispensed with the services of all such casual labourers and handed over the work done by them to contractors. Aggrieved by the said action the respondents herein, approached the Tribunal by preferring an original application, (O.A.No.764 of 2005) seeking regularisation of their services. The said O.A. was dismissed by the Tribunal. Against the order of dismissal, the respondents filed a writ petition before the High Court. While disposing of the writ petition, the High Court directed the

appellants herein to consider the matter afresh in light of the circulars issued by the Department of Personnel in O.M.No.49019/1/2006-Estt(C) dated 11th December, 2006 as also the circulars issued by the Ministry of Finance dated 7th September, 2007 and 13th September, 2007. These circulars were issued pursuant to the order passed by this Court in the case of *Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors.*[1]*, inter-alia* directing the Union of India, State Governments and their instrumentalities to take steps to regularise, as a one time measure, the services of such irregularly appointed employees, who are duly qualified in terms of the statutory recruitment rules for the post and who have worked for ten years or more in duly sanctioned post but not under cover of orders of Courts or Tribunals.

5. Upon a fresh consideration in terms of the said direction, the Chief Commissioner of Central Excise found that the respondents were not eligible for regularization of their services as they did not satisfy the criteria laid down in the case of *Umadevi(3)* (supra) and Office Memorandum dated 11th December, 2006, issued by Department of Personnel & Training, Ministry of Personnel, Public Grievances and Pensions.

6. On 14th January, 2008, the office of the Chief Commissioner of Central Excise, Chennai Zone, issued a notice inviting applications for recruitment to 40 (37 GC & 3 OBC) posts of Sepoy (General Central Service Group D Post). As per the recruitment rules, the age limit prescribed for the post as on 1st January, 2008, was 27 years for general candidate, 32 years for SC/ST candidates and 30 years for OBC because of relaxation of age limit by five years and three years in the cases of SC/ST candidates and OBC candidates respectively. In the recruitment process, thus initiated, initially the respondents were permitted to participate but later on, realising that the respondents (all SC/ST and OBC candidates) had crossed the prescribed age, they were not called to

participate in the further selection process. Their applications were rejected as age barred.

7. Being aggrieved by the decision of the department in not granting relaxation in age, the respondents filed fresh Original Applications before the Tribunal. The Tribunal was of the view that the ratio of the decision of this Court in *Nagendra Chandra & Ors. Vs. State of Jharkhand & Ors.*[2] was applicable to the case of the respondents and therefore, they were entitled to the same relief as was granted in that case. Accordingly, the Tribunal directed the appellants herein to consider the case of the respondents for appointment by relaxing the age limit prescribed, if necessary, in view of the long service rendered by them.

8. Aggrieved by the said direction, the appellants herein unsuccessfully questioned the validity of the order of the Tribunal before the High Court. The High Court disposed of both the writ petitions with modification of the order of Tribunal to the effect that relaxation in the age limit could be up to 3 years for OBC candidates and 5 years for SC/ST candidates, subject to the condition that it would be applicable to those candidates who were actually erstwhile employees of the department. Hence, the present appeals.

9. Mr. B. Bhattacharya, learned Additional Solicitor General of India, appearing for the appellants strenuously urged that the High Court has committed a manifest error in directing relaxation of age bar in the case of the respondents by treating the decision in the case of *Nagendra Chandra & Ors.* (supra) as a binding precedent on the point, without appreciating that: (i) the observation with regard to relaxation in age bar in the penultimate paragraph of *Nagendra Chandra's* case (supra) was made by this Court in exercise of power under Article 142 of the Constitution of India, which is not possessed by either the High Court or the Tribunal and (ii) the fact-situation in the instant case was entirely different from the one obtaining

in that case. It was asserted that unlike *Nagendra Chandra's* case (supra), where there was irregularity in the appointment of Constables against the sanctioned posts, the present case pertained to engagement of need based casual labourers without any recruitment rules or sanctioned posts. It was thus, argued that the High Court failed to notice distinction between the casual labourer and those whose appointment was irregular because of non-compliance with some procedure in the selection process, which is not the case here when none of the respondents had earlier participated in recruitment for the post of Sepoys.

10. Per contra, Mr. P.B. Krishnan, learned counsel appearing for the respondents, in his written submissions, has submitted that though the respondents were informed at the time of the appointment about the nature of their work, many a times they continued to work day and night and also on national holidays without any monetary benefits only with the hope and expectation that they would be absorbed on regular basis or at least conferred temporary status. It has been further pleaded that the action of the appellants in rejecting the request for age relaxation without taking into account considerable years of their casual service, was highly unjust and arbitrary. The learned counsel pleaded that by reason of the impugned directions the respondents have only been given a right to compete and not an appointment as such and therefore, this Court should be loathe to interfere with a just and equitable order by the authorities below, particularly when similarly placed labourers had been granted age relaxation.

11. Thus, in these appeals the first and the foremost question to be examined is whether in the matter of relaxation of age limit, prescribed as eligibility criteria for appointment on a particular post, any principle of law has been laid down in the decision of this Court in *Nagendra Chandra's* case (supra)? If so, whether it could be applied to the facts of the present case for directing the afore-stated relaxation in age

limit?

12. Before examining the first limb of the question, formulated above, it would be instructive to note, as a preface, the well settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. (Ref.: *Bharat Petroleum Corpn. Ltd. & Anr. Vs. N.R. Vairamani & Anr.*[3]*; Sarva Shramik Sanghatana (KV), Mumbai Vs. State of Maharashtra & Ors.*[4] and *Bhuwalka Steel Industries Limited Vs. Bombay Iron & Steel Labour Board & Anr.*[5].)

13. Bearing in mind the aforenoted principle of law, we may now refer to the decision in *Nagendra Chandra* (supra). It is plain from a bare reading of the said decision that the question which fell for consideration before a bench of three learned Judges of this Court was as to whether the appointments of the appellants in that case were illegal or irregular. This Court opined that since the appointments made were not only in infraction of the recruitment rules but also violative of Articles 14 and 16 of the Constitution of India, these were illegal. It was thus, held that the appellants would not be entitled to get the benefit of the directions contained in *Umadevi(3)* case (supra), which are applicable only to those qualified employees who were appointed irregularly in a sanctioned post. Having come to the conclusion that the subject appointments being illegal, the competent authority was justified in terminating the services of the employees concerned

and the High Court was also justified in upholding the same, in our view, the relied upon observation in the penultimate paragraph of the judgment in *Nagendra Chandra* (supra) does not appear to be consistent with the ratio of the decision of the Constitution Bench in *Umadevi(3)* case (supra). In the said decision it has clearly been held that the courts are not expected to issue any direction for absorption/regularisation or permanent continuance of temporary, contractual, casual, daily wagers or ad-hoc employees merely because such an employee is continued for a long time beyond the term of his appointment. It has also been held that such an employee would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. Therefore, in our opinion, the said observation cannot be said to be an exposition of general principle of law on the point that a long length of service, dehors the relevant recruitment rules for the post, is a relevant factor for waiver or relaxation of any eligibility criterion, including age limit, for future regular selections for the post. Obviously, the observation, general in nature, was made by this Court in exercise of its jurisdiction under Article 142 of the Constitution of India and, therefore, cannot be treated as a binding precedent. It has to be confined to the peculiar facts of that case.

14. We may now advert to the second limb of the question in para 11 (supra). The issue need not detain us for long as in our view the factual position as obtaining in the present case does not fit in with the fact situation in the case of *Nagendra Chandra* (supra). In the instant case, indubitably, the respondents were engaged as part time contingent casual labourers in the office of the Commissioner of Central Excise for doing all types of work as may be assigned to them by the office. Their part time engagement was need based for which they were to be paid on hourly basis. Though their stand is that many a times they were required to work day and night

but it is nowhere stated that they were recruited or ever discharged the duties of a 'sepoy' for which recruitment process was initiated vide public notice dated 14th January 2008 and the Tribunal as also the High Court has directed the appellants to grant relaxation in age limit over and above what is stipulated in the recruitment rules/advertisement. In view of the stated factual scenario, in our opinion, the engagement of the respondents as casual labourers even for considerable long duration did not confer any legal right on them for seeking a mandamus for relaxation of age limit. We have no hesitation in holding that *Nagendra Chandra's* case (supra) has no application on facts in hand and the impugned direction by the Tribunal, as affirmed by the High Court based on the said decision, was clearly unwarranted.

15. We may now consider the plea relating to the legitimate expectation of the respondents of being permanently absorbed/ regularised in the Excise Department on account of their alleged uninterrupted engagement for long durations ranging between 8-14 years.

16. The doctrine of legitimate expectation and its impact in the administrative law has been considered by this Court in a catena of decisions. However, for the sake of brevity, we do not propose to refer to all these cases. Nevertheless, in order to appreciate the concept, we shall refer to a few decisions.

17. In *Council of Civil Service Unions Vs. Minister for Civil Service*[6], a locus classicus on the subject, for the first time an attempt was made by the House of Lords to give a comprehensive definition to the principle of legitimate expectation. Enunciating the basic principles relating to legitimate expectation, Lord Diplock observed that for a legitimate expectation to arise, the decision of the administrative authority must affect such person either (*a*) by altering rights or obligations of that person which are enforceable by or against him in private law; or (*b*) by depriving him of some benefit or advantage which either: (*i*) he has in

the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon, or (*ii*) he has received assurance from the decision-maker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.

18. Recently, in *Sethi Auto Service Station & Anr. Vs. Delhi Development Authority & Ors.*[7], one of us (D.K. Jain, J.), referring to a large number of authorities on the point, summarised the nature and scope of the doctrine of legitimate expectation as follows:

> "**32.** An examination of the aforenoted few decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

19. Bearing in mind the afore-stated legal position, we may now advert to the facts at hand. For the sake of ready reference, the relevant portions of offer of appointment issued

by Commissioner of Central Excise, Chennai, to the respondents on 6th August 1999 are extracted below:

> "The under mentioned candidates who have been applied in response to the advertisement given by this department in the "Daily Thanthi" & who are appeared in Interview conducted by this office on 10.04.99 are offered appointment provisionally in "part time contigent casual labourers" Purely on temporary basis on the basis of payment for the number of hours actually worked in a month. They will be paid Rs. 10.00 for every working hour.
>
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
>
> 3. The candidates should note that they will be asked to work on the basis of the need of the office and there is no guarantee as regards minimum number in a month.
>
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
>
> 6. The offer of appointment is purely on temporary basis only. In case the work and conduct of the candidates is not found to be satisfactory. Their services will be terminated without any intimation/notice.
>
> 7.This appointment letter does not confer any right to claim any permanent post in this department and does not also vest any automatic right to be considered for selection to any permanent post in the Department.
>
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

20. It is plain from the terms of the letter of appointment that the respondents were told in unambiguous terms that their appointments were temporary and would not confer any right to claim any permanent post in the department. It is not the case of the respondents that at any point of time, during their engagements with the appellants, a promise was held out to them by the appellants that they would be absorbed as regular

employees of the department. In fact, no such promise could be held out in view of the Government O.M. dated 7th June, 1988 banning the employment of persons in regular posts.

21. At this juncture, it would be apposite to note that a similar plea was negatived by the Constitution Bench in *Umadevi(3)* (supra) by observing thus:

> **"47.** When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

22. Having bestowed our anxious consideration to the facts of the case, in our opinion, the doctrine of legitimate expectation, as explained above, is not attracted in the instant case. The argument is rejected accordingly.

23. Lastly, as regards the submission that the action of the appellants is highly discriminatory in as much as some similarly situated persons have been appointed/absorbed as Sepoys, the argument is stated to be rejected. It is well settled that a writ of mandamus can be issued by the High Court only

when there exists a legal right in the writ petitioner and corresponding legal obligation in the State. Only because an illegality has been committed, the same cannot be directed to be perpetuated. It is trite law that there cannot be equality in illegality. (Ref.: *Sushanta Tagore & Ors. Vs. Union of India & Ors.*[8]*; U.P. State Sugar Corpn. Ltd. & Anr. Vs. Sant Raj Singh & Ors.*[9]*; State, CBI Vs. Sashi Balasubramanian & Anr.*[10] and *State of Orissa & Ors. Vs. Prasana Kumar Sahoo*[11]*.*)

24. In view of the foregoing discussion, the impugned judgment cannot be sustained. It is set aside and the appeals are allowed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeals allowed.

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