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] [12-C-E]

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] [13-E-G]

***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] [14-A-E]**

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] [17-B-C]

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] [14-F; 18-A]

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] [18-B-C]

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] [18-E]

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 @ Rs. 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

1. (2006) 4 SCC 1.

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)

2. (2008) 1 SCC 798.

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,

3. (2004) 8 SCC 579.
4. (2008) 1 SCC 494.
5. (2010) 2 SCC 273.

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

6. 1985 AC 374 : (1984) 3 All ER 935 (HL).

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

7. (2009) 1 SCC 180.

> 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.
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> 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.
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> 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.
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> 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.

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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.

8. (2005) 3 SCC 16.
9. (2006) 9 SCC 82.
10. (2006) 13 SCC 252.
11. (2007) 15 SCC 129.

KESAR ENTERPRISES LTD.
v.
STATE OF U.P. & ORS.
(Civil Appeal No. 6896 of 2002)

JULY 06, 2011

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

U.P. Excise Manual – rule 633 – Imposition of penalty – Company consigned rake of tank wagons, loaded with rectified spirit under PD-25 pass for export – However, out of 15 tank wagons only 14 tank wagons reached the Port – Export consignment routed through appellant (handling agent as also owner of the bonded warehouse at the Port), who executed an indemnity bond in favour of the Governor of Uttar Pradesh in relation to permission for removal of rectified spirit – Issuance of notice to the appellant to deposit excise duty on the rectified spirit along with interest since the appellant failed to furnish PD-25 pass, certified by the Collector – Explanation furnished by appellant not found satisfactory – Excise Commissioner directed the Excise Officer to issue recovery certificate and take appropriate steps against the appellant for the recovery of excise duty and interest – Writ petition – High Court holding that although the State Government had no authority to levy excise duty u/s. 28 on rectified spirit (industrial alcohol) but it could impose penalty on the appellant u/r. 633(7) – On appeal, held: Show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order u/r. 633(7) is made, notwithstanding the fact that the said Rule does not contain any express provision in this regard – Before raising any demand and initiating any step to recover from the executant of the bond any amount by way of penalty, there has to be an adjudication as regards the breach of condition of the bond or the failure to produce the discharge certificate

within the stipulated time as also quantification of the penalty amount but there was absolutely no adjudication by any authority, except the allegation that the appellant had failed to furnish the PD-25 pass certified by the Collector – Thus, the action of the State for the recovery of penalty and interest, being violative of principles of natural justice, is null and void – Matter remitted to the jurisdictional Excise Commissioner – U.P. Excise Act, 1910 – s. 28 – Principles of natural justice.

U.P. Excise Act, 1910 – S. 28 – High strength rectified spirit (industrial alcohol) – Levy of excise duty – Power of State – Held: High strength rectified spirit (industrial alcohol) is a Central subject, thus, the State is not empowered to levy excise duty – Under s. 28, excise duty or a countervailing duty, as the case may be, can be imposed by the State on alcoholic liquor only when it reaches the stage of human consumption.

Administrative law – Natural justice – Principle of – Held: Is to check arbitrary exercise of power by the State or its functionaries – Thus, the principle implies a duty to act fairly.

'D' Company consigned a rake of 15 tank wagons, loaded of rectified spirit under PD-25 pass for export against an order of the Excise Commissioner. The export consignment was to be routed through the appellant, as handling agent as also the owner of the bonded warehouse at 'K' Port, where the spirit was to be stored before export. The appellant executed an indemnity bond in favour of the Governor of Uttar Pradesh in relation to permission for removal of rectified spirit. The said consignment was dispatched through Railway to 'K' Port. However, out of 15 tank wagons only 14 tank wagons reached the 'K' Port and the 15th tank wagon was lying empty at the Railway Station. The Excise Commissioner issued notice to the appellant that they were liable to deposit excise duty amounting to Rs. 8,71,744/- on the

rectified spirit along with interest since the appellant failed to furnish PD-25 pass, certified by the Collector for due delivery. The appellant failed to deposit the amount and another notice was issued. The appellant furnished an explanation but the Excise Commissioner not being satisfied with the same, directed the Excise Officer to issue recovery certificate and take appropriate steps against the appellant for the recovery of the excise duty. The appellant filed a writ petition seeking quashing of the demand notice. The High Court holding that although the State Government had no authority to levy Excise duty under Section 28 of the Act on rectified spirit (industrial alcohol) but could impose penalty on the appellant under Rule 633(7) of the Excise Manual, quashed the demand notice. Therefore, the appellant filed the instant appeal.

Allowing the appeal and remitting the matter to the Excise Commissioner, the Court

HELD: 1.1 The State was not empowered to levy Excise duty on the high strength rectified spirit in 15 tank wagons. Under Section 28 of the U.P. Excise Act,1910 the charging Section, an Excise duty or a Countervailing duty, as the case may be, can be imposed by the State on alcoholic liquor only when it reaches the stage of human consumption and not on high strength rectified spirit (industrial alcohol), a Central subject. Therefore, the High Court is correct in law in holding that the State did not have the jurisdiction to levy Excise duty on rectified spirit, loaded in 15 tank wagons.[Para 13] [30-E-H; 31-A]

Synthetics and Chemicals Ltd. and Ors. vs. State of U.P. and Ors. **(1990) 1 SCC 109: 1989 (1) Suppl. SCR 623 – Relied on.**

1.2 It is manifest that Rule 633 of the Uttar Pradesh Excise Manual made in exercise of the rule-making power

of the State under the Act, would apply only in relation to manufacture, import, export and transport of potable liquor, i.e. the liquor which is capable of being consumed by human beings. Precisely for the said reason in order to bring appellant's case within the scope of Rule 633, the High Court went on to observe that it could be presumed that rectified spirit in the missing tank wagon was diverted for conversion into potable alcohol. Rule 633 is of regulatory character meant to ensure that the liquor being exported under a bond reaches its destination and is not misused or misutilized in transit. It contemplates that if the bond along with certificate signed by the Collector or other named officers of the importing district, certifying due arrival or otherwise of the liquor at its destination, is not furnished to the Collector of the exporting district, he would be entitled to presume that the liquor has been disposed of otherwise than by export and can proceed to take necessary steps as postulated in sub-rule (7) of Rule 633 of the Excise Manual. The said Rule provides for imposition of penalty, which may be equivalent to the Excise duty, leviable under the charging Section 28 of the Act on potable liquor. [Para 15] [33-G-H; 34-A-D]

2.1 Rules of 'natural justice' are not embodied rules. The phrase 'natural justice' is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. [Para 17] [34-E-F]

A.K. Kraipak and Ors. vs. Union of India and Ors. **(1969) 2 SCC 262:1970 (1) SCR 457;** *Income Tax Officer and Ors. vs. M/s Madnani Engineering Works Ltd. Calcutta* **(1979) 2 SCC 455: 1979 (2) SCR 905;** *Swadeshi Cotton Mills vs. Union of India* **(1981) 1 SCC 664: 1981 (2) SCR 533;** *Canara*

Bank vs. V.K. Awasthy **(2005) 6 SCC 321: 2005 (3) SCR 81;** *Sahara India (Firm), Lucknow vs. Commissioner of Income Tax, Central-I and Anr.* **(2008) 14 SCC 151: 2008 (6) SCR 427 – referred to.**

2.2 Keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard. The action under the said Rule is a quasi-judicial function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before raising any demand and initiating any step to recover from the executant of the bond any amount by way of penalty, there has to be an adjudication as regards the breach of condition(s) of the bond or the failure to produce the discharge certificate within the time mentioned in the bond on the basis of the explanation as also the material which may be adduced by the person concerned denying the liability to pay such penalty. Moreover, the penalty amount has also to be quantified before proceedings for recovery of the amount so determined are taken. Therefore, if the requirement of an opportunity to show-cause is not read into the said Rule, an action thereunder would be open to challenge as violative of Article 14 of the Constitution of India on the ground that the power conferred on the competent authority under the provision is arbitrary. [Para 21] [38-B-G]

2.3 In the instant case, the Excise Commissioner called upon the appellant to deposit an amount of Rs.

14,20,943/- towards Excise duty and interest on account of default on their part to furnish PD-25 pass duly certified by the competent authority at 'K' Port. The letter /notice did not indicate the exact quantity of rectified spirit on which duty @ Rs. 40/- per alcoholic litre had been charged, though the total amount of duty payable was mentioned. Similarly, in the final show-cause notice threatening action for black listing for future exports on account of non-payment of the aforenoted amount, there was not even a whisper as to how and why rectified spirit in question was being subjected to Excise duty by the State. [Para 22] [38-H; 39-A-C]

2.4 The State Legislature had no legislative competence to impose Excise duty on rectified spirit (industrial alcohol), the Commissioner of Excise could not demand Excise duty on rectified spirit contained in the tank wagon which, later on, was found to be empty, without returning a finding that the said spirit had been diverted/converted into potable alcoholic liquor fit for human consumption, on which the State was empowered to impose duty. Such a finding could not be recorded by the Commissioner without affording due opportunity to the appellant to explain its stand in this regard for which, the onus lay on them as transporter and the executant of the bond. In the absence of any reasonable explanation regarding disappearance of rectified spirit, the Commissioner would have reason to presume that the same has been disposed of otherwise than by way of export outside the country, for which purpose it was being transported. In the instant case, before imposing the impugned demand of penalty and interest, there was absolutely no adjudication by any authority as regards the breach committed by the appellant, except the allegation that the appellant had failed to furnish the PD-25 pass certified by the Collector. Therefore, the action of the respondents for the recovery

of penalty and interest, being violative of principles of natural justice, was null and void. [Para 22] [39-B-G]

Synthetics and Chemicals Ltd. and Ors. vs. State of U.P. and Ors. **(1990) 1 SCC 109: 1989 (1) Suppl. SCR 623 – Relied on.**

3. The impugned demand raised by the Commissioner of Excise vide notice dated 2nd October 1992, as well as the judgment of the High Court, sustaining the demand by invoking Rule 633 of the Excise Manual are set aside and the matter is remitted to the jurisdictional Excise Commissioner to decide the question of levy of Excise duty and/or penalty and interest on the subject consignment of rectified spirit, after affording adequate opportunity of hearing to the appellant. [Para 23] [40-A-B]

Case Law Reference:

1989 (1) Suppl. SCR 623	**Relied on**	**Para 13, 22**
1970 (1) SCR 457	**Referred to**	**Para 17**
1979 (2) SCR 905	**Referred to**	**Para 17**
1981 (2) SCR 533	**Referred to**	**Para18**
2005 (3) SCR 81	**Referred to**	**Para 19**
2008 (6) SCR 427	**Referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6896 of 2002.

From the Judgment & Order dated 18.01.1996 of the High Court of Judicature at Allahabad in CMWP 599 of 1994.

D.K. Agarwal, Sudhir Kumar Gupta, Manish Gupta for the Appellant.

Ravi Prakash Mehrotra, Mukesh Verma for the Respondents.

The Judgment of the Court was delivere by

D.K. JAIN, J.: 1. Challenge in this appeal, by special leave, is to the judgment and order dated 18th January, 1996, delivered by the High Court of Judicature at Allahabad in C.W.P. No.599 of 1994. By the impugned judgment, the High Court has come to the conclusion that although the State Government had no authority to levy Excise duty under Section 28 of the U.P. Excise Act, 1910 (for short "the Act") on rectified spirit (industrial alcohol) in question but it could impose penalty on the appellant under Rule 633(7) of the Uttar Pradesh Excise Manual, (for short "the Excise Manual").

2. The background facts, essential for disposal of the instant appeal, in brief, are that on 15th October, 1988, the Excise Commissioner, Uttar Pradesh, issued an order authorising nine distilleries in the State, including M/s Daurala Sugar Works, to export rectified spirit (industrial alcohol), outside India. Since the export consignment was to be routed through the appellant, as handling agent as also the owner of the bonded warehouse at Kandla Port, where the spirit was to be stored before export, the appellant was required to furnish an indemnity bond, in the prescribed form, in favour of the Excise Commissioner as the authorised nominee of the exporter. On 20th December 1988, the appellant executed an indemnity bond in favour of the Governor of Uttar Pradesh in relation to permission for removal by rail 67.77 lac bulk litres of rectified spirit of any strength ranging between 91.68% V/V @ 15.60C to 95% V/V @ 15.60C. One of the conditions in the indemnity bond was that if the said quantity of rectified spirit, after deducting such allowance for dryage and wastage, as may be sanctioned, is not delivered at the warehouse at Kandla, the authorised nominee, the appellant herein, shall indemnify the Governor for any loss of duty, which the Governor may suffer by reason of such non delivery or short delivery, by paying him

on demand the duty @ Rs.40/- per alcoholic litre, on spirit not so delivered, after making the allowances aforesaid.

3. On 8th January, 1989, M/s Daurala Sugar Works consigned a rake of 15 tank wagons, loaded with 3,54,413 bulk litres of rectified spirit under PD-25 pass for export against order dated 15th October, 1988. The said consignment was dispatched through the Northern Railway to Kandla Port. However, out of 15 tank wagons only 14 tank wagons reached the Kandla Port. On 16th January, 1989, it was discovered that the 15th tank wagon was lying empty at Gandhi Dham Railway Station.

4. On 2nd October, 1992, a notice was issued by the Excise Commissioner to the appellant alleging that since the pass in form PD-25, issued to the appellant by the concerned Collector in terms of Rule 633 of the Excise Manual had not been received back along with certificate from the Collector for due delivery, they were liable to deposit in the Government Treasury, Excise duty on the rectified spirit @ Rs.40/- per alcoholic litre, which amounted to Rs. 8,71,744/- along with interest at the rate of 18% per annum (Rs.5,49,199/-).

5. The appellant having failed to deposit the said amount, another notice was issued by the Commissioner requiring them to show cause as to why their name be not black-listed and in future, permission for export may not be granted, on account of default on their part in not depositing Excise duty as demanded earlier.

6. The appellant responded to the said show cause notice by their letter dated 11th February, 1993, in which it was stated that since the reason for non receipt of the said rectified spirit was being investigated, the matter may be deferred till 30th June, 1993. Finally, vide their letter dated 29th April, 1994, the appellant replied to the show cause notice, contesting Excise Commissioner's claim for payment of Excise duty on account of non-receipt of full quantity of rectified spirit at the Kandla Port.

It was pleaded that since the entire rake of 15 tank wagons was handed over to the Railway authorities at Daurala station for its delivery at Kandla Port, it was the responsibility of the Railways to make safe delivery of the goods at the destination and, therefore, the appellant was in no way responsible for the disappearance of rectified spirit contained in one of the tank wagons. It was, thus, urged that no Excise duty was payable by the appellant as the State Government had not suffered any loss of duty by reason of non delivery or short delivery of the rectified spirit.

7. Not being satisfied with the explanation furnished by the appellant, vide letter dated 6th April, 1994, the Excise Commissioner directed the District Excise Officer, Bareilly to issue recovery certificate and take appropriate steps against the appellant for the recovery of Excise duty amounting to Rs. 8,71,744/- and interest thereon. By letter dated 22nd June, 1994, the Bank of Baroda, Mandwi Branch, informed the appellant that pursuant to an order dated 22nd June, 1994, issued by the Sub-Divisional Magistrate, their bank account had been attached and a sum of Rs. 12,00,000/- had been earmarked from their account for payment of Excise duty.

8. Being aggrieved, the appellant filed a writ petition before the High Court, seeking quashing of notice of demand dated 6th April, 1994. Relying on the decision of a Bench of seven Judges in *Synthetics And Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.*[1], wherein it was held that the States are not competent to impose a tax or charge imposts in respect of rectified spirit for industrial purposes, having a strength not less than 95% by volume of ethyl alcohol, the High Court held that though the State of U.P. did not have jurisdiction to levy and demand Excise duty on the rectified spirit (industrial alcohol), which disappeared during transit, but Rule 633 of the Excise Manual empowered the State to impose penalty at the same rate at which the Excise duty was payable for breach of

1. (1990) 1 SCC 109.

conditions in the Bond. The High Court also held that it could be presumed that the appellant had diverted the rectified spirit into potable alcohol on which penalty and penal interest could be levied and, therefore, it was not a fit case where it should exercise its jurisdiction under Article 226 of the Constitution of India and quash demand notice dated 6th April, 1994. Accordingly, the writ petition was dismissed. Being dissatisfied, the appellant is before us in this appeal.

9. We have heard learned counsel for the parties.

10. Assailing the decision of the High Court, Mr. D.K. Agarwal, learned senior counsel appearing for the appellant, strenuously urged that in light of decision of this Court in *Synthetics And Chemicals* (supra), which was duly noticed in the impugned judgment, the High Court exceeded its jurisdiction in converting the levy of Excise duty into penalty and interest under Rule 633 of the Excise Manual. It was argued that the High Court misread the Rule inasmuch as Rule 633(7) contemplates recovery of penalty under the bond in order to indemnify the Governor of the State for loss of Excise duty but when admittedly no Excise duty could be levied by the State Excise Commissioner on the entire consignment of rectified spirit, covered under the bond, there was no question of loss of Excise duty on that account, for which the Governor was to be indemnified. It was asserted that in any event imposition of penalty under the said Rule was *ex-facie* illegal as neither any show-cause notice was issued to the appellant before such levy nor any amount by way of penalty on account of the alleged non-compliance with the conditions of the bond was quantified and communicated to the appellant. It was thus, asserted that since an order under Rule 633, entails serious consequences the elementary principles of natural justice and fair play are required to be observed and consequently, an opportunity of hearing has to be afforded before an order under the said Rule is made, which was admittedly not done in the instant case. In fact, the said Rule was invoked for the first time by the High Court.

11. Mr. Ravi Prakash Mehrotra, learned counsel appearing for the State, on the other hand, supporting the view taken by the High Court, submitted that Rule 633, does not postulate a show-cause notice before levy of penalty or interest because penalty or interest being compensatory in nature because of infringement of condition of an indemnity bond furnished by the appellant to the Collector or the Excise Inspector, the liability under the Bond is absolute. It was argued that since in the present case, admittedly, the discharge certificate in terms of Rule 633 had not been furnished by the appellant within the stipulated time, penalty under the said Rule was clearly exigible.

12. The precise question at issue is whether sub-rule (7) of Rule 633 of the Excise Manual postulates the requirement of hearing before steps for recovery of penalty under the said Rule are initiated?

13. Before addressing the issue, it is necessary to bear in mind the fact that in so far as the question of levy of Excise duty on the high strength rectified spirit in 15 tank wagons is concerned, parties are *ad-idem* that in view of the judgment of this Court in *Synthetics And Chemicals* (supra), the State was not empowered to levy Excise duty on the said consignment. In the said decision, while interpreting Entry 84 of List I, Entry 8 and 51 of List II and Entry 33 of List III of the Seventh Schedule to the Constitution of India, it was held that the State legislature has no power to enact law levying duty on the spirit, which is not meant for human consumption. It was also held that the State has the power to impose duty only on spirit, which is meant for human consumption under Entry 51 of List II of the Seventh Schedule. In light of the said decision, it is clear that under Section 28 of the Act, the charging Section, an Excise duty or a Countervailing duty, as the case may be, can be imposed by the State on alcoholic liquor only when it reaches the stage of human consumption and not on high strength rectified spirit (industrial alcohol), a Central subject. Therefore, the High Court is correct in law in holding that the State did not

have the jurisdiction to levy Excise duty on rectified spirit, loaded in 15 tank wagons.

14. However, Rule 633 of the Excise Manual, which has been pressed into service by the High Court to sustain the demands raised against the appellant, reads as follows :

"633. Any person may export in bond foreign liquor manufactured at a distillery in Uttar Pradesh to any place in India under a pass in form P.D.25 granted as provided in the following rules:

(1) When any person desires to export in bond spirit manufactured at a distillery in Uttar Pradesh, he shall present a written application in form P.D. 58 to the Collector of the district in which the distillery of manufacture is situate.

The application must specify—

(i) the name of the consignor;

(ii) the name of the consignee;

(iii) the description, quantity and strength of the spirit to be exported.

(2) Every application must be accompanied by—

(i) a permit from the Collector, Deputy Commissioner, or other officer specially appointed in this behalf of the district to which the spirits are to be exported authorizing the import of spirit; and

(ii) a duly executed special bond in form P.D. 16 or a reference to a general bond in form P.D. 15.

(3) The pass granted by the Collector of the exporting district or the Excise Inspector to whom the Collector may have delegated his power vide

paragraph 58(c) of this Manual, shall be in triplicate in form P.D.-25.

One copy of the pass shall be delivered to the exporter, the second forwarded to the Collector, Deputy Commissioner, or *other* officer specially appointed in this behalf of the district to which the spirits are to be taken, and the third retained for record.

*NOTE-This will usually be the officer-in-charge of the bonded warehouse to which the spirit is consigned.

An advance in form P.D. 26 must also be sent by the officer-in-charge direct to the authority granting the import permit who will return the same duly filed in as soon as possible after receipt and verification of the consignment.

Within a reasonable time to be fixed by the Collector of the exporting district and specified in the bond or pass the importer shall produce before the Collector of the exporting district his copy of the pass endorsed with a certificate signed by the Collector, Deputy Commissioner or other officer specially appointed in this behalf, of the importing district certifying the due arrival or otherwise of the spirit at its destination;

(4) On each cask or other vessel containing spirit for export there shall be legibly cut or painted:

(i) the name and mark of the exporting distillery;

(ii) the number of the cask or other vessel and its capacity;

(iii) the nature, quantity and strength of its contents.

These particulars shall correspond with those entered in the pass.

(5) On a written application being made to the Collector

of the exporting district establishing sufficient cause for the grant of an extension of time, or on the production before him of a certificate from the Collector, Deputy Commissioner, or other officer specially appointed in this behalf, of the district of destination, to the effect that there are good and sufficient reasons for extending the currency of the pass or bond, it shall be competent for the Collector of the exporting district, if he thinks fit, to extend the time specified in the pass or bond for the due arrival of the spirit at its destination.

(6) In the case of spirit exported under special bond the Collector of the exporting district shall discharge the bond on receipt of the pass in form P.D.-25 and certificate mentioned in clause (3), provided that none of the conditions of the bond have been infringed. The duty on consignment issued under a general bond shall be written off on receipt of the pass and certificate mentioned in clause (3), provided that none of the conditions of the bond have been infringed.

(7) If the certificate be not received within the time mentioned in the bond or pass, or if on receipt of the certificate it appears that any of the conditions of the bond have been infringed the Collector of the exporting district or the Excise Inspector who granted the pass shall forthwith take necessary steps to recover from executant or his surety the penalty due under the bond."

15. It is manifest that the said Rule, made in exercise of the rule-making power of the State under the Act, would apply only in relation to manufacture, import, export and transport of potable liquor, i.e. the liquor which is capable of being consumed by human beings. Precisely for the aforesaid reason, in order to bring appellant's case within the scope of Rule 633, High Court went on to observe that it could be presumed that rectified spirit in the missing tank wagon was diverted for conversion into potable alcohol. Rule 633 is of

regulatory character meant to ensure that the liquor being exported under a bond reaches its destination and is not misused or misutilized in transit. It contemplates that if the bond along with certificate signed by the Collector or other named officers of the importing district, certifying due arrival or otherwise of the liquor at its destination, is not furnished to the Collector of the exporting district, he would be entitled to presume that the liquor has been disposed of otherwise than by export and can proceed to take necessary steps as postulated in sub-rule (7) of Rule 633 of the Excise Manual. The said Rule provides for imposition of penalty, which may be equivalent to the Excise duty, leviable under the charging Section 28 of the Act on potable liquor. Bearing in mind the scope of Rule 633, we may now advert to the moot question, viz. whether the principles of natural justice demand that an opportunity of hearing should be afforded before an order under Rule 633(7) of the Excise Manual is made?

16. Before we deal with the question, it would be necessary to understand and appreciate the concept of natural justice and the principles governing its application.

17. Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. As observed by this Court in *A.K. Kraipak & Ors. Vs. Union of India & Ors.*[2] the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see *Income Tax Officer & Ors. Vs. M/s Madnani Engineering Works Ltd., Calcutta*[3]).

2. (1969) 2 SCC 262.

3. (1979) 2 SCC 455.

18. In *Swadeshi Cotton Mills Vs. Union of India*[4] R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to a catena of decisions, his Lordship observed thus:

> "Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. *(i) audi alteram partem and (ii) nemo judex in re sua.* The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle—as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely i*f the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing,* shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this

4. (1981) 1 SCC 664.

> cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."
>
> (Emphasis added)

19. In *Canara Bank Vs. V.K. Awasthy*[5] the concept, scope, history of development and significance of principles of natural justice have been discussed in extenso, with reference to earlier cases on the subject. *Inter alia*, observing that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights, the court said:

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held."

20. The question with regard to the requirement of an opportunity of being heard in a particular case, even in the absence of provisions for such hearing, has been considered by this Court in a catena of cases. However, for the sake of brevity, we do not propose to refer to all these decisions. Reference to a recent decision of this Court in *Sahara India*

5. (2005) 6 SCC 321.

(Firm), Lucknow Vs. Commissioner of Income Tax, Central-I & Anr.[6] would suffice. In that case, the question for adjudication was whether in the absence of a provision in the Income Tax Act, 1961, an opportunity of hearing was required to be given to an assessee before an order under Section 142(2-A) of the said Act, directing special audit of his accounts was passed? A Bench of three Judges, speaking through one of us (D.K. Jain, J.), explaining the concept of "natural justice" and the principles governing its application, summed up the legal position as under :

> "Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.
>
> We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle audi alteram partem, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these

6. (2008) 14 SCC 151.

> matters that the question of application of the said principle can be properly determined."

21. Having considered the issue, framed in para 12 supra, on the touchstone of the afore-noted legal principles in regard to the applicability of the principles of natural justice, we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard. Undoubtedly, action under the said Rule is a quasi-judicial function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before raising any demand and initiating any step to recover from the executant of the bond any amount by way of penalty, there has to be an adjudication as regards the breach of condition(s) of the bond or the failure to produce the discharge certificate within the time mentioned in the bond on the basis of the explanation as also the material which may be adduced by the person concerned denying the liability to pay such penalty. Moreover, the penalty amount has also to be quantified before proceedings for recovery of the amount so determined are taken. In our view, therefore, if the requirement of an opportunity to show-cause is not read into the said Rule, an action thereunder would be open to challenge as violative of Article 14 of the Constitution of India on the ground that the power conferred on the competent authority under the provision is arbitrary.

22. Thus tested, in the instant case, vide his letter dated 2nd October 1992, the Excise Commissioner called upon the appellant to deposit an amount of Rs. 14,20,943/- towards Excise duty and interest on account of default on their part to

furnish PD-25 pass duly certified by the competent authority at Kandla Port. The letter /notice does not indicate the exact quantity of rectified spirit on which duty @ Rs. 40/- per alcoholic litre has been charged, though the total amount of duty payable is mentioned. Similarly, in the final show-cause notice dated 6th April 1994, threatening action for black listing for future exports on account of non-payment of the aforenoted amount, there is not even a whisper as to how and why rectified spirit in question was being subjected to Excise duty by the State. As stated above, this Court having categorically held in *Synthetics And Chemicals* (supra) and in catena of subsequent decisions that the State Legislature had no legislative competence to impose Excise duty on rectified spirit (industrial alcohol), the Commissioner of Excise could not demand Excise duty on rectified spirit contained in the tank wagon which, later on, was found to be empty, without returning a finding that the said spirit had been diverted/converted into potable alcoholic liquor fit for human consumption, on which the State was empowered to impose duty. It bears repetition that such a finding could not be recorded by the Commissioner without affording due opportunity to the appellant to explain its stand in this regard for which, the onus lay on them as transporter and the executant of the bond. We may, however, add that in the absence of any reasonable explanation regarding disappearance of rectified spirit, the Commissioner would have reason to presume that the same has been disposed of otherwise than by way of export outside the country, for which purpose it was being transported. We are convinced that in the present case, before imposing the impugned demand of penalty and interest, there was absolutely no adjudication by any authority as regards the breach committed by the appellant, except the allegation that the appellant had failed to furnish the PD-25 pass certified by the Collector. In our opinion, therefore, the action of the respondents for the recovery of penalty and interest, being violative of principles of natural justice, is null and void.

23. In the afore-said premises, we allow the appeal; set aside the impugned demand raised by the Commissioner of Excise vide notice dated 2nd October 1992, as well as the judgment of the High Court, sustaining the demand by invoking Rule 633 of the Excise Manual and remit the matter to the jurisdictional Excise Commissioner to decide the question of levy of Excise duty and/or penalty and interest on the subject consignment of rectified spirit, after affording adequate opportunity of hearing to the appellant.

24. In the facts and circumstances of the case, the parties are left to bear their own costs throughout.

N.J. Appeal allowed.

STATE OF MAHARASHTRA
v.
GORAKSHA AMBAJI ADSUL
(Criminal Appeal No. 999 of 2007)

JULY 07, 2011

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

Penal Code, 1860 – ss. 302 and 201 – Conviction under – Continuous quarrels amongst family members over division of property – Accused no. 1, his wife (accused no.3) and brother (accused no. 2) on one side and accused no. 1' s father, step mother and step sister on the other side – Accused no. 1 administered sedative/poisonous substance mixed in sweets to all family members and when they fell asleep, he strangulated father, step mother and step sister to death – Thereafter, he packed the dead bodies in two trunks and loaded in different trains, which were later recovered from different railway stations – Conviction of accused no. 1 u/ss. 302 and 201 by trial court, on the basis of circumstantial evidence and award of death sentence – However, acquittal of accused nos. 2 and 3 – High Court upheld the order of conviction but modified the sentence of death to life imprisonment – On appeal, held: Prosecution has been able to prove a complete chain of events which point towards the guilt of the accused – Right from the evidence of the entire family having the last dinner together and administering of sweets with sedatives/poisonous substances to the recovery of bodies of the deceased at different railway stations, the chain of events stands proved beyond reasonable doubt – Statement of the accused u/s. 313 Cr.P.C. supports the prosecution case – Thus, there is no error in the concurrent findings recorded by the courts below convicting accused no. 1 u/ss. 302 and 201 – As regards the order of sentence, the manner in which the crime has been committed is deplorable but the attendant circumstances and the fact that he even

administered the sweets containing sedatives/poisonous substance to his own wife (accused no. 3) shows accused's frustration, and probably greed, for the property had attained volcanic dimensions – Constant nagging was a mitigating circumstance in the commission of the crime – Thus, the case does not fall in the category of 'rarest of rare cases' – Order of sentence as modified by the High Court is upheld.

Evidence – Circumstantial evidence – Conviction on basis of – When – Held: When the prosecution is able to establish the chain of events to satisfy the ingredients of commission of an offence, accused would be liable to suffer the consequences of his proven guilt.

Sentence/Sentencing – Principles governing sentencing policy – Held: Awarding punishment is an onerous function in the dispensation of criminal justice – Court is expected to keep in mind the facts and circumstances of a case, principles governing award of sentence, the legislative intent of special or general statute raised in the case and impact of awarding punishment – Court need to examine these nuances with discernment and in depth – Criminal jurisprudence.

Code of Criminal Procedure, 1973

s. 354(3) – Conditions to be satisfied prior to imposition of death penalty – Held: Death penalty should be imposed in rarest of rare cases and that too for special reasons to be recorded – Courts to take into consideration the mitigating circumstances and their resultant effects – The conditions of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic feature of a reasoning supporting and making award of death penalty unquestionable – Circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only inevitable conclusion should be awarding the death penalty.

s. 354(3) – Legislative intent behind enactment – Explained.

'A' was the real father of accused nos. 1 and 2 while accused no. 3 is the wife of accused no. 1. 'J' is the step-mother of accused nos. 1 and 2 while R and PW.13-'S' are their step-sister and step-brother respectively. There were quarrels amongst family members over the partition of the property with accused no. 1 to 3 on one side and 'A', his wife 'J' and his daughter 'R' on the other side. On the night of the incident, accused no. 1 offered sweets containing sedatives/poisonous substance to all - 'A', 'J', 'SN', 'R' and accused no. 3 and when the family was asleep, he killed 'A', 'J' and 'R' by strangulation. Thereafter, he packed the dead bodies in two boxes and loaded them in two different trains. The same were recovered later from two different railway stations. FIR was registered. Investigation was carried out. Accused Nos. 1 to 3 were arrested. The trial court on the basis of the circumstantial evidence-dispute over agricultural land/ partition; last seen theory; administration of sedative through sweets; disposal of dead bodies by accused no. 1; identification of accused no. 1 as person loading trunk in the train; homicidal death of 'A', 'J' and 'R'; and false theory/explanation propounded by accused for absence of the victim, convicted accused no. 1 for commission of offence under Sections 302 and 201 IPC and awarded sentence of death. However, accused no. 2 and 3 were acquitted. The High Court converted the death penalty into life imprisonment while sustained the order of conviction. Therefore, accused no. 1 and the State filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 It is a case of circumstantial evidence and there is no eye-witness or other direct evidence in regard to the murder of the three deceased persons. PW- 13 and

the accused no. 3-'S' required medical assistance on the next day as they suffered from vomiting and dysentery presumably because of food poisoning caused by the sedative-infused pedas, which were offered to them by accused no.1. On enquiry by the brother of the deceased 'A', the accused had informed him that 'A', 'J' and 'R' had gone to place 'AN' for medical treatment and subsequently claimed that he had received a telephone call from his father stating that the family was proceeding to the holy place 'P'. This lead to the arrest of the accused. Also, accused no. 1 hired a Maruti Van owned by PW14 for the purpose of carrying the two trunks containing the three dead bodies from the village to the Railway Station. PW-7, a friend of the accused also deposed that the trunk was kept in front of his house before it was loaded in the Maruti Van. PW12 is a friend of PW.14 and both of them were together when accused no. 1 contacted PW.14 for hiring of Maruti Van on 24th October, 2002. They were again together when two trunks were lifted in the early dawn hours on 25th October, 2002. Thus, these two persons were material witnesses for establishing the fact that these trunks/iron boxes were actually carried from the said place to the Railway Station by the accused. PW17, brother of 'J' identified the dead bodies. His statement is of significance in regard to the identification of the dead bodies as well as the conduct of the accused subsequent to the recovery of the dead bodies. He is the person who was provided with incorrect information by the accused no.1 regarding whereabouts of the deceased. PW13-'S' is another material witness as he was also administered the pedas laced with sedatives and the same was served in his presence to the deceased by the accused no.1. Besides this evidence, the statement of PW10-doctor also helped in completing the chain of events leading to the commission of the crime and its subsequent result. According to PW.10 he

had treated PW13 and accused no.3 on 24th October, 2002 when they were brought to him with the complaint of diarrhea. When they went to the doctor, the accused no.1 had accompanied them. [Para 9] [53-H; 54-A-H; 55-A-F]

1.2 PW 23, Judicial Magistrate recorded the statements of PW12, PW14, PW17 and sister of the deceased 'J' under Section 164 Cr.P.C. PW 12, PW 14 and PW 17 are the main witnesses on whose statement the entire case of the prosecution rests in addition to the statement of the Investigating Officers and other formal witnesses. [Paras 10 and 11] [55-G-H; 56-A-B]

1.3 In the facts and circumstances of the case, the High Court expressed the opinion that two circumstances, i.e. the last seen together and the homicidal death stands proved by themselves and do not require further evidence to prove that fact. The view expressed by the High Court that keeping in view the photographs of the dead body and the doctor's statement, it was proved to be a homicidal death, is concurred with. The argument that the doctor had not expressed his opinion with regard to the cause of death particularly in relation to 'R' and 'J', is not impressive at all inasmuch as the death of the two persons was proved. From the injury report on the body of the deceased, the photographs and the circumstances attendant thereto, it is more than clear that this was a case of homicidal death. The bodies of the deceased were duly identified. It was practically an admitted case that the deceased as well as the accused were living in a joint family and had their last meals together, during which the accused had offered pedas to the family including the deceased. This is fully substantiated by the statement of PW13 and PW10. PW13, 'S' is a family member. He had also suffered the consequences of consuming the pedas and was treated by PW10-doctor. The factum of carrying of

two boxes and loading them on the respective trains was fully established by the prosecution. In some portion of the judgment, the High Court correctly appreciated the evidence. It disregarded the statement of PW7 while fully relying upon and holding that there were witnesses who were truthful and can be safely relied upon. [Para 13] [56-H; 57-A-F]

1.4 The conclusion of the High Court does not suffer from any legal infirmity. It is in conformity with the settled principles of law and is based on proper appreciation of evidence. The finding of guilt by both the courts is concurrent. However, they differ only on the question of quantum of sentence. On the appreciation of evidence, the prosecution has been able to prove a complete chain of events which points only towards the guilt of the accused. Even in a case of circumstantial evidence, if the prosecution is able to establish the chain of events to satisfy the ingredients of commission of an offence, the accused would be liable to suffer the consequences of his proven guilt. In the instant case, right from the evidence of the entire family having the last dinner together and administering of pedas with sedatives or poisonous substances to the recovery of bodies of the deceased at different railway stations the chain of events stands proved beyond reasonable doubt. In fact, the statement of the accused under Section 313 Cr.P.C. further supports the case of the prosecution and demolishes the stand of the defence of complete denial. Thus, there is no error in the concurrent findings recorded by the courts holding the accused guilty of an offence under Sections 302 and 201 IPC. [Para 14] [60-E-H; 61-A-B]

2.1 Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances

of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth. The legislative intent behind enacting Section 354(3) Cr.P.C. clearly demonstrates the concern of the legislature for taking away a human life and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the Court would also take into consideration the mitigating circumstances and their resultant effects. Language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words 'in the case of sentence of death the special reasons for such sentence' unambiguously demonstrates the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at ad idem in law. The death penalty should be imposed in rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the pre-requisites contemplated under Section 354(3) Cr.P.C. [Para 16] [61-E-H; 62-A-D]

2.2 Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding

death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the Court to the extent that the only and inevitable conclusion should be awarding of death penalty. [Para 21] [68-B-D]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh vs. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413 – relied on.**

D.K. Basu v. State of West Bengal **(1997) 1 SCC 416: 1996 (10)Suppl. SCR 284;** *Santosh Kumar Satishbhushan Bariyar vs. State ofMaharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Vashram Narshibhai Rajpara v.State of Gujarat* **AIR 2002 SC 2211: 2002(3)SCR 422 – referred to.**

2.3 In the instant case, the accused belonged to the armed forces, his father had married for the second time and had children from the second wife. There were continuous quarrels with regard to the division of property and during these quarrels the accused is stated to have even hit his father. It was a pressure which had increased with the passage of time and probably this frustration attained the limit of commission of such a heinous crime by the accused. The manner in which the crime has been committed is deplorable but the attendant circumstances and the fact that he even administered the sweets (pedas) containing sedatives/poisonous substance to his own wife, the accused no.3, shows that his frustration, and probably greed, for the property had attained volcanic dimensions. The intensity of bitterness between the members of the family had exacerbated the thoughts of revenge and retaliation in him. The constant nagging would have to be taken as a mitigating circumstance in the commission of this crime. Thus, in

view of the factual matrix and the legal analysis, the instant case does not fall in the category of 'rarest of rare cases'. [Para 22] [68-E-H; 69-A]

Case Law Reference

(1980) 2 SCC 684	**Relied on**	**Paras 16, 18**
1983 (3) SCR 413	**Relied on**	**Para 17**
1996 (10) Suppl. SCR 284	**Referred to**	**Para 19**
2009 (9) SCR 90	**Referred to**	**Para 19**
2002 (3) SCR 422	**Referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 999 of 2007.

From the Judgment & Order dated 30.09.2005 of the High Court of Judicature at Bombay Bench at Aurangabad in Confirmation Case No. 1 of 2005 and Criminal Appeal No. 157 of 2005.

WITH

Crl. A. No. 1623 of 2007.

Asha Gopalan Nair, Suvira Lal (Amicus Curiae) for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The learned trial court, while weighing the mitigating and aggravating circumstances and keeping in mind the principle of proportionality of sentence or what it termed as "just-desert" for the brutal and diabolical killing of three innocent family members, formed an opinion that the Court could not resist from concluding that the only sentence that could be awarded to the accused was death penalty. Thus, it directed that the accused Goraksha Ambaji Adsul be hanged by the neck till he is dead in terms of Section

354(5) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), subject to confirmation by the High Court in accordance with law. Aggrieved by this extreme punishment and the order of conviction, the accused challenged the judgment of the learned trial court dated 14th February, 2005 by filing an appeal before the High Court which vide its detailed judgment dated 30th September, 2005, declined to confirm the death sentence referred under Section 366 of the Cr.P.C. and held the said accused guilty of offence under Sections 302 and 201 of the Indian Penal Code (for short 'IPC'), and sentenced him to undergo life imprisonment. In other words, the High Court converted the death penalty into life imprisonment while sustaining the order of conviction.

2. The State of Maharashtra has preferred the present appeal bearing Crl.A. No. 999/2007, before this Court claiming that the said conversion by the High Court is not appropriate in the facts and circumstances of the case. The State further avers that the High Court in its judgment has fallen in error of law as well as failed in appreciation of evidence. It is contended that this Court should restore the judgment of the trial court on the quantum of sentence by awarding death penalty. The accused has filed a separate appeal being Crl.A. No. 1623 of 2007 challenging the very same judgment of the High Court on the ground that the appellant could not have been held guilty for an offence under Sections 302 and 201 of the IPC and the appellant was entitled to judgment of acquittal.

3. Thus, it will be appropriate for us to dispose of both the above appeals by a common judgment. For that purpose, we may briefly notice the facts giving rise to the present appeals.

4. Accused no.1 Goraksha Ambaji Adsul is the son of the deceased, Ambaji Ahilaji Adsul. Accused no.3 Sow. Sunita Goraksha Adsul is the wife and Accused no.2 Mininath Ambaji Adsul is the brother of the Accused no.1 Goraksha. Accused no.1 was serving in the Indian Army and used to visit his village Hivare-Korda where the family had some agricultural land and

other properties. The deceased, Ambaji Ahilaji Adsul was also married to the second deceased, Janabai and she was his second wife. In other words, Janabai was the stepmother of the Accused no.1 and 2 and Reshma (deceased) was their stepsister. All these persons used to jointly reside in their house in the said village. It has come in evidence that there used to be quarrels between the Accused no.1, his brother and wife on the one side and the deceased Ambaji Ahilahi Adsul, his wife Janabai and daughter Reshma on the other. The accused used to demand partition of the land and other property and allotment of share to the accused and his brother. This persisted for a considerable time and is said to be the motive for commission of the offence.

5. One Premchand Rangarao Jatav, Deputy Station Superintendent, Railway Station, Bhopal (PW9), received a memo sent by Sh. R.K. Arora, Train Ticket Examiner (TTE), informing him that a black coloured trunk was found in Bogie No.S-6 of Train No. 2779 (Goa-Nizamuddin Express) running via Ahmednagar when it reached Bhopal Railway Station on 25th October, 2002 at about 7.00 p.m. The black trunk was seized under *panchnama* and when the same was opened in the presence of Dr. Harsh Sharma it was found that it contained a dead body which was later identified to be that of Ambaji Ahilaji Adsul. Mr. Someshwari Jogeshwari Prasad Mishra, ASI, G.R.P. Bhopal (PW11) completed the formalities of inquest and post-mortem. After the body was received in the hospital it was inspected by one Dr. Mrs. Rajni Armit Arora, the then Associate Professor at the Department of Forensic Medicine, Gandhi Medical College, Bhopal, (PW19). It was noticed that a lace was found to have been tied to the portion covering neck and throat of the deceased. Dr. Arora performed the autopsy on 26th October, 2002. She noticed ligature mark of brownish colour and ligature material of khaki colour shoe lace, two in number, tied around the neck encircling it and described the injuries as ante-mortem injuries. According to the said doctor, the cause of death was

strangulation and homicidal in nature and was caused two to three days prior to the post-mortem examination. As nobody had claimed the body, the blood stained clothes of the deceased were seized and the body was cremated at Bhadbhada Vishram Ghat, Bhopal. An FIR (exhibit-82) was registered with regard to the said crime.

6. On 25th October, 2002 itself, another train, i.e. Train No. 7602-UP (Nanded Pune Express) reached Ahmednagar Railway Station at its scheduled time in the morning at about 6.15 a.m. and departed at 6.30 a.m. Enroute, during the stop at Akolner Railway Station for crossing of the train coming from opposite direction, Mr. Sanjay Bhujadi, TTE, found one white tin trunk in Bogie No. S-4 placed between the two toilets of the Bogie No. S-4. After arriving Kasthi Railway Station, Mr. Sanjay Bhujadi made a report to the Station Master, Kashti, informing him of the said trunk. This memo was delivered to GRP, Daund Railway Station (Ex.132). The trunk was removed from the bogie and a *panchnama* was prepared. Thereafter, it was opened and two dead bodies were found in that trunk. These were later identified as those of Janabai and Reshma. Inquest formalities were completed and an FIR (exhibit 125) was lodged on 25th October, 2002 as Crime No. 43/2002 for offence punishable under Sections 302 and 201 of the IPC.

7. The railway police investigating officer, Mr. B.B. Joshi, (PW8) conducted investigation and registered a case vide Crime No. 237/2002 on 17th November, 2002 against the three accused namely, Goraksha Ambaji Adsul, Sow. Sunita Goraksha Adsul and Mininath Ambaji Adsul. On further investigation, it was found that the accused persons had administered sedative/poisonous substance mixed in *pedas* and thereafter strangulated all the three victims with shoe laces. Thereafter, they placed the bodies of the these victims in two different trunks . One trunk was kept near the electricity board D.P. at nearby Village Malkop and the other at the house of one Mr. Sakharam Thakaji Nabge, a friend of the accused

(PW7), before both were transported to the Ahmednagar Railway Station by the accused Goraksha in a hired maruti van. Thereafter, as afore-noticed, these trunks were placed in different trains.

8. Accused nos. 2 and 3 were arrested on 14th November, 2002 and Accused no.1 on 30th November, 2002. Their statements were recorded under Section 164 of the Cr.P.C. by Mr. Sayyad, Judicial Magistrate, First Class, on 6th February, 2003 and 7th February, 2003 respectively. Investigation was completed and the accused were sent to the court of Judicial Magistrate on 11th February, 2003 for committal to the Court of Sessions so that they could be tried in accordance with law. All the three accused had taken the defence of total denial and pleaded false implication. Accused no. 1 had specifically taken up the plea that between 22nd October, 2002 and 25th October, 2002, he was present at his duty place i.e. the Army Office at Patiala. The prosecution has examined as many as 25 witnesses to bring home guilt of the accused persons and after recording the statement of the accused under Section 313 of the Cr.P.C., the trial court after discussing the entire evidence on record had found Accused no.1 Goraksha Ambaji Adsul guilty of an offence under Section 302 as well as Section 201 of the IPC and awarded the sentence of death to him. However, Accused Nos. 2 and 3 were acquitted as according to the trial court, the prosecution had failed to prove its case beyond reasonable doubt against these accused. The State did not prefer any appeal against the acquittal of the said two accused and thus, their acquittal has already attained finality. Resultantly, in the present appeal, we are only concerned with Accused no.1 Goraksha Ambaji Adsul, who has filed an independent appeal against the judgment of conviction and sentence.

9. As would appear from the above narrated factual matrix, it is a case of circumstantial evidence and there is no eye-witness or other direct evidence in regard to the murder of the

three deceased persons. As is clear from the above, Ambaji Ahilaji Adsul was the real father of Accused nos.1 and 2 while Accused no.3 is the wife of Accused no.1. Deceased Janabai was the second wife of Ambaji and therefore the step-mother of Accused nos.1 and 2. Deceased Reshma and PW13 Sunil are the children born to Janabai from Ambaji, thus, they are the step-sister and step-brother of the Accused nos.1 and 2. It is the case of the prosecution that there used to be quarrels and the accused Goraksha used to demand partition of the land and other properties. In fact, he is stated to have assaulted his father during those quarrels. The accused Goraksha had returned home for Diwali. He had brought sweets (*pedas*) with him, which he offered to all, i.e. Ambaji, Janabai, Sunita, Reshma and Sunil on the night of 23rd October, 2002. These *pedas* contained sedative/poisonous substance and after supper when the family was asleep, Goraksha killed his father, stepmother and stepsister by strangulation and packed the dead bodies in two metallic boxes. One of the boxes was loaded in the train 2779 UP, Goa-Nizammudin Express while the other was loaded in train 7602-UP, Nanded-Pune Express and the same were recovered at Bhopal and Daund Railway Stations respectively, as noticed above. Sunil and the accused Sunita required medical assistance on the next day as they suffered from vomiting and dysentery presumably because of food poisoning caused by the sedative-infused *pedas*, which were offered to them by Accused no.1 Goraksha. Another suspicious circumstance which led to the arrest of the accused was that on enquiry by the brother of the deceased Ambaji, the accused had informed him that Ambaji, Janabai and Reshma had gone to Ahmednagar for medical treatment and subsequently claimed that he had received a telephone call from his father stating that the family was proceeding to the holy place of Pandharpur. Still another circumstance which connected accused no.1 with the commission of the crime was that he had hired a maruti van owned by PW14 Bapusaheb Shinde for the purpose of carrying the two trunks containing the three dead bodies from

Village Malkop to the Railway Station, Ahmednagar. PW-7 Sakharam Nabge, a friend of the accused had also deposed that the trunk was kept in front of his house before it was loaded in the Maruti Van. PW12, Baban Vishnu Thorat is a friend of Bapusaheb Shinde and both of them were together when Goraksha contacted Bapusaheb for hiring of Maruti Van on 24th October, 2002. They were again together when two trunks were lifted in the early dawn hours on 25th October, 2002. Thus, these two persons were material witnesses for establishing the fact that these trunks/iron boxes were actually carried from the place afore-indicated to the Railway Station by the accused. PW17, Pandurang Daobhat is the brother of the deceased Janabai and had identified the dead bodies. His statement is of significance in regard to the identification of the dead bodies as well as the conduct of the accused subsequent to the recovery of the dead bodies. He is the person who was provided with incorrect information by the accused Goraksha regarding whereabouts of the deceased. PW13 Sunil is another material witness as he was also administered the *pedas* laced with sedatives and the same was served in his presence to the deceased by the Accused no.1 Goraksha. Besides this evidence, the statement of Dr. Sanjay Pande, PW10 also helps in completing the chain of events leading to the commission of the crime and its subsequent result. According to this witness, he had treated Sunil (PW13) and Sunita (Accused no.3) on 24th October, 2002 when they were brought to him with the complaint of diarrhea. When they went to the doctor, Goraksha, the Accused no.1 had accompanied them.

10. PW23, Ezaz Ahmed, Judicial Magistrate, First Class at Sahabad had recorded the statements of PW12, PW14, PW17 and Meerabai Daobhat, sister of the deceased Janabai under Section 164 of the Cr.P.C. We may also notice that some of the *panch* witnesses who had signed the *panchnamas* turned hostile and PW7 Sakharam, a personal friend of the

accused Goraksha also did not fully support the case of the prosecution.

11. The above are the main witnesses on whose statement the entire case of the prosecution rests, of course, in addition to the statement of the Investigating Officers and other formal witnesses. Accused nos. 2 and 3 were acquitted by the trial court and the High Court noticed that it was not concerned with the merit or otherwise of their acquittal by the trial court as the State had not preferred any appeal against the judgment of acquittal.

12. At this stage, we may usefully refer to the circumstances which were relied upon by the prosecution before the courts and they were as follows:-

(i) Motive – dispute over agricultural land/partition. (Evidence of PW-13 Sunil and PW-17 Pandurang)

(ii) Last seen together – (togetherness by virtue of joint family).

(iii) Administration of sedative through sweets. (Evidence of PW-13 Sunil and PW-10 Dr. Pande).

(iv) The disposal of dead bodies by Accused no.1 (Evidence of PW-12 Baban, PW-14 Bapusaheb).

(v) Identification of Accused no.1 as person loading one trunk in Goa-Nizammuddin Express train (PW-15 Aradhana).

(vi) Homicidal death.

(vii) False theory/explanation propounded by accused for absence of the victim. (Evidence of PW-13 Sunil and PW-17 Pandurang).

13. In the facts and circumstances of the case, the High Court expressed the opinion that two circumstances, i.e. the

last seen together and the homicidal death stands proved by themselves and do not require further evidence to prove that fact. We fully agree with the view expressed by the High Court that, keeping in view the photographs of the dead body and the doctor's statement, it was proved to be a homicidal death. The learned counsel appearing for the Accused no.1 (appellant) argued with some vehemence that the doctor had not expressed his opinion with regard to the cause of death particularly in relation to Reshma and Janabai, as is evident from Exhibits 113 and 114. But this argument does not impress us at all inasmuch as the death of the two persons have been proved. From the injury report on the body of the deceased, the photographs and the circumstances attendant thereto, it is more than clear that this was a case of homicidal death. The bodies of the deceased were duly identified. It was practically an admitted case that the deceased as well as the accused were living in a joint family and had their last meals together, during which the accused had offered *pedas* to the family including the deceased. This is fully substantiated by the statement of PW13 and PW10. PW13, Sunil is a family member. He had also suffered the consequences of consuming the *pedas* and was treated by PW10, Dr. Pande. The factum of carrying of two boxes and loading them on the respective trains has also been fully established by the prosecution as we have above-discussed. At this stage, we may refer to some extracts of the High Court judgment where in our view the High Court has correctly appreciated the evidence. It disregarded the statement of PW7 while fully relying upon and holding that there were witnesses who were truthful and can be safely relied upon, the Court held as under: -

> "To sum-up the assessment of evidence of these seven vital witnesses, we may say that, PW-7 Sakharam Nabge has made himself sufficiently useless for the prosecution. Evidence of PW-12 Baban Thorat is acceptable to establish that Accused No.1 had contracted with PW-14 Bapusaheb and accordingly two trunks were transported from Malkop D.P. to Ahmednagar Railway Station at the instance of Accused No.1 (sic), for which accused no.1 paid hire charges of Rs.200/-. Evidence of PW-14 Bapusaheb, although shaky, can be relied upon on the same point, to the extent it is in harmony with the evidence of PW-12. We find PW-10 Dr. Pande, in the absence of case-papers to refresh his memory, to be not reliable. PW-15 Aradhana also cannot be relied upon for the purpose of identification of Accused No.1, although she can be believed to the extent that the trunk was loaded in Goa-Nizamuddin Express, at Ahmednagar Railway Station. PW-17 Pandurang can be relied upon for identification of the victims and subsequent conduct of Accused No.1, so also to some extent, possible motive i.e. quarrels on the point of partition. PW-13 Sunil, although a child witness, can certainly be believed regarding togetherness on the fateful night, more so because that is an admitted position. His evidence regarding quarrels on the point of partition can also be accepted, because of support from Pandurang and probability. The story of administration of Pedhas containing some sedative/ poisonous substance and subsequent admission to Mate Hospital, has become a story not acceptable without risk, more so when such story is not supported by any case papers.
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> We have subjected the evidence to close scrutiny and only thereafter arrived at our conclusion as to whether witnesses are to be believed and if yes, to what extent.
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> By relying upon *Anthony D. Souza – Vs. – State of Kerala,* A.I.R. 2003 S.C. 258 and *Darshansingh –Vs.- State of Punjab,* 1995 S.C.C. (Crl.) 702, learned A.P.P. has propounded that, in case accused makes a statement under section 313 of Cr.P.C. completely denying the

prosecution case and established facts and offers false answers or explanation, that can be counted as providing missing link from complete chain of the prosecution evidence and circumstances, in a case based on circumstantial evidence. Relying on these cases, an argument that false explanation can be utilized as one of the links in the chain of circumstantial evidence was advanced, in order to persuade this Court that story narrated by accused Goraksha to PW-17 Pandurang about the victims having gone to Pandharpur should be taken into consideration as false explanation, although not to the Court, to the relatives and others. In fact, as already pointed out earlier, accused have persisted in sticking to this explanation even during the curse (sic) of their statement under Section 313 Cr.P.C., 1973, without demonstrating to the Court that either of the two trains, i.e. Goa-Nizamuddin Express and Nanded-Pune Express travel via Padharpur (sic). We may state it here itself, that explanation offered by the accused about his having received a message from Balasaheb Sinare of Village Padali, who received telephone of the deceased Ambaji, of the three victims having gone to Pandharpur cannot be said to have been probabilised in the absence of evidence of said Balasaheb Sinare. The two trains not having been demonstrate as passing through Pandharpur gives another set back to the said defence.

24. In the light of acquittal of Accused Nos. 2 and 3 by the trial court, learned Advocate for the appellant has placed reliance upon the observations of the Supreme Court in the matter of Suraj Mal – Vs- State (Delhi Administration), A.I.R. 1979 S.C. 1408, and more particularly, observation to the following effect in para 2: -

> "where witnesses make tow (sic) inconsistent statements in their evidence, either at one stage or at two stages, the testimony of such witnesses

> becomes unreliable and unworthy of credence, and in absence of special circumstances, no conviction can be based on the evidence of such witness."

This was a case under Prevention of Corruption Act. Three police officers were tried for allegedly having accepted bribe. PW No.s 6, 8 and 9, Shiv Naryan, Prem Nath and Sham Sunder resiled from their statements which they made in their chief examination and all of them stated that Ram Naryan (one of the three accused) refused to accept the bribe. Ram Naryan was, therefore, acquitted by the trial Court. Another accused Devender Singh was acquitted by the High Court on the ground that the sanction was not valid.

We are unable to appreciate the applicability of the ratio to the matter at hands. As can be seen from the impugned judgment, in the present matter, Accused No.s 2 and 3 are acquitted by the trial Court because there is no evidence referring to them….."

14. The above conclusion of the High Court does not suffer from any legal infirmity. It is in conformity with the settled principles of law and is based on proper appreciation of evidence. In fact, finding of guilt by both the Courts is concurrent. However, they differ only on the question of quantum of sentence. On the appreciation of evidence, we are also of the considered view that the prosecution has been able to prove a complete chain of events which points only towards the guilt of the accused. Even in a case of circumstantial evidence, if the prosecution is able to establish the chain of events to satisfy the ingredients of commission of an offence, the accused would be liable to suffer the consequences of his proven guilt. In the present case, right from the evidence of the entire family having the last dinner together and administering of *pedas* with sedatives or poisonous substances to the recovery of bodies of the deceased at different railway stations the chain of events stands

proved beyond reasonable doubt. In fact, the statement of the accused under Section 313 of the Cr.P.C. further supports the case of the prosecution and demolishes the stand of the defence of complete denial. Thus, we are unable to find any error in the concurrent findings recorded by the Courts holding the accused guilty of an offence under Sections 302 and 201 of the IPC.

15. Next, we are concerned with whether this Court should exercise its judicial discretion to enhance his punishment from life imprisonment to death sentence, as contemplated on behalf of the State in its appeal.

16. The factual matrix of the case as well as the evidence which has been led by the prosecution to bring home the guilt of the accused, we have already discussed in some detail. Presently, we may discuss the principles which have been long settled by this Court for imposition of death penalty. The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in the case of *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684]. Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The Court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the Court with discernment and in depth. The legislative intent behind enacting Section 354(3) of the Cr.P.C. clearly demonstrates the concern of the legislature for taking away a human life and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the

Court would also take into consideration the mitigating circumstances and their resultant effects. Language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, *'in the case of sentence of death the special reasons for such sentence'* unambiguously demonstrates the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at *ad idem* in law. The death penalty should be imposed in rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the pre-requisites contemplated under Section 354(3) of the Cr.P.C. in light of the dictum of the Court in the case of *Bachan Singh* (supra).

17. The Constitution Bench judgment of this Court in the case of *Bachan Singh* (supra) has been summarized in paragraph 38 in the case of *Machhi Singh vs. State of Punjab (1983) 3 SCC 470* and the following guidelines have been stated while considering the possibility of awarding sentence of death:

> "i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
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> ii) Before opting for the death penalty the circumstances of the '*offender*' also required to be taken into consideration along with the circumstances of the 'Crime'.
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> iii) Life imprisonment is the rule and death sentence is an exception, Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to

impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

18. The judgment in the case of *Bachan Singh* (supra), did not only state the above guidelines in some elaboration, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issues and they are as follows:

"*Mitigating circumstances.* – In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

19. Now, we may examine certain illustrations arising from the judicial pronouncements of this Court. In the case of *D.K. Basu v. State of West Bengal* [(1997) 1 SCC 416] this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case. In the case of *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* [(2009) 6 SCC 498], this Court also spelt out in paragraphs 56 to 58 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which the court may take into consideration while dealing with such cases. In that case the friends of the victim had called him to see a movie and after seeing the movie, a ransom call was made, but with the fear of being caught, they murdered the victim. The Court felt that there was no evidence to show that the criminals were incapable of reforming themselves, that it was not a rarest of rare case, and therefore, declined to award death sentence to the accused. Interpersonal circumstances prevailing between the deceased and the accused was also held to be a relevant consideration in the case of *Vashram Narshibhai Rajpara v. State of Gujarat* [AIR 2002 SC 2211] where constant nagging by family was treated as the mitigating factor, if the accused is mentally unbalanced and as a result murders the family members. Similarly, the intensity of bitterness which prevailed and the escalation of simmering thoughts into a thirst for revenge and retaliation were also considered to be a relevant factor by this Court in different cases.

20. This Court in the case of *Satishbhushan Bariyar* (supra) also considered various doctrines, principles and factors which would be considered by the Courts while dealing with such cases. The Court discussed in some elaboration the applicability of doctrine of rehabilitation and the doctrine of prudence. While considering the application of the doctrine of rehabilitation and the extent of weightage to be given to the mitigating circumstances, it noticed the nature of the evidence and the background of the accused. The conviction in that case was entirely based upon the statement of the approver and was a case purely of circumstantial evidence. Thus, applying the doctrine of prudence, it noticed the fact that the accused were unemployed, young men in search of job and they were not criminals. In execution of a plan proposed by the appellant and accepted by others, they kidnapped a friend of theirs. The kidnapping was done with the motive of procuring ransom from his family but later they murdered him because of the fear of getting caught, and later cut the body into pieces and disposed it off at different places. One of the accused had turned approver and as already noticed, the conviction was primarily based upon the statement of the approver. Basing its reasoning on the application of doctrine of prudence and the version put forward by the accused, the Court, while declining to award death penalty and only awarding life imprisonment, held as under: -

> "135. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realize the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential

> content of all rights under the Constitution. If life is taken away, all other rights cease to exist.
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> 168. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view of evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed vis-a-vis the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine
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> 169. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on Accused No. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent

thereto.

171. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof. We do not think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty. The discretion granted to the courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

172. We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the '*rarest of rare*' case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the "*rarest of rare*" category.

173. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous

imprisonment for life. Subject to the modification in the sentence of appellant (A1) mentioned hereinbefore, both the appeals of the appellant as also that of the State are dismissed."

21. The above principle, as supported by case illustrations, clearly depicts the various precepts which would govern the exercise of judicial discretion by the Courts within the parameters spelt out under Section 354(3) of the Cr.P.C. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the Court to the extent that the only and inevitable conclusion should be awarding of death penalty.

22. In the present case, the accused belonged to the armed forces, his father had married for the second time and had children from the second wife. There were continuous quarrels with regard to the division of property and during these quarrels the accused is stated to have even hit his father. It was a pressure which had increased with the passage of time and probably this frustration attained the limit of commission of such a heinous crime by the accused. Surely, the manner in which the crime has been committed is deplorable but the attendant circumstances and the fact that he even administered the sweets (*pedas)* containing sedatives/ poisonous substance to his own wife Sunita Goraksha Adsul, the Accused no.3, shows that his frustration, and probably greed, for the property had attained volcanic dimensions. The intensity of bitterness between the members of the family had exacerbated the thoughts of revenge and retaliation in him.

The constant nagging would have to be taken as a mitigating circumstance in the commission of this crime. Resultantly, in view of the above factual matrix and the legal analysis, we do not find that the present case falls in the category of 'rarest of rare cases'.

23. For the reasons afore-recorded, we dismiss both the appeals.

N.J. Appeals dismissed.

SHIPPING CORPORATION OF INDIA LTD.

v.

MARE SHIPPING INC.

(Special Leave Petition (C) No. 19461 of 2006)

JULY 13, 2011

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

***Shipping**: Demurrage charges on account of delay in discharge of cargo – Claim for – Charter Party providing for carriage of crude oil from Ras Sukheir to a safe port on the Indian coastline – No specific port in the Indian coastline mentioned in the Charter Party – Charterers given choice of nominating port for discharge of the cargo – After vessel left Ras Sukheir, intimation given by Charterers for discharge of the cargo at the SBM at Port Vadinar – Vessel reached Port Vadinar on 15.12.1999 and Master of vessel tendered Notice of Readiness (NOR) – However, vessel was not so equipped and could not be moored at the SBM – The Addendum to Charter Party drawn up between Charterer and owner of vessel containing conditions that vessel would be diverted from Vadinar to Mumbai for discharge and all extra cost/ demurrage charges would be borne by Charterer – Thereafter vessel diverted to Mumbai and completed discharge – Claim for demurrage charges made by owner of vessel – Dispute arose and arbitration clause contained in Charter party invoked – Arbitral Tribunal allowed the claim of owner of vessel – High Court upheld the order of the Arbitral Tribunal – On appeal, held: In giving Notice of Readiness upon arrival at the customary anchorage at Vadinar, the Master of the Vessel duly complied with the conditions of the Charter Party – The responsibility for the failure of the ship to moor at the SBM in Vadinar lay squarely on the Charterers and the receiver as they had nominated the SBM for the safe mooring of the vessel –It cannot also be said that the owners of the*

vessel contributed in any way to such failure since the equipment on board the vessel were made known to the Charterers when the Charter Party was signed – The terms of the Charter Party were agreed upon by the parties with their eyes wide open – Even after the vessel was denied mooring at the SBM for safety reasons, no steps were taken by the Charterers to either arrange for an alternate safe berthing in Vadinar or to give instructions as to where the cargo was to be discharged – Even the subsequent deviation of the vessel from Vadinar to Mumbai was not on account of any laches on the part of the owners of the vessel – Read with the Charter Party, the Addendum made it abundantly clear that the Charterers had accepted the responsibility for the failure of the vessel to discharge her cargo at Vadinar and had agreed to bear all the expenses for the delay in diversion of the vessel from Vadinar to Mumbai, including the time spent at Vadinar port and the expenses incurred towards pilotage, tugs and other port expenses – Apart from that the Charter Party specifically provided that extra expenses incurred on account of any change in loading or discharging ports, has to be paid by the Charterers, and any time thereby lost to the vessel shall count as used lay time – There was no reason to interfere with the award of the Arbitral Tribunal – Arbitration.

On 9.11.1999, the petitioner-Charterers and the respondent-owner entered into a Charter Party in respect of the respondent's vessel for carriage of 8150 metric tones of crude oil from the Egyptian Red Sea port of Ras Sukheir to one/two safe anchorage/lighterage points/ SBMs/one/two safe port(s) one/two safe berth(s) anywhere in India. The vessel was described in the Charter party as being fitted with "AK Tongue Type Bow Chain Stopper of min SWL 2000 Mts." The Charter Party contained arbitration clause.

On 19.11.1999, the vessel arrived at Ras Sukheir at 4.00 a.m. and tendered Notice of Readiness (NOR). The loading commenced at 10 p.m. on 20.11.1999 and was

completed by 3.15 p.m. on 21.11.1999. The total lay time provided for loading and discharge of cargo was 72 running hours. Out of the said lay time hours, the lay time used at Ras Sukheir was 37 hours and 30 minutes. On account of a mishap involving the vessel's anchor and the submarine pipe-lines, the vessel was delayed at Ras Sukheir for fourteen days and could leave the port only on 4.12.1999. On 6.12.1999 while the vessel was sailing, the respondents-owners nominated Vadinar Single Berth Mooring (SBM) for discharge of the cargo. The port of discharge was not nominated earlier. The vessel arrived at Vadinar and the Master tendered NOR at 8 p.m. on 15.12.1999. Since the vessel had only one chain stopper/Bow Panama Chock as specified in the Charter Party, the vessel could not be safely moored at the SBM and the Master was asked by the Receiver, Indian Oil Corporation on 21.12.1999 to take away the vessel from the Vadinar SBM.

On 21.12.1999, a message was sent to the petitioner's agents by the Manager of the respondents drawing attention to the fact that the vessel could not be berthed at the SBM and requesting that immediate steps be taken to berth the vessel. But no steps were taken by the petitioners in that regard. Finally a decision was arrived at on 28.12.1999 and Addendum to the Charter Party was drawn up and signed by the Owner and the Charterers containing the conditions that the vessel would be diverted by the Charterers from Vadinar to L.P.O. Mumbai for discharge into a daughter vessel and all the extra cost/ expenses of daughter vessel/demurrage charges would be born by the Charterers. Pursuant to this arrangement, the vessel sailed from Vadinar at 1 a.m. on 29.12.1999 and arrived at Mumbai Lighterage point on 30.12.1999 at 2 p.m. The vessel tendered Notice of Readiness at 2 p.m. on 30.12.1999 and completed discharge at 3.30 p.m. on 1.1.2000. The respondents/owner submitted the

demurrage claims along with supporting documents to the Charterer. As the said claim was disputed, arbitration clause was invoked by the parties under the provisions of the Arbitration & Conciliation Act, 1996. The Arbitral Tribunal passed an award allowing the respondents' demurrage claim in full. Certain other amounts payable under the Addendum were also awarded in favour of the respondents. The petitioner-charterers challenged the award. The Single Judge of the High Court upheld the award. The Division Bench of the High Court affirmed the same.

The question which arose for consideration in the instant special leave petition was whether on arriving at anchorage point at Port Vadinar, despite the destination point being the SBM mooring, it could be said that it was an arrived ship which was competent under the Charter Party dated 9.11.1999, to issue Notice of Readiness of discharge of its cargo; if the finding of the Arbitral Tribunal that the vessel was an arrived ship at Port Vadinar, as upheld by the Single Judge and the Division Bench of the High Court is accepted, would the respondent/owners of the vessel be entitled to damages or demurrage.

Dismissing the special leave petition, the Court

HELD: 1. The Charter Party dated 9.11.1999 was in respect of a transaction which provided for carriage of crude oil from Ras Sukheir to a safe port on the Indian coastline. The Charterers were given the choice of nominating such port for discharge of the said cargo of crude oil. In the absence of any named port of destination in the Charter Party itself, it was only after the vessel left Ras Sukheir that an intimation was given by the Charterers for discharge of the cargo at the SBM at Port Vadinar in Gujarat. That the said nomination was a conscious decision on the part of the Charterers, despite

having knowledge of the equipment available on board the vessel for mooring at a SBM, and in keeping with such decision the vessel set its course from Ras Sukheir to Vadinar. The fiasco at Vadinar was occasioned by the fact that no prior checking had been done to see whether with the mooring equipment on board, the vessel would be able to safely berth at the SBM for discharge of its cargo. [Para 43] [95-A-E]

2. The concept of an arrived ship in shipping terminology requires that a vessel should reach a destination in a port where she could be safely berthed and thereupon be ready to either discharge or load cargo from and on to the vessel. That is a general concept, but the Charterers and the Owners of the vessel could in the Charter Party agree to a specific destination point within the port area for discharging or loading of cargo. Once the vessel arrived at the said spot and was ready to discharge its cargo, it could be described as an "arrived ship" with the authority to issue and tender Notice of Readiness. In the instant case, the nominated port for the arrival of the vessel was Vadinar Port, but the destination point was the SBM where the vessel was to be moored and was to discharge its cargo of crude oil. In fact, in the Charter Party dated 9.11.1999, Clause 6 specifically provided for arrival of the vessel at the port of loading or discharge and cast an obligation upon the Master or his Agent to give the Charterer or his Agent Notice of Readiness in relation to discharge of the cargo. It is a possibility that since no specific port in the Indian coastline had been mentioned in the Charter Party, the Master of the vessel or his Agent was required to give Notice of Readiness upon the vessel arriving at customary anchorage. It is only after the vessel sailed from Ras Sukheir that the receiver, IOC, nominated Vadinar to be the port of discharge with the specific destination point being the SBM within the port. In giving

such Notice of Readiness upon arrival at the customary anchorage at Vadinar, the Master of the Vessel duly complied with the conditions of Clause 6 of the Charter Party and in terms of the said clause irrespective of whether a berth was available or not, lay time commenced upon the expiry of six hours after receipt of such notice. That the vessel could not be moored at the SBM is a different facet of the story. The Charterers had full knowledge of the equipment on board vessel through the questionnaire provided by the respondents/Owners to the petitioners/Charterers. It cannot be denied that despite having such knowledge the IOC nominated the SBM as the destination point for discharge of the cargo. Obviously, the parties to the Charter Party had not made any attempt to verify as to whether the equipment on board the vessel was sufficient for her to be safely moored at the SBM and to discharge her cargo safely. As it turned out later on, the vessel was not so equipped and could not, therefore, be moored at the SBM and had to be requested to move away therefrom. The responsibility for the failure of the ship to moor at the SBM in Vadinar must lie squarely with the Charterers and the receiver as it was they who had nominated the SBM for the safe mooring of the vessel. The lay time must, therefore, be held to have recommenced after the expiry of six hours from the tendering of the Notice of Readiness upon the vessel's arrival at the customary anchorage at Vadinar on 15.12.1999 in keeping with the provisions of Clause 6 of the Charter Party. It was not the case of the Charterers that the failure of the vessel to discharge its cargo at the SBM at Vadinar was for reasons beyond their control. It cannot also be said that the owners of the vessel contributed in any way to such failure since the equipment on board the vessel had been made known to the Charterers when the Charter Party was signed.[Paras 44 and 45] [95-G-H; 96-A-C-G-H; 97-A-H; 98-A-B]

3. In the face of the specific conditions indicated in Clause 6 of the Charter Party, the theoretical and/or academic exercise of what constitutes an "arrived ship" loses much of its relevance. The terms of the Charter Party were agreed upon by the parties with their eyes wide open. Even after the vessel was denied mooring at the SBM for safety reasons on 21.12.1999, no steps were taken on behalf of the petitioners to either arrange for an alternate safe berthing in Vadinar or to give instructions as to where the cargo was to be discharged. In fact, on behalf of the respondent/Owners a legal notice was addressed to the petitioners on 24.12.1999 pointing out that the vessel continued to await discharge incurring demurrage. It was only thereafter that Addendum to the Charter Party was drawn up and signed on 28.12.1999 by the Owners and the Charterers, whereby the vessel was diverted by the Charterers from Vadinar to a Lighterage point at Mumbai port for discharge and it was specifically agreed that the Charterers would bear all the costs of discharge, including freight charges and the expenses of the daughter vessel. It was also agreed that demurrage would be settled as per the terms of the Charter Party. [Para 46] [98-C-G]

4. Once it is held that the vessel was an arrived ship on reaching the customary anchorage at Vadinar port and it was the Charterers who having the choice of a safe port, had selected the SBM at Vadinar as the discharge point, the suggestion made on behalf of the Charterers that it was the responsibility of the Owners of the vessel to check whether the ship could be safely moored at the SBM, is untenable. The responsibility of the Owners of the vessel ended with the declaration of the equipment available on board for mooring and berthing for the purpose of discharge of its cargo. Consequently, all the other ancillary issues which arose had to be answered in favour of the respondents. The fiasco at Vadinar was

occasioned by the fact that no prior checking had been done by the Charterers to ascertain as to whether with the mooring equipment on board the vessel she would be able to moor safely at the SBM for discharge of her cargo. Even the subsequent deviation of the vessel from Vadinar to Mumbai was not on account of any laches on the part of the Owners of the vessel who were awaiting instructions once the vessel had been asked to move away from the SBM. In fact, it took a notice from the Owners of the vessel and a week for the Charterers to galvanize themselves into action, which ultimately resulted in the Addendum dated 28.12.1999. Read with Clause 6 of the Charter Party, the Addendum dated 28.12.1999 makes it abundantly clear that the Charterers had accepted the responsibility for the failure of the vessel to discharge her cargo at Vadinar and had agreed to bear all the expenses for the delay in diversion of the vessel from Vadinar to Mumbai, including the time spent at Vadinar port and the expenses incurred towards pilotage, tugs and other port expenses. Apart from that Clause 4(1) of Part II of the Charter Party specifically provides that extra expenses incurred on account of any change in loading or discharging ports, has to be paid by the Charterers, and any time thereby lost to the vessel shall count as used lay time. There is no reason to interfere with the Award of the Arbitral Tribunal and the decisions, both of the Single Judge and the Division Bench, confirming the Award of the Arbitral Tribunal. [Paras 47- 50] [99-B-H; 100-A-D]

Leonis Steamship Company Ltd. v. Rank Limited **(1908) 1 K.B. 499;** *Armament Adolf Deppe v. John Robinson & Company Ltd.* **(1917) 2 K.B. 204;** *Owners of S.S. Plata v. Ford & Co.* **(1917) 2 K.B. 593:** *Johanna Oldendorff* **(1973) 11 LLR 285;** *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* **(2003) 5 SCC 705: 2003 (3) SCR 691 – referred to.**

Case Law Reference:

(1908) 1 K.B. 499	**referred to**	**Para 14, 18**
(1917) 2 K.B. 204	**referred to**	**Para 14**
(1917) 2 K.B. 593	**referred to**	**Para 14**
(1973) 11 LLR 285	**referred to**	**Para 17,18**
2003 (3) SCR 691	**referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 19461 of 2004.

From the Judgment & Order dated 20.01.2006 of the High Court of Judicature at Bombay in Appeal No. 1158 of 2005 in Arbitration Petition No. 531 of 2003.

Bhaskar Gupta, Manoj Khanna, R.K. Khanna for the Petitioner.

Prashant Pratap, Siddhartha Dave, Jemtiben AO, Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Special Leave Petition arises out of the Judgment and Order dated 24.10.2005 passed by the learned Single Judge of the Bombay High Court in A.P.No.531 of 2003 affirming the Award of the Arbitral Tribunal dated 8.9.2005, and the judgment and order dated 20.1.2006 passed by the Division Bench dismissing A.N.No.1158 of 2005 filed by the Petitioners herein.

2. On 9.11.1999 the Petitioners and the Respondent(s) entered into a Charter Party in respect of the Respondents' vessel, "m.t. Prestige", for carriage of minimum 8150 metric tonnes of crude oil from the Egyptian Red Sea port of Ras Sukheir to one/two safe anchorage(s)/lighterage points/SBM(s)/ one/two safe port(s)one/two safe berth(s) anywhere in India.

The vessel was described in Clause 41 of the Charter Party as being fitted with "AK Tongue Type Bow Chain Stopper of min SWL 2000 Mts."

3. Clause 9 of the Charter Party provided for settlement of all disputes arising out of the Charter Party by arbitration under the Arbitration & Conciliation Act, 1996, and the Maritime Arbitration Rules of the Indian Council of Arbitration (ICA).

4. The vessel arrived at Ras Sukheir at 4.00 a.m. on 19.11.1999 and tendered Notice of Readiness (NOR). The loading commenced at 10 p.m. on 20.11.1999 and was completed by 3.15 p.m. on 21.11.1999. The total lay time provided for loading and discharge of cargo was 72 running hours. Out of the said lay time hours, the lay time used at Ras Sukheir was 37 hours and 30 minutes. On account of a mishap involving the vessel's anchor and the submarine pipe-lines, the vessel was delayed at Ras Sukheir for fourteen days and could leave the port only on 4.12.1999. On 6.12.1999 while the vessel was sailing, the Respondents nominated Vadinar Single Berth Mooring (SBM) for discharge of the cargo. Port of discharge had not been nominated earlier. The vessel arrived at Vadinar and the Master tendered NOR at 8 p.m. on 15.12.1999. Since the vessel had only one chain stopper/Bow Panama Chock, which had been specified in the Charter Party, the vessel could not be safely moored at the SBM and the Master was asked by the Receiver, Indian Oil Corporation on 21.12.1999 to take away the vessel from the Vadinar SBM.

5. On 21.12.1999 a message was sent to the Petitioners' Agents, M/s. J.M. Baxi & Co. by the Manager of the Respondents drawing attention to the fact that the vessel could not be berthed at the SBM and requesting that immediate steps be taken to berth the vessel. In the absence of any positive response to the said letter, the Respondents' lawyer, Mr. Prashant Pratap, sent a legal notice to the Petitioners on 24.12.1999 indicating that the vessel continued to await discharge incurring demurrage for which the Petitioners were

held responsible. The Petitioners were also informed that on account of the detention of the vessel at Vadinar, there was a serious possibility of the vessel missing its next engagement.

6. Finally a decision was arrived at on 28.12.1999 and Addendum No.1 to the Charter Party dated 9.11.1999 was drawn up and signed by the Owners and the Charterers containing the following further conditions agreed upon, namely,

(a) m.t. Prestige will be diverted by the Charterers from Vadinar to L.P.O. Mumbai for discharge.

(b) Charterers will pay freight basis Ras Sukheir/LPO Mumbai where cargo will be discharged into a daughter vessel and Charterers will pay all the expenses of the daughter vessel, M.T. Maharaja Agrasen.

(c) Charterers will bear the cost of deviation of m.t. Prestige basis Ras Sukheir/LPO Mumbai v/s Ras Sukheir/Vadinar/LOP Mumbai which included time at the demurrage rate.

(d) The extra cost of bunkers incurred as a result of the deviation will be on Charterers' account, subject to the Owners submitting documentary evidence.

(e) All direct expenses incurred by the Owners at Vadinar towards pilotage, tugs and other port expenses and Agency fees, will be settled by the Charterers.

(f) Demurrage to be settled as per Charter Party terms.

7. Pursuant to the above arrangement, m.t. Prestige sailed from Vadinar at 1 a.m. on 29.12.1999 and arrived at Mumbai Lighterage point on 30.12.1999 at 2 p.m. The vessel tendered Notice of Readiness at 2 p.m. on 30.12.1999 and completed discharge at 3.30 p.m. on 1.1.2000. The Respondents/Owners submitted their demurrage claims along with supporting documents to the Charterers on 3.2.2000. As the said claim was disputed, arbitration was invoked by the parties under the

provisions of the Arbitration & Conciliation Act, 1996, hereinafter referred to as "the 1996 Act". Both the parties appointed their Arbitrators and the two Arbitrators appointed a third as the Presiding Arbitrator. The Arbitrators made and published their Award dated 26.8.2003 by which they allowed the Respondents' demurrage claim in full. Certain other amounts payable under the Addendum dated 28.12.1999 were also awarded in favour of the Claimants/Respondents.

8. The said Award was challenged by the Petitioners/ Charterers in the Bombay High Court on the ground that the Respondents had not proved that the Notice of Readiness had been tendered at Vadinar and consequently the Respondents were not entitled to demurrage for the period that m.t. Prestige was detained at Vadinar. The learned Single Judge of the High Court accepted the submission made on the Petitioners' behalf and by his order dated 25.4.2005 remitted the matter to the Arbitration for a proper finding in this regard, with leave to the Respondents/owners to lead evidence to prove tender of the Notice of Readiness to the Petitioners/Charterers.

9. After remand, the Arbitrators passed another Award on 8.9.2005 after admitting fresh evidence, including documentary evidence, holding that the service of the Notice of Readiness by the Master of the vessel on the Agents of the Petitioners at Jamnagar had been duly proved in view of the evidence of the Petitioners' witness, Mr. Sunil D'Souza that he had asked Captain Jude D'Souza for a copy of the Notice of Readiness sent by the Master to the Petitioners' Agents at Jamnagar. The said fact was also confirmed by Mr. S.J. Joshi during his evidence before the Tribunal. The Arbitrators also noted that no attempt had been made by the Charterers to rebut Mr. Sunil D'Souza's evidence by producing Captain Jude D'Souza.

10. The Tribunal accordingly held that the Respondents/ Owners were entitled to receive demurrage in the amount of U.S. $220376.48, together with interest and costs, as awarded in the earlier Award of 26.8.2003.

11. On receiving a copy of the Award of the Tribunal dated 8.9.2005, the Petitioners applied for amendment of the Petition under Section 34 of the 1996 Act. However, by order dated 24.10.2005 the learned Single Judge dismissed the Arbitration Petition No.531 of 2003. An appeal, being No.1158 of 2005, was filed by the Petitioners before the Division Bench of the Bombay High Court which dismissed the same on 20.1.2006.

12. The present Special Leave Petition has been filed against the said Award of the Arbitration dated 8.9.2005, as well as the judgments and orders dated 24.10.2005 and 20.1.2006 passed by the learned Single Judge and the Division Bench of the Bombay High Court confirming the Award.

13. Mr. Bhaskar Gupta, learned Senior Advocate, who appeared for the Petitioners, focused his submissions on the sustainability of the Respondents' claim for demurrage. Urging that a claim for demurrage can only arise after the expiry of the "lay days", namely, the time specified for loading or discharging the cargo from the vessel, Mr. Gupta submitted that the all-important question in respect of such a claim is when do the lay days commence and when are they used up. Mr. Gupta submitted that the commencement of lay days depends on three factors :-

(a) Firstly, the ship must be an "arrived ship" in order to give Notice of Readiness.

(b) Secondly, she must have given the prescribed notice to load or discharge, as the case may be.

(c) Thirdly, she must be ready to load or discharge, as the case may be.

14. Mr. Gupta submitted that whether the ship is an "arrived ship" or not depends on the point designated as the destination in the mutual understanding of the parties in the Charter Party itself or the terms thereof – the degree of precision being a

matter of agreement between the parties. Mr. Gupta urged that in practice, the destination is usually a part or a specified area within the port such as a basin, a dock, or a buoy at a certain distance from the shore or a river. A still more precise point would be where the loading or discharge is to take place, e.g., a particular quay, pier, wharf or mooring. Mr. Gupta submitted that a ship is said to be an "arrived ship" only when she has reached the particular point and has moored there. Mr. Gupta urged that the said propositions are well-established and have been laid down in (1) *Leonis Steamship Company Ltd. Vs. Rank Limited* (1908) 1 K.B. 499; (2) *Armament Adolf Deppe Vs. John Robinson & Company Ltd.* [1917] 2 K.B. 204; and (3) *Owners of S.S. Plata Vs. Ford & Co.* (1917) 2 K.B. 593. We shall have recourse to refer to the aforesaid decisions later in this judgment.

15. Mr. Gupta submitted that Clause 'D' of the Charter Party dated 9.11.1999, specifies "discharging port" as one/two safe anchorage(s)/lighterage point(s)/SBM(s), 1/2 safe Ports, 1/2 safe Berth(s) and full India. Mr. Gupta also submitted that the Charter Party provides that on arrival of the vessel for discharge at Vadinar, the vessel was to maintain 70% of her deadweight on board for safe mooring at a SBM.

16. Mr. Gupta urged that by a communication dated 6.12.1999, the Petitioners/Charterers designated Vadinar SBM as the destination and not a 'Port'. The destination was, therefore, a specific point and not a large area like a Port. Vadinar SBM, therefore, became the destination as if incorporated in the Charter Party itself. Mr. Gupta submitted that inspite of the best efforts of the Terminal Authorities, IOC, who were also the receivers of the cargo, m.t. Prestige was unable to moor at the Vadinar Single Berth Mooring (SBM) on account of the fact that it had only one bow chain. It may be of interest to note that Vadinar is the only SBM in the whole of India. Mr. Gupta urged that inspite of the various attempts of the Port Authorities, the vessel could not be berthed at the

Vadinar SBM and was asked to move away. Mr. Gupta contended that since the vessel could not be moored at Vadinar, it was not an "arrived vessel' and "lay time" could not be said to have commenced running on 15.12.1999. The Notice of Readiness given by the Petitioners could not, therefore, be treated as valid and the period spent at Vadinar could not be taken into consideration while computing the number of lay days utilized.

17. In support of his aforesaid contention, Mr. Gupta referred to and relied on the decision of the House of Lords in the case of *Johanna Oldendorff*, (1973) 11 LLR 285, in which Viscount Dilhorne laid down ten tests for determining when a ship is an arrived ship. Mr. Gupta referred to the first and fifth tests as being relevant in the context of this case and the same are extracted hereinbelow :

(i) That under a port Charter Party to be an "arrived ship", that is to say a ship at a place where a valid Notice of Readiness to load or discharge can be given, she must have ended her voyage at the port named; and

(ii) A vessel has not reached her port of destination until it has ended its voyage within the port, either in its legal, or if it differs, in its commercial sense. If it is refused permission and ordered to wait outside the port by the Port Authority, it is not an "arrived ship".

18. Mr. Gupta submitted that the mere fact that the vessel had arrived near the SBM and had anchored there would not make the vessel an "arrived ship", because the destination was the SBM and not the port and the vessel could end her voyage only when she was moored at the SBM, which the vessel was unable to do. Mr. Gupta submitted that the decision in *Johanna Oldendorff's* case was an affirmation of the Kings Bench decision in the case of *Leonis Steamship Company Ltd. Vs. Rank Limited* (1908) 1 K.B. 499. Mr. Gupta urged that not

having been allowed to berth at the SBM, the vessel could not be categorized as an "arrived ship" for the purpose of issuing Notice of Readiness, which Mr. Gupta submitted had not been served on the Petitioners in the first place.

19. By way of an alternative argument, Mr. Gupta submitted that under Clause 6 Part II of the Charter Party, the delay at Vadinar could not be counted as lay time, because it was the receivers (I.O.C.) and not the Charterers who declared that safe berthing of the vessel at Vadinar was not possible because of infra-structural deficiencies and not because of any fault on behalf of the Petitioners since the Petitioners had no control over the situation. Accordingly, the entire time from the tender of the Notice of Readiness on 15.12.1999, if at all tendered, till the vessel started discharge in Bombay, had to be excluded in calculating lay time.

20. Mr. Gupta submitted that service of the Notice of Readiness had not been proved even after remand, as the only evidence tendered was that of Sunil D'Souza which, in any event, did not prove anything beyond the fact that he had been asked to get a copy of the Notice of Readiness from the Agent. Furthermore, the entire evidence of Sunil D'Souza was hearsay.

21. On the question of Safe Port Warranty, Mr. Gupta contended that only after all attempts had been made to berth the vessel at the SBM that it was asked to move away from the mooring. Consequently, even if the finding of the Arbitrators that the Petitioners had failed to designate a safe port was accepted, at best the ship owners could be entitled to damages and not demurrage and would be subject to the ordinary rules as to remoteness, mitigation etc., as available under Section 73 of the Contract Act. Mr. Gupta submitted that the Respondents had claimed damages before the learned Arbitrators who, however, allowed demurrage in their Award on the ground that demurrage is a genuine pre-estimate of damages. Mr. Gupta submitted that even if there was a breach of warranty on the Petitioners' part, the same would give rise

to a claim for damages and not demurrage within the scope of Sections 73 and 74 of the Contract Act.

22. Mr. Gupta submitted that in the Addendum dated 28.12.1999 to the Charter Party dated 9.11.1999 since the Charterers had agreed to bear the cost of deviation basis Ras Sukheir/LPO Mumbai vs Ras Sukheir/Vadinar/LPO Mumbai, which included time at the demurrage rate, there could not be a separate claim for demurrage as that would amount to double jeopardy. Mr. Gupta submitted that it is the said provision contained in Clause (f) of the aforesaid Addendum which has given rise to this arbitration. Mr. Gupta submitted that although the Award has relied on Clause 4(1) of Part II of the Charter Party, which provides that extra expenses incurred in connection with any change in loading or discharging ports, has to be paid by the Charterers, and any time thereby lost to the vessel shall count as used lay time, the said clause would have to be read in the context of Clauses 4(a) and 4(b) where certain ports, other than any Indian Port, have been named.

23. On the question of mitigation of damages, Mr. Gupta urged that the Petitioners/Owners had done everything in its power to safely berth the vessel at the SBM Vadinar, which was perhaps the only SBM in operation in India at the relevant point of time and would otherwise have been ideal for discharge of the cargo of crude oil. Mr. Gupta contended that it was IOC, the receiver, who had taken almost two weeks to decide to redirect the vessel from Vadinar to Mumbai. Mr. Gupta submitted that it was, in effect, the Respondents who did not take any steps to mitigate the damages.

24. On the quantum of demurrage or damages, Mr. Gupta submitted that since the demurrage rate was fixed at US $16000 per day and the same has really a genuine pre-estimate of damages, the Tribunal should have awarded damages at a reasonable rate, instead of making its Award on the consideration of damage as fixed in the Charter Party. Mr. Gupta urged that the Tribunal had gone completely wrong

in giving a go-bye to the provisions of Sections 73 and 74 of the Contract Act in awarding compensation in keeping with the provisions for fixed demurrage in the Charter Party, particularly when all the lay days had not been used up.

25. Mr. Gupta submitted that the scope of a petition under Section 34 of the 1996 Act had been considered by this Court in detail in *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* [(2003) 5 SCC 705], and it was indicated therein that if the Award passed by the Arbitral Tribunal was contrary to any of the provisions of the Act or the substantive law governing the parties or was against the terms of the contract, the same could be set aside. Mr. Gupta urged that even in the instant case, the law had been misapplied by the Arbitrators who had missed considering the all-important issue that no valid Notice of Readiness could have been tendered by a ship which was not an "arrived ship". In such circumstances, the petition under Section 34 of the 1996 Act was clearly not maintainable.

26. In conclusion, Mr. Gupta drew our attention to the wording of Clause 6 of the Charter Party which deals with Notice of Readiness and in particular, to the last sentence thereof where delay in getting a berth for a vessel after giving Notice of Readiness, for any reason over which the Charterer has no control, shall not count as used lay time. Mr. Gupta submitted that the facts of the case would clearly indicate that the Arbitral Tribunal failed to take into consideration the facts in their true sequence and ended up in a "cart before the horse" situation, since no demurrage, which is the consequence of using up all the lay time, could have been awarded without a correct computation of the used "lay time".

27. Going to the heart of the matter, Mr. Prashant Pratap, learned Advocate, submitted that the case of the Petitioners/Charterers of the vessel depended primarily on the terms and conditions of the Charter Party on the basis whereof the Arbitral Tribunal had awarded demurrage to the Respondents/Owners of the vessel. As was also done by Mr. Gupta, special

emphasis was laid by Mr. Prashant Pratap on Clause 6 of the Charter Party relating to Notice of Readiness. Learned counsel emphasized the fact that in terms of the said clause, the Master of the vessel or his Agent would give the Charterer or his Agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo, berth or no berth, and lay time would commence upon the expiration of six hours from receipt of such notice or upon the vessel's arrival in berth, which would mean finished mooring when at a sea loading or discharging terminal and all fast when loading or discharging alongside a wharf *whichever first occurs*. Then follows the rider that, however, where the delay is caused to the vessel getting into berth after giving Notice of Readiness for any reason over which the Charterer has no control, the delay caused could not be counted as used lay time.

28. Mr. Prashant Pratap referred to Clauses 8 and 9 of the Charter Party dealing with Demurrage and Safe Berthing Shifting. Clause 8 provides that the Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for all the time taken for loading and discharging when the time taken for discharging the cargo exceeds the allowed lay time specified. If, however, delay in discharge of the cargo is caused at the port of loading and/or discharge by reason of fire or other unavoidable circumstances, the rate of demurrage would be reduced to one-half of the amount stated in Part I per running hour or pro rata for part of an hour for demurrage so incurred. It was also stipulated that the Charterer would not be liable for demurrage for delay caused by strike, lockout, stoppage or restraint of labour for master, officers and crew of the vessel or tugboat or pilots. Mr. Prashant Pratap also pointed out that Clause 9 of the Charter Party which provides for Safe Berthing Shifting indicates that the vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighterage point reachable on her arrival, which shall be designated and procured by the Charterer, provided the vessel could proceed thereto, lie at and

depart therefrom always safely afloat. Clause 9 also enables the Charterer to shift the vessel at ports of loading and/or discharge from one safe berth to another on payment of towage and pilotage for shifting to the next berth and other expenses and the time consumed on account of such shifting would count as used lay time, except as otherwise provided in Clause 15.

29. Mr. Prashant Pratap then contended that the question as to whether M/s. m.t. Prestige was an "arrived ship" or not at port Vadinar, had never been raised either before the learned Single Judge or the Division Bench of the High Court, nor was it taken as a ground in the Special Leave Petition. Learned counsel submitted that even the ground taken with regard to the Notice of Readiness being invalid, as the vessel was allegedly not ready in all respects to discharge its cargo, was neither argued before the learned Single Judge or the Division Bench nor was the ground taken in the Special Leave Petition before this Court.

30. Coming to the question as to what constitutes an "arrived ship", Mr. Prashant Pratap submitted that the said question was extensively considered by the House of Lords in the case of *Johanna Oldendorff* (supra), which was also relied upon by Mr. Gupta, where the House of Lords was of the view that the vessel should have reached a position in the port where she is at the immediate and effective disposition of the Charterers and for practical purposes it is so much easier to establish that if the ship is at the usual waiting place within the port where waiting vessels would normally lie before proceeding to the berth nominated by the Charterers for discharge of cargo. If the vessel is at such a place, then the vessel is considered to be an "arrived ship". It is only thereafter that the vessel can tender Notice of Readiness. Furthermore, if the Charter Party provides for the location where the vessel should arrive and tender Notice of Readiness, then if the vessel has reached that location, the vessel is considered to be an "arrived ship". Mr. Prashant Pratap submitted that in the present

Charter Party, the parties have expressly agreed in Clause 6 for the vessel to arrive at *customary anchorage* (emphasis supplied) at the port of loading or discharge and tender Notice of Readiness. Accordingly, once the vessel arrived at anchorage at Vadinar, it became an arrived ship in terms of Clause 6 of the Charter Party and was entitled to tender Notice of Readiness.

31. Mr. Prashant Pratap submitted that it was not disputed that M/s. m.t. Presitge was at customary anchorage at Vadinar Port when Notice of Readiness was tendered. Mr. Prashant Pratap also placed emphasis on the expression "berth or no berth", included in Clause 6 of the Charter Party which meant that even if a berth was not available or the vessel had not reached the berth, the vessel is entitled to tender Notice of Readiness. Mr. Prashant Pratap submitted that the term had been explained in the case of the NOTOs where dealing with a clause identical to Clause 6 of the Charter Party, it was held that the meaning of the said words indicated that the Notice of Readiness could be given upon arrival at the customary anchorage and could take effect whether or not a berth was then available or not for the vessel.

32. Mr. Prashant Pratap then argued that the submission made on behalf of the Petitioners/Charterers that since the destination in the Charter Party had been shown as "SBM" and the vessel had failed to be moored at the SBM, no demurrage could be claimed, was wholly erroneous on account of the fact that such notice could be tendered on the arrival of the vessel at the customary anchorage. The vessel is not, therefore, required to be at the destination within the port for the purpose of becoming an "arrived ship" and for tendering of Notice of Readiness.

33. Referring to Mr. Gupta's submissions that for the purpose of tendering Notice of Readiness, the vessel must be an arrived ship, Mr. Prashant Pratap submitted that the vessel, therefore, must be at the effective disposal of the Charterers

who would have unrestricted access to the vessel's cargo tanks and the vessel pumps must be in working order to pump out the cargo upon the hoses being connected, provided that the Charterers were ready to receive the cargo. In this regard, Mr. Prashant Pratap referred to the decision in the *Leonis Steamship Co. Ltd.* (supra), where it was observed by Lord Justice Kennedy that "the ship's obligations, therefore, under such a Charter Party the performance of which much precede the commencement of the lay days (as the fixed loading period is commonly termed) are three : Firstly, the ship must have arrived at her destination and so be within the designation of an arrived ship. Till then she is not entitled to give a Notice of Readiness to load. Secondly, she must have given the prescribed Notice of Readiness to load. Thirdly, she must, in fact, be so far as she is concerned, ready to load. The ship owner cannot claim against the Charterer that the lay days begin to count until the ship is an arrived ship; ……." Mr. Prashant Pratap submitted that the aforesaid passage made it clear that the vessel has to be ready to load or discharge, as the case may be. The Tribunal's findings are that the vessel was ready, but the terminal was not. The Tribunal held that the vessel was at the immediate and effective disposition of the Charterers when Notice of Readiness was given.

34. Mr. Prashant Pratap then urged that from the Charter Party it is quite clear that the responsibility of providing a berth where the vessel could moor safely was that of the Charterers and the same would be clear from the use of the word "safe" in Clause D of Part I of the Charter Party which precedes the words "Ahchorage/Lighterage Points/SBM". Even in terms of Clause 9 of the Charter Party, the place of discharge must be safe and has to be designated and procured by the Charterers. Mr. Prashant Pratap referred to various other judgments such as the *Sea Queen* [(1988) Vol.1 KKR 500] and *Fjordaas* [(1988) Vol.1 LLR 336]. In the later case, it has been indicated that "reachable" or "arrival" are well-known expressions and mean precisely what they say. It was further observed that if

the berth cannot be reached on arrival, the warranty is broken, unless there is some relevant protecting exception. Such berth, in its term, is required to have two characteristics: it has to be safe and it also has to be reachable on arrival. By nominating SBM at Vadinar as the destination of the vessel and also the place for discharge of the cargo, it was the responsibility of the Charterers to ascertain as to whether the vessel could be moored there safely and be in a position to discharge the cargo safely.

35. Apart from the aforesaid questions regarding the vessel being an arrived ship, Mr. Prashant Pratap urged that service of the Notice of Readiness by the Master on the Agents of the Charterers have been duly proved and is a finding based on appreciation of evidence by the Arbitrators, which has been upheld by the learned Single Judge and the Division Bench, whose orders were under challenge in the Special Leave Petition.

36. Mr. Prashant Pratap urged that if the Notice of Readiness was valid, as had been found not only by the Arbitral Tribunal but also by the learned Single Judge and the Division Bench of the Bombay High Court, then lay time commenced six hours after the tender of Notice of Readiness. Accordingly, lay time expired on 17.12.1999, and, thereafter, the vessel was on demurrage all throughout, till discharge of the cargo was completed. Since in the instant case, the Charterers had failed to nominate a safe berth at which the vessel could safely lie and discharge the cargo and failing to provide a berth which was reachable upon arrival of the vessel at Vadinar, the consequent delay in berthing and discharge of the cargo, was the responsibility of the Charterers for which demurrage was payable by them. Mr. Prashant Pratap pointed out that at no stage did the Charterers question the validity of the Notice of Readiness tendered at Vadinar either on the ground that the vessel was not an arrived ship, or on the ground that the vessel was not ready to discharge the cargo. On the contrary, the

Charterers signed the Addendum dated 28.12.1999 by which they agreed to bear all the expenses incurred by the vessel at Vadinar and also agreed to pay additional freight charges for discharge of cargo at Mumbai. Significantly, the Charterers also agreed that the time taken for the vessel to proceed from Vadinar to Mumbai would count as demurrage time. Mr. Prashant Pratap urged that the Charterers would not have agreed to the terms and conditions of the Addendum if it was their contention that the vessel was not an arrived ship or that the Notice of Readiness was invalid.

37. Mr. Prashant Pratap then submitted that the only requirement as far as the vessel was concerned was that it had to maintain 70% of the dead weight on board for safe mooring at the SBM at Vadinar and it is nobody's case that the vessel did not conform to such condition.

38. On the question of designation of the SBM as the destination point within Vadinar Port by the Charterers, Mr. Prashant Pratap contended that the Charterers had been put on notice regarding the berthing arrangement both in the Charter Party as well as in the questionnaire setting out the vessel's mooring arrangements provided to the Charterers. Learned counsel submitted that it was for the Charterers to check the vessel equipment vis-à-vis facilities available at the Port of loading and discharge, before nominating the same. Since the Charterers had failed to undertake such an exercise, there was a resultant problem faced at Vadinar whereby the vessel could not discharge its cargo at Vadinar but had to be diverted to Mumbai. Mr. Prashant Pratap also pointed out that while the entire Indian coastline was available to the Charterers to nominate a safe port for discharge of the cargo, it made a conscious decision to nominate the SBM at Vadinar which ultimately turned out to be unsafe for mooring of the vessel, given the equipment available on board the ship.

39. Mr. Prashant Pratap submitted that it had been agreed on behalf of the Charterers that demurrage is a genuine pre-

estimate of damages and even if the Charterers' argument is to be accepted that the owners are entitled to damages and not demurrage, the calculation of such damages would have to be the demurrage rate in the facts and circumstances of the case.

40. Mr. Prashant Pratap, accordingly, submitted that the award of the Arbitral Tribunal, as upheld both by the learned Single Judge and the Division Bench of the Bombay High Court, did not warrant any interference and the Special Leave Petition was liable to be dismissed with appropriate costs.

41. Having gone through the submissions made on behalf of the respective parties in the background of the facts as disclosed, it is clear that we are required to consider two basic questions for the purpose of deciding the present Special Leave Petition, namely :-

(a) Whether on arriving at anchorage point at Port Vadinar, despite the destination point being the SBM mooring, it could be said that it was an arrived ship which was competent under the Charter Party dated 9.11.1999, to issue Notice of Readiness of discharge of its cargo?

(b) If the finding of the Arbitral Tribunal that the vessel was an arrived ship at Port Vadinar, as upheld by the learned Single Judge and the Division Bench of the Bombay High Court is accepted, would the Respondents/Owners of the vessel be entitled to damages or demurrage?

42. Various ancillary questions connected with the aforesaid two questions also crop up, which we shall consider shortly.

43. From the undisputed facts, the position that emerges is as follows :-

(i) The Charter Party dated 9.11.1999 was in respect of a transaction which provided for carriage of crude oil from Ras Sukheir to a safe port on the Indian coastline. The Charterers were given the choice of nominating such port for discharge of the aforesaid cargo of crude oil.

(ii) In the absence of any named port of destination in the Charter Party itself, it was only after the vessel left Ras Sukheir that an intimation was given by the Charterers for discharge of the cargo at the SBM at Port Vadinar in Gujarat.

(iii) That the aforesaid nomination was a conscious decision on the part of the Charterers, despite having knowledge of the equipment available on board the vessel for mooring at a SBM, and in keeping with such decision m.t. Prestige set its course from Ras Sukheir to Vadinar.

(iv) The fiasco at Vadinar was occasioned by the fact that no prior checking had been done to see whether with the mooring equipment on board, the vessel would be able to safely berth at the SBM for discharge of its cargo.

(v) Who was responsible for the detention of the vessel at Vadinar since its arrival at the anchorage point and its final departure from the said Port? Whether there was contributory negligence on the part of both the parties in the cause of such delay?

44. The concept of an arrived ship in shipping terminology requires that a vessel should reach a destination in a port where she could be safely berthed and thereupon be ready to either discharge or load cargo from and on to the vessel. That is a general concept, but the Charterers and the Owners of the vessel could in the Charter Party agree to a specific destination

point within the port area for discharging or loading of cargo. Once the vessel arrived at the said spot and was ready to discharge its cargo, it could be described as an "arrived ship" with the authority to issue and tender Notice of Readiness. In the instant case, the nominated port for the arrival of the vessel was Vadinar Port, but the destination point was the SBM where the vessel was to be moored and was to discharge its cargo of crude oil. In fact, in the Charter Party dated 9.11.1999, Clause 6 specifically provided for arrival of the vessel at the port of loading or discharge and cast an obligation upon the Master or his Agent to give the Charterer or his Agent Notice of Readiness in relation to discharge of the cargo. Since the decision in this case will to a large extent depend on the interpretation of Clause 6, the same is extracted hereinbelow :

"Clause 6 Notice of Readiness :

Upon arrival at customary anchorage at each port of loading or discharge, the Master or his Agent shall give the charterer or his Agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo berth or no berth and lay time as hereinafter provided shall commence upon the expiration of six (6) hours after receipt of such notice or upon the vessel arrival in berth – finished mooring when at a sea loading or discharging terminal and all fast when loading or discharging alongside a wharf which ever first occurs. However, where delay is caused to vessel getting – berth after giving notice of readiness for any reason over which charterer has no control, such delay shall not count as used lay time."

45. As will be evident from the above clause, the Master of the vessel was under an obligation to give Notice of Readiness on arrival at the customary anchorage at the port of discharge. It is a possibility that since no specific port in the Indian coastline had been mentioned in the Charter Party, the Master of the vessel or his Agent was required to give

Notice of Readiness upon the vessel arriving at customary anchorage. It is only after the vessel sailed from Ras Sukheir that the receiver, IOC, nominated Vadinar to be the port of discharge with the specific destination point being the SBM within the port. In giving such Notice of Readiness upon arrival at the customary anchorage at Vadinar, the Master of the Vessel duly complied with the conditions of Clause 6 of the Charter Party and in terms of the aforesaid clause irrespective of whether a berth was available or not, lay time commenced upon the expiry of six hours after receipt of such notice. That the vessel could not be moored at the SBM is a different facet of the story. The Charterers had full knowledge of the equipment on board m.t. Prestige through the questionnaire provided by the Respondents/Owners to the Petitioners/Charterers. It could not be denied that despite having such knowledge the IOC nominated the SBM as the destination point for discharge of the cargo. Obviously, the parties to the Charter Party had not made any attempt to verify as to whether the equipment on board the vessel was sufficient for her to be safely moored at the SBM and to discharge her cargo safely. As it turned out later on, the vessel was not so equipped and could not, therefore, be moored at the SBM and had to be requested to move away therefrom. Although, an attempt has been made on behalf of the Charterers to convince us that it was really the duty and responsibility of the Owner of the vessel to check whether the vessel could be safely moored at the SBM in Vadinar, we are unable to convince ourselves that such a duty was that of the Owners of the vessel and not the Charterers which had a choice of all the ports in India for discharge of the cargo, as was subsequently done in Mumbai port. As has been held by the Arbitral Tribunal and subsequently affirmed both by the learned Single Judge and the Division Bench of the Bombay High Court, the responsibility for the failure of the ship to moor at the SBM in Vadinar must lie squarely with the Charterers and the receiver as it was they who had nominated the SBM for the safe mooring of the vessel. The lay time must, therefore, be held to have recommenced after the expiry of six hours from

the tendering of the Notice of Readiness upon the vessel's arrival at the customary anchorage at Vadinar on 15.12.1999 in keeping with the provisions of Clause 6 of the Charter Party. It was not the case of the Charterers that the failure of the vessel to discharge its cargo at the SBM at Vadinar was for reasons beyond their control. It cannot also be said that the owners of the vessel contributed in any way to such failure since the equipment on board the vessel had been made known to the Charterers when the Charter Party was signed.

46. In the face of the specific conditions indicated in Clause 6 of the Charter Party, the theoretical and/or academic exercise of what constitutes an "arrived ship" loses much of its relevance. The terms of the Charter Party were agreed upon by the parties with their eyes wide open. What is also significant and cuts at the root of the submissions advanced on behalf of the Charterers is that even after the vessel was denied mooring at the SBM for safety reasons on 21.12.1999, no steps were taken on behalf of the Petitioners to either arrange for an alternate safe berthing in Vadinar or to give instructions as to where the cargo was to be discharged. In fact, on behalf of the Respondents/Owners a legal notice was addressed to the Petitioners on 24.12.1999 pointing out that the vessel continued to await discharge incurring demurrage. It is only thereafter that Addendum No.I to the Charter Party was drawn up and signed on 28.12.1999 by the Owners and the Charterers, whereby m.t. Prestige was diverted by the Charterers from Vadinar to a Lighterage point at Mumbai port for discharge and it was specifically agreed that the Charterers would bear all the costs of discharge, including freight charges and the expenses of the daughter vessel, m.t. Maharaja Agrasen. It was also agreed that demurrage would be settled as per the terms of the Charter Party. In our view, the various decisions cited on behalf of the Petitioners/Charterers do not help them in the facts of this case. We do not, therefore, think it necessary to consider all the decisions cited on behalf of the respective parties and those referred to hereinbefore are

sufficient for our purpose. The decisions relied upon by the parties lay down certain propositions of law which are well-established and with which there cannot be any disagreement, but for the purposes of this case they are basically academic.

47. Once we have affirmed the finding that m.t. Prestige was an arrived ship on reaching the customary anchorage at Vadinar port and once we have also held that it was the Charterers who having the choice of a safe port, had selected the SBM at Vadinar as the discharge point, the suggestion made on behalf of the Charterers that it was the responsibility of the Owners of the vessel to check whether the ship could be safely moored at the SBM, is untenable. The responsibility of the Owners of the vessel ended with the declaration of the equipment available on board for mooring and berthing for the purpose of discharge of its cargo. Consequently, all the other ancillary issues which arise have to be answered in favour of the Respondents herein. As indicated hereinbefore, the fiasco at Vadinar was occasioned by the fact that no prior checking had been done by the Charterers to ascertain as to whether with the mooring equipment on board the vessel she would be able to moor safely at the SBM for discharge of her cargo. Even the subsequent deviation of the vessel from Vadinar to Mumbai was not on account of any laches on the part of the Owners of the vessel who were awaiting instructions once the vessel had been asked to move away from the SBM. In fact, it took a notice from the Owners of the vessel and a week for the Charterers to galvanize themselves into action, which ultimately resulted in the Addendum No.1 dated 28.12.1999.

48. Read with Clause 6 of the Charter Party, the Addendum dated 28.12.1999 makes it abundantly clear that the Charterers had accepted the responsibility for the failure of the vessel to discharge her cargo at Vadinar and had agreed to bear all the expenses for the delay in diversion of the vessel from Vadinar to Mumbai, including the time spent at Vadinar port and the expenses incurred towards pilotage, tugs and other port expenses.

49. Apart from the above, Clause 4(1) of Part II of the Charter Party specifically provides that extra expenses incurred on account of any change in loading or discharging ports, has to be paid by the Charterers, and any time thereby lost to the vessel shall count as used lay time. We are not inclined to accept Mr. Gupta's submission that the aforesaid clause has to be read in the context of Clauses 4(a) and 4(b) which refer to ports other than Indian Ports in a different context.

50. We, therefore, see no reason to interfere with the Award of the Arbitral Tribunal and the decisions, both of the learned Single Judge and the Division Bench, confirming the Award of the Arbitral Tribunal and, accordingly, dismiss the Special Leave Petition. In the facts of the case, the parties shall bear their own costs as far as these proceedings are concerned.

D.G. Special Leave Petition dismissed.

MUSTKEEM @ SIRAJUDEEN
v.
STATE OF RAJASTHAN
(Criminal Appeal No.1327 of 2008)

JULY 13, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Penal Code, 1860:

s.302/34 – Murder – Circumstantial evidence – Conviction by trial court – Upheld by High Court – HELD: Where the case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person – In the instant case, the eye-witnesses and one of the recovery witness, having retracted their statements u/s 161CrPC, were not believed by courts below – As regards other witnesses, there are several discrepancies and contradictions in their statements – Their evidence that the accused had one day prior to the incident intimated them to eliminate the deceased is not trustworthy – No enmity could be established between the accused and the deceased, and there was nothing on record which warranted them to eliminate the deceased – Recovery witnesses were not local persons – Overwriting on the recovery memos was not explained by the I.O. – The blood found on the weapon recovered at the instance of the accused was not sufficient for test as it had already disintegrated – Thus, looking to the matter from all angles, it would not be safe and proper to hold the accused guilty of the offence – They are accordingly acquitted – Evidence Act, 1872 – s.27 – Constitution of India, 1950 – Article 226 – Code of Criminal Procedure, 1973 – s.162 – Explanation – "Contradictions".

Evidence Act, 1872:

s.27 – Information received from accused – On the disclosure statement made by the accused, weapons recovered – HELD: With regard to s.27 what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused – In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence – What is admissible u/s 27 is the information leading to discovery and not any opinion formed on it by the prosecution – One recovery witness was declared hostile and the other stated that recovery memos were prepared in the Police Station – Thus, the recovery of the weapons on disclosure of the appellants itself becomes doubtful – Penal Code, 1860 –s.304/34.

Constitution of India, 1950:

Article 136 – Interference with concurrent findings of the courts below – In the instant case, the entire evidence, is vitiated by serious errors and if the appellant's conviction is upheld then it would amount to miscarriage of justice – Therefore, the conviction as recorded by trial court and confirmed by High Court cannot be sustained in law and, therefore, set aside.

The appellant along with four others was prosecuted for committing the murder of one 'RY'. The prosecution case was that on 24.07.2003 at 5.45 p.m., the SHO P.W. 16 received telephonic information about murder of a person. He rushed to the spot with police squad and found a person lying dead in a pool of blood. On inquiries being made, P.W.3 present there informed him that the murder was committed by A-1, A-2 and one other person, who was later identified as A-3, by inflicting injuries on

the victim with sword and knife. The SHO recorded the Parcha Bayan of P.W.3 and registered the case. In all there were five accused. One of them was declared absconder. Out of the remaining four, the trial court acquitted one and convicted the three accused-appellants u/s 302/34 IPC and s.4/25 of the Arms Act. Their appeals were dismissed by the High Court. Aggrieved, the accused filed the three separate appeals.

Allowing the appeals, the Court

HELD: 1.1 In the light of the Post Mortem Report and the evidence of the doctor (PW-13), it is evident that deceased had met with homicidal death. [para 8] [110-C]

1.2 It is pertinent to mention that the solitary star witness of the prosecution, namely, P.W.3, and the main material witnesses were declared hostile. The trial court observed in this context that P.W.1 (recovery witness), P.W.3 and P.W.2 (both eye-witnesses) had retracted their statements made u/s 161 Cr.P.C. during examination. Furthermore, it has also refused to attach much credence to the deposition of P.W.19, owing to the clear contradictions in his statement and deposition regarding his presence at the scene of crime. Thus, the trial court had also found them unreliable and has not based the appellants' conviction on the basis of their statements. Similarly, the High Court has not taken their evidence into consideration. The trial court had recorded a finding that the case is without any eye witness and is based on circumstantial evidence. [para 11] [110-F-H; 111-A]

2.1 As per the statement of P.W. 10, in whose house the deceased was residing as a tenant for the last 5-6 years, appellants (A-1) and (A-3) had met him a day before the occurrence, and told him that, that day it would be the last visit of 'RY' and he would not come to his house again. Similar is the evidence of P.W.9, the wife of P.W.10.

P.W.8 deposed that the three accused-appellants used to visit the deceased regularly as all of them were dealing in illicit liquor trade. On coming to know from P. W. 9 that the accused were keen to eliminate the deceased, she had telephonically asked him to meet her at the earliest. When the deceased met her, she informed him about the intentions of the accused. From an appraisal of the evidence of P.W.8, P.W.9 and P.W.10, the trial court and the Division Bench of the High Court ruled that the prosecution has been able to establish that the deceased and the appellants were all involved in illegal trade of liquor and a day prior to the date of incident, A-1 and A-3 had expressed to P.W.9 and P.W.10 their intentions to eliminate the deceased. But, in fact, the omissions on the part of all three witnesses, namely, P.Ws.8 to 10 to state certain material facts in the course of making their statements before the police, which they have categorically admitted in their depositions may even be considered as "contradictions" as per the Explanation to s. 162 Cr.P.C. Their evidence, that the accused had intimated P.W.8 a day prior to the date of incident, that they would eliminate the deceased is also not trustworthy. There are several discrepancies appearing in their evidence. Further, P.W.8 is absolutely an hearsay witness. [para 14-16, 21 and 22] [111-D-H; 112-A-B; 113-B-D]

2.2 The other circumstance found against the appellants by High Court was that, on the basis of the disclosure statements made by them, weapons alleged to have been used in the commission of the offence and clothes stained with human blood were recovered. In fact, the recovery of the weapons on disclosure of the appellants itself becomes doubtful. P.W.1, the witness of Recovery Memo, was declared hostile and another witness P.W.10 admitted that signatures were obtained on the memos and annexures at the Police Station. If the

recovery memos were prepared at the Police Station itself, then the same would lose its sanctity. It is also pertinent to mention that P.W.1 was residing 4 Kms. away and P.W.10 was residing 8 Kms. away from the place of recovery and both were also declared hostile. The prosecution failed to establish as to why none of the local persons were called to be the witnesses. The conduct of the prosecution appears to be extremely doubtful and renders the case as concocted, to falsely implicate the appellants. The recovery Memos also reflect that there were overwriting on the same which has not been explained by P.W.16, the Investigating Officer. [para 18,24 and 28] [112-D; 113-G-H; 114-A-D; 115-G-H]

Varun Chaudhary Vs. *State of Rajasthan* **2010 SCR 296 = AIR 2011 SCC 72 – relied on.**

2.3 With regard to s.27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible u/s 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. [para 27] [115-E-G]

Anter Singh Vs. *State of Rajasthan,* **2004 (2) SCR 123 = 2004 (10) SCC 657 – relied on.**

Pulukuri Kotayya & Ors. Vs. *Emperor* **AIR 1947 PC 67 - referred to.**

2.4 On the basis of the report of the serologist, it has come on record that traces of 'AB' blood group were found on the pants and baniyan of the deceased. The prosecution has also averred that sword and clothes

stained with human blood of group 'AB' were also recovered at the instance of the appellants, from the places shown by them and known only to them and none others. The High Court was of the opinion that the chain of circumstances was complete and it pointed the finger for commission of the said offence only to the appellants. However, it is significant to note that the 'AB' blood group which was found on the clothes of the deceased does not by itself establish the guilt of the appellants unless the same was connected with the murder of the deceased by the appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of A-1 was not sufficient for test as the same had already disintegrated. [para 19 and 23] [112-E-F; 113-E-F]

2.5 As regards the motive (if any) behind the homicide, on review of the relevant deposition of the witnesses, one of the circumstances found against the appellants, that the deceased and the appellants indulged in illegal trade of liquor and thus were having enmity with each other, is not based on any cogent and reliable evidence much less on the evidence of P.W.8, P.W.9 and P.W.10. This could not have been the motive for killing the deceased. The evidence of P.Ws.9 and 10 does not establish the intention on the part of the accused to murder the deceased. Since no enmity could be established on record between them there was nothing which warranted to eliminate the deceased. [para 20 and 22] [112-G-H; 113-A-C-D]

2.6 It is too well settled in law that where the case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be

decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by this Court. In the instant case, looking to the matter from all angles it would not be safe and proper to hold the appellants guilty of commission of the offence. [paras 24- 25] [114-D-F]

Sharad Birdhichand Sarda Vs. State of Maharashtra **1985 (1) SCR 88 =1984 (4) SCC 116; and** *Sattatiya @Satish Rajanna Kartalla Vs. State of Maharashtra* **2008 (3) SCC 210 - relied on.**

3. As regards scope of interference against concurrent findings of fact, there is no doubt that in the instant case, the entire evidence is vitiated by serious errors and if the appellant's conviction is upheld then it would amount to miscarriage of justice. Therefore, the judgment and order of conviction as recorded by trial court and confirmed by High Court cannot be sustained in law. The same are, therefore, set aside and quashed. The appellants are acquitted of the charges levelled against them. [para 31-33] [117-B-G]

Case Law Reference:

1985 (1) SCR 88	**relied on**	**para 26**
2010 SCR 296	**relied on**	**para 28**
AIR 1947 PC 67	**referred to**	**para 28**
2004 (2) SCR 123	**relied on**	**para 28**
2008 (3) SCC 210	**relied on**	**para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1327 of 2008.

From the Judgment and Order dated 03.12.2007 of the High Court of Judicature for Rajasthan Bench at jaipur in D.B. Criminal Appeal No. 210 of 2005.

WITH

Criminal Appeal No. 1369 of 2008

Criminal Appeal No. 1370 of 2008.

R.K. Kapoor, Shweta Kapoor, Reetu Sharma, Anis Ahmed Khan, Dr. Monika Gusain, Hariom Yaduvanshi and R.K. Kapoor (Amicus Curiae) for the Appellant.

Imtiaz Ahmed, Naghma Imtiaz, Milind Kumar, Archana Pathak Dave and Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. This judgment and order shall govern disposal of Crl. A. No. 1369 of 2008 *Nandu Singh @ Vikram Singh Vs. State of Rajasthan* and Crl. A.No. 1370 of 2008 *Arun Joseph Vs. State of Rajasthan* as they arise out of the common judgment and order recorded by Division Bench of the High Court of Judicature for Rajasthan, Bench at Jaipur in D.B. Criminal Appeal No. 125/2005, 210/2005 and 1176/2005 decided on 03.12.2007, arising out of judgment and order of conviction recorded by Special Judge SC/ST (PA Cases) Jaipur in Sessions Case No. 02/2004 decided on 10.02.2005.

2. The trial court vide its judgment and order held the Appellants guilty for commission of offence under Section 302/34 of the Indian Penal Code (in short 'IPC') and awarded life imprisonment with fine of Rs. 1000/- and in default of payment of fine further three months simple imprisonment and under Section 4/25 of the Arms Act one year R.I. and fine of Rs. 500/- and in default of payment of fine to further suffer one month imprisonment. The sentences were directed to run concurrently.

3. Feeling aggrieved by the said judgment, Appellants had preferred three appeals as mentioned hereinabove before the Division Bench of the High Court of Judicature for Rajasthan

at Jaipur Bench. The High Court, after considering the matter from all angles also came to the conclusion that no interference was called for against the said judgment of the trial Court and dismissed the appeals. In all, there were five accused out of which one Abrar was declared absconder and Abdul Wahid was acquitted by the Trial Court. Thus these appeals by the three convicted accused.

4. We have, accordingly, heard learned Counsel Mr. R.K. Kapoor, Ms. Shweta Kapoor, Mrs. Mansi Dhiman for the Appellants and Mr. Milind Kumar, Mr. Imtiaz Ahmeda and Ms. Archana Pathak Dave for the Respondent State and perused the record.

5. Facts giving rise to the prosecution story, ultimately resulting in conviction of the Appellants, are as under:-

On 24.07.2003 at 5.45 p.m. Diwakar Chaturvedi SHO Police Station Vidhan Sabha, Jaipur received telephonic information about murder of a person in Kathputli Colony. After recording the said information in Rojnamcha, SHO rushed to the spot with police squad and found a person lying dead in a pool of blood.

6. On inquiries being made P.W.3 – Ashok Kumar, present at the place of occurrence informed Diwakar that the name of the deceased was Ram Pal Yadav. He further informed that the murder of Ram Pal Yadav has been caused by Mustkeem, Nandu and one other person by inflicting injuries on his person with sword and knife. The third person was later identified as Arun Joseph. On receiving the said information SHO recorded the Parcha Bayan of P.W.3 – Ashok Kumar and registered a case under Section 302/120B of the IPC. Thus the investigation machinery was set into motion. Dead body was sent for autopsy, necessary memos were drawn, statements of witnesses were recorded, accused were arrested and on completion of investigation charge sheet was filed.

7. Charges under Section 302/149 IPC and Section 4/25

of the Arms Act were framed against the accused. They denied the charges and prayed for being tried. The prosecution in support of its case examined 19 witnesses. The statements of the Appellants under Section 313 of Cr. P.C. were recorded, who claimed innocence and prayed for their acquittal.

8. As per the post mortem report Ex. P.34, deceased Ram Pal Yadav had received 38 ante mortem injuries and from the evidence of P.W.13 - Dr. Sumant Dutta, cause of death was stated to be due to hemorrhagic shock as a result of injuries to chest, lungs and skull and on account of excessive bleeding. In the light of the Post Mortem Report and the evidence of P.W.13 – Dr. Sumant Dutta, it cannot be disputed nor has been disputed before us that deceased had met with homicidal death.

9. Now the question that arises for our consideration in this and the connected appeals is as to who were the perpetrators of the crime and whether the trial Court and High Court were justified in holding the appellants guilty for commission of the said offences.

10. Before we proceed to do so it is necessary to point out that the solitary star witness of the prosecution P.W.3 - Ashok Kumar had turned hostile and was declared as such.

11. In fact, it is pertinent to mention here that the main material witnesses were declared hostile. The Trial Court observed in this context that P.W.1 Mohd. Ayub (recovery witness), P.W.3 Ashok Kumar and P.W.2 Prakash (both eye-witnesses) had retracted their statements made under Section 161 Cr.P.C. during examination. Furthermore, it has also refused to attach much credence to the deposition of P.W.19 Yogesh Kumar, owing to the clear contradictions in his statement and aforesaid deposition regarding his presence at the scene of crime. Thus, in a nutshell, Trial Court had also found them unreliable and has not based the Appellants conviction on the basis of their statements. Similarly High Court has not taken their evidence into consideration. Thus, it is

neither required nor is necessary to deal with their evidence. Trial Court had recorded a finding that the case is without any eye witness and is based on circumstantial evidence.

12. It is therefore necessary to discuss the evidence of P.W.8 – Smt. Supyar Kanwar, P.W.9 – Lali Devi and P.W.10 – Chittar so as to find out the element of truth in the same and to discern any motive behind the commission of the offence.

13. It is fully established that the prosecution case is based on circumstantial evidence. In this view of the matter, we have to see if the chain of circumstances was so complete so as to unerringly point the finger only at the Appellants as perpetrators of crime. Before delving into the legal analysis, however, we would like to examine the statements of P.W.8 and P.W.10 in brief.

14. As per the prosecution story, Appellants Mustkeem and Arun had met P.W.10 – Chittar a day before the occurrence, in whose house deceased Ram Pal Yadav, was residing as a tenant, for last 5 to 6 years and he deposed that Appellants Mustkeem and Arun had told him that, that day it would be the last visit of Ram Pal and he will not come to his house again. Similar is the evidence of P.W.9 – Lali Devi, wife of P.W.10. She has repeated the same version as had been deposed by P.W.10– Chittar.

15. P.W.8 – Smt. Supyar deposed that Mustkeem, Arun and Nandu used to visit Ram Pal Yadav regularly as all of them were dealing in illicit liquor trade. On coming to know from Lali Devi that Arun, Mustkeem and Nandu were keen to eliminate Ram Pal Yadav, she had telephonically asked him to meet her at the earliest. When deceased Ram Pal Yadav met Smt. Supyar, she informed him about the intentions of the accused. She also told him that Arun and Mustkeem both had said that it would be the last visit of Ram Pal Yadav to her house as they were planning to eliminate him.

16. Thus, from an appraisal of the evidence of P.W.8, P.W.9 and P.W.10, the Trial Court and the Division Bench of the High Court ruled that prosecution has been able to establish that deceased Ram Pal Yadav and Appellants were all involved in illegal trade of liquor and a day prior to the date of incident, Arun and Mustkeem had expressed their intentions to eliminate Ram Pal to P.W.9 and P.W.10.

17. High Court while considering the Appellants' appeal found this factor as one of the incriminating circumstances to eventually hold the Appellants guilty for the aforesaid offence.

18. The other circumstance found against the Appellants by High Court was that, on the basis of the disclosure statements of the Appellants, weapons alleged to be used in the commission of offence and clothes stained with human blood were recovered. In its Judgment, the High Court has discussed *in extenso* the effect of Section 27 of the Indian Evidence Act (hereinafter shall be referred to as 'Act') and subsequent discovery of the material objects thereafter.

19. On the basis of the report of the serologist, it has come on record that traces of AB blood group were found on the pants and baniyan of the deceased. The prosecution has also averred that Sword and clothes stained with human blood group AB were also recovered at the instance of Appellants, from the places shown by them and known only to them and none others. On account of aforesaid circumstances, the High Court was of the opinion that the chain of circumstances was complete and the completed chain of circumstances pointed the finger for commission of the said offence only by the Appellants.

20. As regards the motive (if any) behind the homicide, on review of the relevant deposition of the witnesses, we are of the opinion that one of the circumstances found against the present Appellants, that deceased and Appellants indulged in illegal trade of liquor and thus were having enmity with each other, is not based on any cogent and reliable evidence much

less on the evidence of P.W.8, P.W.9 and P.W.10. This could not have been the motive of killing Ram Pal.

21. In fact, the omissions on the part of all three witnesses namely, P.W.8, P.W.9 and P.W. 10 to state certain material facts in the course of making their statements before the police, which they have categorically admitted in their depositions may even be considered as "contradictions" as per the Explanation to Section 162 of the Cr.P.C.

22. Their evidence, that they had intimated P.W.8 a day prior to the date of incident, that they would eliminate Ram Pal is also not trustworthy. On account of several discrepancies appearing in their evidence, P.W.8 is absolutely an hearsay witness which is borne out from their evidence. Similarly the evidence of P.W.9 and P.W.10 does not establish the intention on the part of the accused to murder Ram Prasad. Since no enmity could be established on record between them there was nothing which warranted to eliminate Ram Pal.

23. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the Appellant unless the same was connected with the murder of deceased by the Appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of the Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot *ipso facto* enable us to arrive at the conclusion that the latter were used for the murder.

24. In fact, the recovery of the weapons on disclosure of the Appellants itself becomes doubtful. The witness of Recovery Memo P.W.1 – Mohd. Ayub Khan was declared hostile and another witness P.W.10 – Chittar admitted that signatures were obtained on the memos and annexures at the Police

Station itself. It is also pertinent to mention here that P.W.1 – Mohd. Ayub Khan was residing 4 Kms. away from the place of recovery and P.W.10 – Chittar was residing 8 Kms. away from the place of recovery and were also declared hostile. Prosecution failed to establish as to why none of the local persons were called to be the witnesses. The conduct of the prosecution appears to be extremely doubtful and renders the case as concocted, to falsely implicate the Appellants. Recovery Memos also reflect that there were overwriting on the same which has not been explained by P.W.16 – Diwakar Chaturvedi (Investigating Officer). He admitted that memos and annexures were prepared in his own handwriting but also admitted in his cross examination that the same were in a different handwriting. This lacuna should have been explained by the prosecution more so when the whole case rested only on circumstantial evidence. Thus looking to the matter from all angles we are of the considered opinion that it would not be safe and proper to hold the Appellants guilty for commission of offence.

25. It is too well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by this Court.

26. In a most celebrated case of this Court reported in 1984 (4) SCC 116 *Sharad Birdhichand Sarda* Vs. *State of Maharashtra* in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence following features are required to be complied with. It would be beneficial to repeat the same salient features once

again which are as under:-

"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

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

(iii) The circumstances should be of a conclusive nature and tendency,

(iv) They should exclude every possible hypothesis except the one to be proved, and

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

27. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

28. If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity as held by this Court in *Varun Chaudhary* Vs. *State of Rajasthan* reported in AIR 2011 SCC 72.

29. The scope and ambit of Section 27 were also illuminatingly stated in AIR 1947 PC 67 *Pulukuri Kotayya & Ors.* Vs. *Emperor* reproduced hereinbelow:-

"...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The same were thereafter restated in another judgment of this Court reported in 2004 (10) SCC 657 *Anter Singh* Vs. *State of Rajasthan*.

30. The doctrine of circumstantial evidence was once again discussed and summarised in 2008 (3) SCC 210 *Sattatiya @Satish Rajanna Kartalla* Vs. *State of Maharashtra* in the following terms:

"10. ..It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstance

from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances".

31. As regards scope of interference against concurrent findings of fact, powers under Article 136 of the Constitution can be exercised, in the manner described in para 14 of the aforesaid judgment reproduced hereinbelow:-

"14. At this stage, we also deem it proper to observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court. [*Bharat Vs. State of M.P.* 2003 (3) SCC 106]

32. After having discussed the entire evidence, we have no doubt in our mind that the same is vitiated by serious errors and if Appellant's conviction is upheld then it would amount to miscarriage of justice.

33. In the light of the aforesaid well settled principles of law by several authorities of this Court, we are of the opinion that the judgment and order of conviction as recorded by Trial Court and confirmed by High Court in Appellants appeal cannot be sustained in law. The same are, therefore, hereby set aside and quashed. Appeals are allowed. Appellants are acquitted of the charges levelled against them. The Appellants be set at liberty, if not required in any other criminal cases.

R.P. Appeals allowed.

SRIVALLA SRINIVASA RAO & ORS.
V.
STATE OF A.P.
(Criminal Appeal No. 671 of 2009)

JULY 14, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

PENAL CODE, 1860:

s. 376 (2) (g) – Gang rape – Three accused convicted of the offence – Pleas of non-corroboration of version of prosecutrix and delay in lodging the FIR – Held: The evidence of prosecutrix is supported by the evidence of two more witnesses who reached the place of incident on hearing her shrieks – Besides, the medical evidence indicating duration of injuries, the Forensic Science Laboratory report, the broken pieces of glass bangles recovered from the place of incident and the torn clothes of the victim fully support the factum of rape – If some delay is occasioned in registering the FIR, that cannot in any way detract from the other credible evidence – Conviction and the sentence of seven years RI upheld – Evidence – Delay in lodging FIR.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 671 of 2009.

From the Judgment & Order dated 9.4.2008 of the High Court of Andhra Pradesh at Hyderbad in Criminal Appeal No. 562 of 2000.

Guntur Prabhakar for the Appellants.

D. Mahesh Babu, Ramesh Allanki for the Respondent.

The following Order of the Court was delivered

O R D E R

1. The appellants, eight in number, were brought to trial for offences punishable under Sections 376 (2g), 323 and 354 of the Indian Penal Code. The trial court on a consideration of the evidence acquitted the appellants for the offence punishable under Section 354 but convicted A1 to A3 under Section 376(2g) and imposed a sentence of 10 years' rigorous imprisonment whereas a fine of Rs. 1,000/- was levied for the offence punishable under Section 323 IPC on all the eight accused. An appeal was thereafter taken to the High Court and the High Court reduced the sentence awarded to A1 to A3 from ten years to seven years rigorous imprisonment and with this modification in the order of the trial court, dismissed the appeal. It is in this background the present appeal has come before us for consideration after the grant of special leave.

2. The facts of the case are as under:

2.1. At about 6:00a.m. on the 22nd of March, 1986 the victim P.W. 1, left her village for village Pidana to sell milk. As she was on her way she wa accosted by A1 to A3 who were coming from the opposite direction. They abused P.W. 1 and beat her thereafter. They also took her to the nearby field of one Chintalu and committed rape on her. In the meantime, A4 to A8 also came there and pointed out that it was not sufficient punishment for her to be raped but she should also be given a severe beating to teach her a lesson. All the accused thereupon beat her still further. The cries of the victim attracted some of the villagers who were closeby and on reaching there they found that her clothes had been torn and that she was in a traumatised state. The villagers took her to her village where she narrated the incident to her co-villagers and on their advice made her way to the police station at about 8:30p.m. and lodged a report with the Sub Inspector alleging the facts as given above. The investigating officer then visited the scene of occurrence and seized broken pieces of glass bangles in

the presence of witnesses. He also arrested the accused and seized the clothes they had been wearing at the time of the incident and also sent A1 to A3 for their medical examination.

2.2. On the completion of the investigation, a charge sheet was, accordingly, filed against the eight accused for offences punishable under Section 376(2g), 114, 354 and 323 read with Section 34 of the Indian Penal Code and they were committed for trial to the Court of Sessions and were, accordingly, charged and tried for the aforesaid offences with the results already mentioned above.

3. Mr. Guntur Prabhakar, the learned counsel for the appellants, has raised several arguments before us during the course of hearing. He has first pointed out that but for the self-serving evidence of P.W. 1, the complainant who as also the victim of rape, there was no independent evidence with respect to the involvement of the appellants. He has also pointed out that the medical evidence did not indicate the commission of rape more particularly, as these injuries were no on the back of the victim. It has also been urged that as the FIR had been lodged belatedly the prosecution story had been created in suspicious circumstances.

4. The learned counsel for the State of Andhra Pradesh Mr. D. Mahesh Babu has, however, supported the judgment of the trial court and the High Court and has urged that no interference was called for as the courts below had found that the primary evidence against the appellants was that of the victim herself wherein she had stated that she had been accosted by A1 to A3 who had then carried her to the fields close by and raped her and accused A4 to A8 had also arrived at the site thereafter and all the accused had caused injuries to her. We, further find that the statement of P.W. 1 is corroborated by the statements of P.W. 2 and 6 who were attracted to the place of incident on hearing the shrieks of the victim. We are, therefore, of the opinion that the statement of these witnesses inspires confidence.

5. It is true that there appears to be some delay in the lodging of the FIR but in a case of rape and that too in a gang rape, some delay is inevitable. The incident is said to have happened at about 6:00a.m. and P.W. 1 had reached the police station at about 8:30p.m., the same evening and the formal FIR recorded a few hours thereafter. She had also been subjected to a medical examination at about 11:30p.m. and P.W. 12 Dr. C. Anantha Lakhsmi, the lady Medical Officer, found that the injuries on the victim had been caused during the commission of rape. P.W. 12 also observed that the saree and blouse of the victim had been torn and that she had multiple injuries on her person including the arms, chest and breasts. She also opined that injuries could have been suffered within 24 hours or so. The time factor also fully supports the factum of rape. Moreoever, we see that the vaginal swabs taken from P.W. 1 had been sent for examination to the Forensic Science Laboratory, Vijayawada which in its opinion rendered on the 21st July, 1996, found semen stains thereon. Likewise, the police officer had picked up broken glass bangles from the place where the rape had been committed. In this background, though there is some delay in lodging of the FIR this can be over looked. A victim of gang rape inevitably suffers acute trauma and it is some time before such a victim is in a position to make a lucid and sensible statement. Moreover, rape itself brings enormous shame to the victim and it is after much persuasion that a rape victim goes to the police station to lodge a report and if some delay if occasioned that cannot in any way detract from the other credible evidence.

6. We thus find no merit in the appeal which is, accordingly, dismissed.

R.P. Appeal dismissed.

JALANDHAR IMPROVEMENT TRUST
v.
VINOD KUMAR AND ORS.
(Civil Appeal No. 5461 of 2011)

JULY 15, 2011

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

Punjab Public Premises Land (Eviction and Rent Recovery) Act, 1973 – ss. 5 and 7 – Initiation of – Proprietary rights – Land in question was part of the Development Scheme developed by the Punjab Government – Respondent claimed that they were Displaced persons from Pakistan and were in possession of the said land as an evacuee property – Order ofCivil Court that respondents not be dispossessed from the property otherwise than in due course of law – Appellant initiated proceedings under the Public Premises Act for eviction of the respondents – The proceedings were stopped when the case file got lost at the stage of evidence – Respondents filed writ petition contending that the proceedings under the Public Premises Act was without jurisdiction – In terms of the orders of High Court, matter was placed before the Settlement Commissioner who held that the case could not be decided in view of repeal of the Displaced Persons Act – Respondents filed another writ petition for quashing the order of the Settlement Commissioner – High Court remanded back the matter to the Settlement Commissioner once again to consider the claims of the respondents and also stayed their dispossession till the matter was decided by the Settlement Commissioner – On appeal, held: Since the Evacuee Property Act has been repealed, there is no justification in the order passed by the High Court remanding back the matter to the Settlement Commissioner to consider the claim of the respondents once again inasmuch as the issue as to whether or not respondents

are authorised or unauthorised occupants of the land in dispute and as to whether or not the respondents are entitled to alternative plots or rehabilitation are matters which can be adjudicated upon separately in accordance with law but not in the manner as suggested by the High Court – Even if respondents are entitled to rehabilitation under any law the same has to be established by due process of law – But they cannot claim any land within the acquired area/55.0 Acres of Development Scheme but in case an order is passed in their favour, they would be rehabilitated in alternative plot(s) – Therefore, they would have to prove their case before the competent authority and not before the Settlement Commissioner – However, in order to comply with the directions of the Civil Court and also for eviction in accordance with law, proceeding initiated under the Public Premises Eviction Act should be continued till the same comes to a logical end – Evacuee Property Act, 1950 – Displaced Persons (Compensation & Rehabilitation) Act, 1954.

Respondents filed application for grant of proprietary rights in respect of land measuring 2-1/2 kanals in the 55.0 Acres Development Scheme developed by the Punjab Government contending that they were displaced persons from Pakistan and were in occupation of the said land since the year 1947 by way of evacuee property. The application was dismissed by the Naib Tehsildar (S), M.O. on 3-8-1981 on the ground that the said area had already been acquired by the appellant-Improvement Trust Jalandhar and that it was not an evacuee property. The respondents then filed appeals before the Settlement Commissioner which vide its order dated 5-10-1981 remanded the matter to the Tehsildar (S)-cum-M.O., for decision afresh.

Earlier, an Award had been passed on 05.01.1977 by the Land Acquisition Collector, Jalandhar Improvement Trust and in the said Award, it was stated that the State

Government (Local Government) vide their notification dated the 10th July, 1975, issued under Section 42 of the Punjab Town Improvement Act, 1922, had accorded sanction to the Development Scheme for an area measuring approximately 55.0 acres. The Land Acquisition Collector vide its Award dated 05.01.1977 held that the land occupied by the respondents had already been received by the Improvement Trust, Jalandhar in the package deal.

In the meantime the predecessor-in-interest of the respondents Nos. 1 & 2 filed a civil suit seeking for injunction restraining the appellant from dispossessing the predecessor-in-interest from the land illegally, unlawfully or by force. The Trial Court, namely, the Sub Judge passed an order in the said suit that the plaintiff would not be dispossessed from the suit property otherwise than in due course of law. The said order of the Trial Court was also upheld by the Additional District Judge. Subsequent to the aforesaid order, an application under Sections 5 and 7 of the Punjab Public Premises Land [Eviction and Rent Recovery] Act No. 31 of 1973 was filed by the appellant initiating a proceeding for eviction of the respondents. The competent authority issued notice to the respondents and at the stage when the said proceeding was at the stage of evidence, the file of the case got lost, consequent upon which the proceeding was stopped.

The respondents filed Writ Petition before the High Court contending *inter alia* that the aforesaid land is an evacuee property and therefore the aforesaid initiation of proceedings under Sections 5 and 7 of the Punjab Public Premises Land [Eviction and Rent Recovery] Act No. 31 of 1973 was without jurisdiction. The High Court disposed of the said writ petition by holding that if the

Settlement Commissioner found that the claim of the respondents was without any merit and they were not entitled to any alternative sites/rehabilitation then they would also have no action to claim to retain the sites which were under their possession. Pursuant to the aforesaid directions of the High Court the matter was placed before the Sub Divisional Magistrate, Jalandhar (Settlement Commissioner) by the respondents for allotment of property. The Sub Divisional Magistrate, Jalandhar (Settlement Commissioner) passed order dated 27-4-2007 holding that the case could not be decided in view of repeal of Displaced Persons (Compensation & Rehabilitation) Act, 1954 by the Ministry of Law and Justice, Legislative Department, New Delhi. Thereupon, the respondents filed a separate writ petition for quashing the order dated 27-4-2007 passed by the Settlement Commissioner/Sub Divisional Magistrate. The High Court remanded back the matter to the Settlement Commissioner once again to consider the claims of the respondents and also stayed their dispossession till the matter was decided by the Settlement Commissioner. The said order of the High Court was challenged in the present appeal.

Allowing the appeal, the Court

HELD:1. There can be no dispute with regard to the fact that the land in dispute is a part of the Award passed on 05.01.1977 and the same belongs to the Punjab Town Improvement/Government being a part of development scheme. The respondents claimed to be in possession of the said land as an evacuee property. If in case the respondents were in possession of the said land as an evacuee property and not as encroachers meaning thereby holding right and title to hold and possess such land, they were required to challenge the Award passed on 05.01.1977. The said Award having not been

challenged by the respondents the same has become final and binding on all concerned. [Para 17] [132-E-G]

2. The civil suit filed by the predecessor-in-interest of the respondents Nos. 1 & 2 was disposed of by the trial court, namely, the Sub Judge with a direction that the plaintiff would not be dispossessed from the suit property otherwise than in due course of law as respondents were in possession of the land, may be as encroachers. Consequent thereto, the appellant moved the competent authority for initiation of proceedings under the Punjab Public Premises Land (Eviction and Rent Recovery) Act, 1973 [the Eviction Act]. In the said proceedings all the issues could be urged as to whether or not the respondents were owners and had their rights over the disputed land and also as to whether or not appellant was owner of the land and as to whether or not the respondents were authorised occupants or unauthorised occupants of the land. It was also averred clearly in the writ petition and also in this appeal that the respondents were allotted four alternative plots in lieu of their occupation of the land which is part of the disputed land. The aforesaid fact although has been disputed by the respondents in their counter affidavit but no documentary evidence has been placed on record to indicate that the aforesaid land was not allotted by the Government to the respondents and that they had purchased the land by paying full consideration thereof from the competent authority. [Para 18] [132-H; 133-A-D]

3. Whether or not the respondents are lawful owners of the land in question or they are mere encroachers and liable to be evicted would be gone into and decided although in a summary manner in the proceedings which were initiated against them. [Para 19] [133-E]

4. Since the Evacuee Property Act, 1950 has been repealed, there is no justification in the order passed by

the High Court remanding back the matter to the Settlement Commissioner to consider the claim of the respondents once again inasmuch as the issue as to whether or not respondents are authorised or unauthorised occupants of the land in dispute and as to whether or not the respondents are entitled to alternative plots or rehabilitation are matters which can be adjudicated upon separately in accordance with law but not in the manner as suggested by the High Court. Even if respondents are entitled to rehabilitation under any law the same has to be established by due process of law. But they cannot claim any land within the acquired area/ 55.0 Acres of Development Scheme but in case an order is passed in their favour, they would be rehabilitated in alternative plot(s). Therefore, they would have to prove their case before the competent authority and not before the Settlement Commissioner. However, in order to comply with the directions of the Civil Court and also for his eviction in accordance with law, proceeding has to be initiated under the Public Premises Eviction Act, which stands initiated, and therefore, the said proceeding should be continued till the same would come to a logical end. [Para 20] [133-F-H; 134-A-C]

5. The order passed by the High Court is set aside and it is held that the proceedings initiated against the respondents under Sections 5 and 7 of the Eviction Act would be allowed to be continued and the same shall be brought to a logical end as expeditiously as possible. [Para 21] [134-D]

6. The land in question is a part of the Development Plan and therefore the matter requires urgent consideration. In any case the land in question being a part of the Development Plan cannot be left to the occupation of the respondents if they are held to be encroachers by passing an interim order. Therefore, the

proceedings to adjudicate upon and decide as to whether or not respondents are authorised or unauthorised occupants of the land in dispute should be completed and brought to an end. As to whether or not the respondents are encroachers would also be decided in the said proceeding. All other claims regarding entitlement of alternative plot or rehabilitation and whether or not such land is already allotted as rehabilitation package could be raised by the respondents only after the proceeding initiated under the Eviction Act is finalised and also depending on its outcome. Six months time is granted to the competent authority to complete proceedings initiated under Sections 5 and 7 of the Eviction Act, so that, the matter is disposed of as expeditiously as possible as the same is pending for a very long time. [Paras 22, 23] [134-E-H; 135-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5461 of 2011.

From the Judgment & Order dated 30.4.2009 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 10203 of 2007.

Samarth Sagar, Arun K. Sinha, Sumit Sinha for the Appellant.

Dinesh Verma, Rajat Sharma, Dr. Vipin Gupta for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. For the reasons stated in the application for condonation of delay, we are of the view that there is sufficient cause for such condonation. Accordingly, delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order dated 30.04.2009 passed by the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 10203 of 2007, whereby the High Court disposed of the writ petition by remanding back the matter to the Settlement Commissioner for considering the claims of the respondents while maintaining status quo in the matter.

4. Brief facts leading to the filing of the present appeal are that the land in dispute belongs to the State. It is averred by the respondents that they have occupied the land in dispute in the year 1947, measuring 2-1/2 kanals in Khasra No. 16693/6729 in the 55.0 Acres Development Scheme as they were displaced persons from Pakistan. On the other hand the appellant – Improvement Trust Jalandhar has stated that respondents encroached the said land which belongs to the Government.

5. An Award was passed on 05.01.1977 by the Land Acquisition Collector, Jalandhar Improvement Trust in Land Acquisition No. 1 of 1975-76 and in the said Award, it was stated that the State Government (Local Government) vide their notification No. 8080-3CI-75/21963 dated the 10th July, 1975, issued under Section 42 of the Punjab Town Improvement Act, 1922, accorded sanction to the Development Scheme for an area measuring approximately 55.0 acres on Police Lines Road, behind Commissioner's Office, Jalandhar framed by the Jalandhar Improvement Trust. The aforesaid Trust vide its Memorandum No. JIT/3058 dated the 26th July, 1975, applied for the acquisition of the non-evacuee and composite property comprised in the Scheme under the Land Acquisition Act, 1894. It was also stated in the aforesaid award that according to the acquisition file prepared by the revenue staff of the Trust total area of the scheme works out to be 598 Kanal 2 Marlas and out of this area measuring 69 Kanals and 2 Marlas belongs to the Improvement Trust, Jalandhar itself. The aforesaid Award included the area in dispute which is the subject matter of the present case.

6. The respondents, however, contended inter alia that they are in occupation of the said land by way of evacuee property as they were being displaced persons from Pakistan. The said land was transferred to the Improvement Trust, Jalandhar for the execution of 55.0 Acres Development Scheme developed by the Punjab Government. The Land Acquisition Collector vide its Award dated 5th January, 1977 held that the land occupied by the respondents had already been received by the Improvement Trust, Jalandhar in the package deal.

7. Respondents filed an application for grant of proprietary rights in respect of land measuring 2-1/2 kanals in Khasra No. 16693/6729 in the 55.0 Acres Development Scheme. However, the application filed by the respondents for grant of proprietary rights was dismissed by the Naib Tehsildar (S), M.O. Jalandhar on 03.08.1981 on the ground that the aforesaid area had already been acquired by the Improvement Trust Jalandhar and that it was not an evacuee property.

8. The respondents then filed appeals before the Settlement Commissioner, Punjab, Rehabilitation Department, Jalandhar against the order dated 03.08.1981 which were accepted by the Settlement Commissioner vide its order dated 5.10.1981 and remanded the matter to the Tehsildar (S)-cum-M.O., Jalandhar for fresh decision, after hearing the respondents.

9. In the meantime the predecessor-in-interest of the respondents Nos. 1 & 2 filed a civil suit seeking for injunction restraining the appellant herein from dispossessing the predecessor-in-interest from the land illegally, unlawfully or by force. The Trial Court, namely, the Sub Judge passed an order in the said suit that the plaintiff would not be dispossessed from the suit property otherwise than in due course of law. The said order of the Trial Court was also upheld by the Additional District Judge, Jalandhar vide his judgment dated 18.01.1985.

10. Subsequent to the aforesaid order, an application

under Sections 5 and 7 of the Punjab Public Premises Land [Eviction and Rent Recovery] Act No. 31 of 1973 [hereinafter referred to as the "Eviction Act"] was filed by the appellant initiating a proceeding for eviction of the respondents. The competent authority issued notice to the respondents and at the stage when the said proceeding was at the stage of evidence, the file of the case lost, consequent upon which the proceeding was stopped.

11. In the meantime the respondents filed a Writ Petition before the Punjab and Haryana High Court contending inter alia that the aforesaid land is an evacuee property and therefore the aforesaid initiation of proceedings under Sections 5 and 7 of the Punjab Public Premises Land [Eviction and Rent Recovery] Act No. 31 of 1973 is without jurisdiction.

12. The appellant herein filed a counter affidavit in the said writ petition. The High Court by its order dated 12.05.2006 disposed of the said writ petition by holding that if the Settlement Commissioner finds that the claim of the respondents is without any merit and they are not entitled to any alternative sites/rehabilitation then they would also have no action to claim to retain the sites which are under their possession. Pursuant to the aforesaid directions of the High Court the matter was placed before the Sub Divisional Magistrate, Jalandhar by the respondents herein for allotment of property comprising in Khasra No. 16693/6729 situated in Bhisti Darwaja, Civil Lines, Jalandhar.

13. The Sub Divisional Magistrate, Jalandhar passed an order dated 27.04.2007 holding that the case could not be decided in view of repeal of Displaced Persons (Compensation & Rehabilitation) Act, 1954 by the Ministry of Law and Justice, Legislative Department, New Delhi.

14. Thereupon, the respondents herein filed a separate writ petition for quashing the order dated 27.04.2007 passed by the Settlement Commissioner which was registered as 10203 of

2007. In the said writ petition the State of Punjab filed its counter affidavit in which it was averred that the respondents have already transferred their land which was being used as residential. With regard to the remaining land being used for Dairy, it was stated that they are not using the said land as the Dairy business has been shifted to Jamsher Tehsil Jalondha in the light of the decision of Municipal Corporation of Jalandhar wherein the respondents have been allotted four different plots bearing Nos. 139 to 142 vide letter dated 12.03.2008.

15. The High Court passed an order dated 30.04.2009 which is the impugned order herein and whereby the High Court remanded back the matter to the Settlement Commissioner once again to consider the claims of the respondents and also stayed their dispossession till the matter is decided by the Settlement Commissioner.

16. Being aggrieved by the said order the present appeal was filed on which we heard the learned counsel appearing for the parties. Counsel appearing for the parties have taken us meticulously through the entire records.

17. There can be no dispute with regard to the fact that the land in dispute is a part of the Award and the same belongs to the Punjab Town Improvement/Government being a part of development scheme. The respondents claimed to be in possession of the said land as an evacuee property. If in case the respondents were in possession of the said land as an evacuee property and not as encroachers meaning thereby holding right and title to hold and possess such land, they were required to challenge the Award passed on 05.01.1977. The said Award having not been challenged by the respondents the same has become final and binding on all concerned.

18. The civil suit filed by the predecessor-in-interest of the respondents Nos. 1 & 2 was disposed of by the trial court, namely, the Sub Judge with a direction that the plaintiff would not be dispossessed from the suit property otherwise than in

due course of law as respondents were in possession of the land, may be as encroachers. Consequent thereto, the appellant has moved the competent authority for initiation of proceedings under the Punjab Public Premises Land (Eviction and Rent Recovery) Act, 1973. In the said proceedings all the issues could be urged as to whether or not the respondents are owners and have their rights over the disputed land and also as to whether or not appellant is owner of the land and as to whether or not the respondents are authorised occupants or unauthorised occupants of the land. It was also averred clearly in the writ petition and also in this appeal that the respondents have been allotted four alternative plots in lieu of their occupation of the land which is part of the disputed land. The aforesaid fact although has been disputed by the respondents in their counter affidavit but no documentary evidence has been placed on record to indicate that the aforesaid land was not allotted by the Government to the respondents and that they had purchased the land by paying full consideration thereof from the competent authority.

19. Be that as it may, as to whether or not the respondents are lawful owners of the land in question or they are mere encroachers and liable to be evicted would be gone into and decided although in a summary manner in the proceedings which were initiated against them.

20. Since the Evacuee Property Act, 1950 has been repealed, we see no justification in the order dated 30.04.2009 passed by the High Court remanding back the matter to the Settlement Commissioner to consider the claim of the respondents once again inasmuch as the issue as to whether or not respondents are authorised or unauthorised occupants of the land in dispute and as to whether or not the respondents are entitled to alternative plots or rehabilitation are matters which can be adjudicated upon separately in accordance with law but not in the manner as suggested by the High Court. Even if respondents are entitled to rehabilitation under any law the

same has to be established by due process of law. But they cannot claim any land within the acquired area/55.0 Acres of Development Scheme but in case an order is passed in their favour, they would be rehabilitated in alternative plot(s). Therefore, they would have to prove their case before the competent authority and not before the Settlement Commissioner. However, in order to comply with the directions of the Civil Court and also for his eviction in accordance with law, proceeding has to be initiated under the Public Premises Eviction Act, which stands initiated, and therefore, the said proceeding should be continued till the same would come to a logical end.

21. The respondents have not challenged the award and therefore the aforesaid Award has become final and binding. Therefore, we set aside the order passed by the High Court and hold that the proceedings initiated against the respondents under Sections 5 and 7 of the Eviction Act would be allowed to be continued and the same shall be brought to a logical end as expeditiously as possible.

22. The land in question is a part of the Development Plan and therefore the matter requires urgent consideration. In any case the land in question being a part of the Development Plan cannot be left to the occupation of the respondents if they are held to be encroachers by passing an interim order. Therefore, in our considered opinion the proceedings to adjudicate upon and decide as to whether or not respondents are authorised or unauthorised occupants of the land in dispute should be completed and brought to an end. As to whether or not the respondents are encroachers would also be decided in the said proceeding. All other claims regarding entitlement of alternative plot or rehabilitation and whether or not such land is already allotted as rehabilitation package could be raised by the respondents only after the proceeding initiated under the Eviction Act is finalised and also depending on its outcome.

23. Six months time is granted to the competent authority

to complete proceedings initiated under Sections 5 and 7 of the Eviction Act, so that, the matter is disposed of as expeditiously as possible as the same is pending for a very long time.

24. Therefore, the present appeal is allowed and the order passed by the High Court accordingly stands quashed. We leave the parties to bear their own costs.

B.B.B. Appeal allowed.

G. KRISHNAREDDY

v.

SAJJAPPA (D) BY LRS. AND ANR.

(Civil Appeal No. 4255 of 2002)

JULY 18, 2011

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

Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978:

ss. 4 and 5 – Land granted for 15 years for cultivation by the State Government, purchased within the prohibited period – After coming into force of the Act, application by grantee for resumption of the land – Plea of adverse possession raised by purchaser – HELD: High Court has rightly held that the plea of adverse possession was not available to the purchaser.

Government grant of agricultural land – Land purchased within the period of prohibition – After coming into force of the Act, application for resumption of the land filed by grantee – Plea of adverse possession by purchaser – Limitation – HELD: The grant provides that the grantee can enjoy the property for 15 years – Not only the grant was only for a limited period but it was also for cultivation – Therefore, it was a grant for possession by way of cultivation for a limited period and it cannot be said that by the said grant the grantee had acquired absolute title to the land in question from the State Government – Therefore, the period of limitation which would have been applicable in the instant case would be 30 years – Adverse possession – Limitation.

One Smt. 'M' was allotted 2 acres of agricultural land through a grant by the State Government on 08.01.1957 with a condition prohibiting any alienation of the land for

a period of 15 years. The father of the appellant purchased the said land from Smt. 'M' under a registered sale deed dated 20.12.1968. After the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 came into force, Smt. 'M' made an application for resumption of the land in question on the ground that it was purchased by the father of the appellant, in violation of the prohibition clause of the grant. In the first round of litigation, the revenue authorities allowed the application of Smt. 'M' but on remand of the matter from the High Court, the authorities accepted the plea of adverse possession set up by the purchaser. However, in the writ petition filed by the heirs of the original grantee the single Judge of the High Court held that the purchaser was precluded from setting up the inconsistent plea of adverse possession and, ultimately, held in favour of heirs of the original grantee. The writ appeal having been dismissed by the Division Bench of the High Court, the heir and legal representative of the purchaser filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. It is clear that the appellant took up the plea of adverse possession by way of defence. The predecessor-in-interest of the appellant claimed title over the land in question by virtue of purchase and at no stage he had put up any hostile claim to the property. The plea was of ownership by right of purchase and, therefore, a lawful right to enjoy the property. The Single Judge while allowing the writ petition filed by the respondents rightly held that the plea of adverse possession was not available to the predecessor-in-interest of the appellant in law; and in view of such legal position the authorities below erred in accepting the plea of adverse possession in respect of the granted land. [para 9] [143-E-G]

1.2. Even otherwise, so as to ascertain whether in the

instant case the period of limitation would be 12 years or 30 years, a bare perusal of the grant would indicate that it was only a transfer of the possession of the land by way of allotment and in none of the clauses of the grant it is stated that it is a conveyance of the title over such land by the State Government. Clause 1 of the grant gives authority to the grantee to clear the land and to bring it to cultivable stage. It further provides that the grantee can enjoy the property for 15 years. Not only the grant was only for a limited period but it was also for cultivation. Therefore, it was a grant for possession by way of cultivation for a limited period and it cannot be said that by the said grant the transferee had acquired absolute title to the land in question from the State Government. Therefore, the period of limitation which would have been applicable in the instant case would be 30 years, in the light of the ratio laid down in *K.T. Buchegowda's **case. [Para 11] [145-A-E]**

***K.T. Buchegowda v. Deputy Commissioner and Others (1994) 3 SCC 536 – relied on.**

Case Law Reference:

(1994) 3 SCC 536	**relied on**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4255 of 2002.

From the Judgment & Order dated 20.10.1998 of the High Court of Karnataka at Bangalore in W.A. No. 3269 of 1998.

K.V. Mohan for the Appellant.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. This appeal is directed against the judgment and order dated 20.10.1998 passed by the Division Bench of the Karnataka High Court in

Writ Appeal No. 3269 of 1998 dismissing the Writ Appeal filed by the appellant.

2. Brief facts leading to the filing of the case are that the disputed land was allotted through a grant by the State of Karnataka to one Smt. Munemma on 08.01.1957 with a condition prohibiting any alienation of the land for a period of 15 years. Gopalappa, late father of the appellant herein, purchased the said land from Smt. Munemma under a registered sale deed dated 20.12.1968.

3. In view of the coming into force of the Karnataka Scheduled Castes and Scheduled Tribes [Prohibition of Transfer of Certain Lands] Act, 1978 [for short "the Prohibition of Transfer Act"] Smt. Munemma made an application under the said Prohibition of Transfer Act for the resumption of the land in question on the ground that it was purchased by Gopalappa, late father of the appellant, in violation of the prohibition clause of the grant. By passing an order dated 07.06.1984 Assistant Commissioner allowed the application filed by Smt. Munemma which was also confirmed by the Deputy Commissioner in appeal. Against the said order of the Deputy Commissioner the predecessor-in-interest of the appellant filed a Writ Petition before the Karnataka High Court, which remanded back the matter to the appropriate authority for its disposal in accordance with law. Pursuant thereto the Assistant Commissioner after conducting an enquiry vide its order dated 10.10.1995 held that the purchaser is in possession of the land for more than 12 years which decision was further confirmed in appeal by the Deputy Commissioner. Against the aforesaid order a Writ Petition was filed by the heirs of the original grantee which was registered as Writ Petition No. 26848/1997.

4. Learned Single Judge who heard the aforesaid Writ Petition vide order dated 15.06.1998 held that the authorities below erred in law in applying the principles of adverse possession to the case in hand. The learned Single Judge held that since the purchaser had taken the stand that by purchasing

the said land under a valid sale deed he had been enjoying the cultivation and possession in his own right as owner thereof, therefore, he is precluded from setting up the inconsistent plea of adverse possession either as against the State or the grantee. It was also held that the aforesaid allotted land through a grant was purchased by the purchaser in contravention of the prohibition clause of the grant in question. Consequently, the said Writ Petition filed by the heirs of the original grantee succeeded and the impugned orders were quashed and the Assistant Commissioner was directed to take action according to law to restore possession of the said land to the respondent.

5. Being aggrieved by the aforesaid order a Writ Appeal was filed by the appellant herein which was dismissed by order dated 20.10.1998 as against which the present appeal has been filed, on which we heard learned counsel appearing for the appellant, who during the course of his argument had taken us through the records also. The respondent despite service did not enter appearance.

6. The land involved in the present case is Sy No. 53 measuring 2 acres situated in Village-Hebbatta, Taluk-Srinivaspur, District-Kolar. While granting land in favour of the predecessor-in-interest of the respondent herein through a grant dated 8th January, 1957 it was clearly stipulated in the grant that the said land cannot be transferred for 15 years. Subsequently, however, on 20.12.1968 the said land was purchased by the late father of appellant. Earlier to the same an agreement to sale was also entered into between the parties on 25.12.1965.

7. However, after coming into force of the Karnataka Scheduled Castes and Scheduled Tribes [Prohibition of Transfer of Certain Lands] Act, 1978, w.e.f., 01.01.1979, the original grantee - Smt. Munemma made an application under Section 5 of the Prohibition of Transfer Act before the Assistant Commissioner seeking resumption of the land on the ground that it was purchased by the late father of the appellant in

violation of the prohibition clause of the grant. The application of Smt. Munemma was allowed by the Assistant Commissioner which was also upheld by Deputy Commissioner in appeal. Against the said decision of the Deputy Commissioner a Writ Petition was filed by the appellant before the Karnataka High Court, which remanded back the matter to be decided by the appropriate authority in accordance with law.

8. Pursuant to the said order of the High Court an application was filed before the Assistant Commissioner. At this stage it would be appropriate to extract the provisions of Section 4 and 5 of the said Prohibition Act: -

"4. PROHIBITION OF TRANSFER OF GRANTED LANDS-

(1) Notwithstanding anything in any law, agreement, contract or instrument, any transfer of granted land made either before or after the commencement of this Act, in contravention of the terms of the grant of such land or the law providing for such grant, or sub-Section (2) shall be null and void and no right title or interest in such land shall be conveyed not be deemed ever to have conveyed by such transfer.

(2) No person shall, after the commencement of this Act transfer or acquire by transfer any granted land without the previous permission of the Government.

(3) The provision of sub-Sections (1) and (2) shall apply also to the sale of any land in execution of a decree or order of a civil court or of an award or order of any other authority.

5. RESUMPTION AND RESTITUTION OF GRANTED LANDS-

(1) Where an application by any interested person or on

information given in writing by any person or suo motu, and after such enquiry as he deems necessary the Assistant Commissioner is satisfied that the transfer of any granted land is null and void under sub-section (1) of section 4, he may –

a) by order take possession of such land after evicting all persons in possession thereof in such manner as may be prescribed;

provided that no such order shall be made except after giving the person affected a reasonable opportunity of being heard;

b) restore such land to the original grantee or his legal heir. Where it is not reasonably practicable to restore the land in such grantee or legal heir such land shall be deemed to have vested in the Government free from all encumbrances. The Government may grant such land to a person belonging to any of the Scheduled Castes or Scheduled Tribes in accordance with the rules relating to grant of lands.

(1A) After an enquiry referred to in sub-section(1) the Assistant Commissioner may if he is satisfied that transfer of any granted land is not null and void pass an order accordingly.

(2) Subject to the orders of the Deputy Commissioner under Section 5A, any order passed under sub-section (1) and (1A) shall be final and shall not be questioned in any court of law and no injunction shall be granted by any court in respect of any proceeding taken or about to be taken by the Assistant Commissioner in pursuance of any power conferred by or under this Act.

(3) For the purposes of this section where any granted land is in the possession of a person other than the original grantee or his legal heir it shall be presumed until the

contrary is proved that such person has acquired the land by a transfer which is null and void under the provisions of sub-section (1) of section 4."

The Assistant Commissioner after hearing the parties, however, rejected the application holding that the late father of the appellant is protected from dispossession by way of application of the plea of adverse possession which decision was also confirmed in appeal by the Deputy Commissioner. But in a Writ Petition filed by the respondent the learned Single Judge of the High Court set aside the said findings of the authorities below and directed for the restoration of possession of the land in favour of the respondent. Learned Single Judge further held that no transfer could have been made by the predecessor-in-interest of respondent, i.e., Smt. Munemma and, therefore, alienation made in favour of the late father of the appellant was contrary to the prohibition clause of the said grant as also to the provisions of law.

9. It is clear from the aforesaid position that in order to overcome the aforesaid difficulties the appellant took up the plea of adverse possession by way of defence. The predecessor-in-interest of the appellant claimed title over the said land by virtue of purchase and at no stage he had put up any hostile claim to the property. The plea was of ownership by right of purchase and therefore a lawful right to enjoy the property. The learned Single Judge while allowing the writ petition filed by the respondent has made reference to the aforesaid position and held that the plea of adverse possession was not available to the predecessor-in-interest of the appellant in law and in view of such legal position the authorities below erred in accepting the plea of adverse possession in respect of the granted land. There appears to be justification in the findings of the High Court.

10. Even otherwise, we may refer to the decision of this Court in *K.T. Buchegowda v. Deputy Commissioner and*

Others reported in (1994) 3 SCC 536 where at paragraph 8 of the said judgment this Court has held thus: -

"8. On a plain reading, granted land will mean, any land granted by the Government to a person, who is a member of the Scheduled Castes or Scheduled Tribes which includes land allotted to such persons. Grant may be of different types; it may be by absolute transfer of the interest of the State Government to the person concerned; it may be only by transfer of the possession of the land, by way of allotment, without conveying the title over such land of the State Government. If by grant, the transferee has acquired absolute title to the land in question from the State Government, then subject to protection provided by the different provisions of the Act, he will be subject to the same period of limitation as is prescribed for other citizens by the provisions of the Limitation Act, in respect of extinguishment of title over land by adverse possession. On the other hand, if the land has been allotted by way of grant and the title remains with the State Government, then to extinguish the title that has remained of the State Government by adverse possession, by a transferee on the basis of an alienation made in his favour by an allottee, the period of limitation shall be 30 years. Incidentally, it may be mentioned that some of the States in order to protect the members of the Scheduled Tribes from being dispossessed from the lands which belong to them and of which they are absolute owners, for purpose of extinguishment of their title by adverse possession, have prescribed special period of limitation, saying that it shall be 30 years. In Bihar, vide Regulation No. 1 of 1969, in Article 65 of the Limitation Act, it has been prescribed that it would be 30 years in respect of immovable property belonging to a member of the Scheduled Tribes as specified in Part III to the Schedule to the Constitution (Scheduled Tribes) Order, 1950."

11. Therefore, so as to ascertain whether in the present case the period of limitation would be 12 years or 30 years, we have perused the grant given to the predecessor-in-interest of the Respondent, a copy of which was placed on record by the appellant. A bare perusal of the aforesaid grant would indicate that nowhere in the said grant it has been clearly and specifically stated that it has been an absolute transfer of the right in title and possession by the State Government to the concerned person. A bare perusal of the document would also indicate that it was only a transfer of the possession of the land by way of allotment and in none of the clauses of the grant it is stated that it is a conveyance of the title over such land by the State Government. Clause 1 of the grant gives authority to the grantee to clear the land and to bring it to cultivable stage. It further provides that the grantee can enjoy the property for 15 years. Not only the grant was only for a limited period but it was also for cultivation. Therefore, it was a grant for possession by way of cultivation for a limited period and it cannot be said that by the aforesaid grant the transferee had acquired absolute title to the land in question from the State Government. Therefore, the period of limitation which would have been applicable in the present case would be 30 years, in the light of the ratio laid down by the said decision.

12. In any case the appellant has failed to make out any case for interference. We find no merit in this appeal, which stands dismissed, leaving the parties to bear their own costs.

R.P. Appeal dismissed.

INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION
v.
UNION OF INDIA & OTHERS
IA NO.36 AND IA NO.44
IN
WRIT PETITION (C) No.967 OF 1989

JULY 18, 2011

[DALVEER BHANDARI AND H.L. DATTU, JJ.]

ADMINISTRATION OF JUSTICE:

Abuse of process of law – Chemical industries causing damage to the ecology by throwing untreated toxic sludge in the open – Toxic substances percolated deep into the bowels of earth polluting the acquifers and the sub-terrain supply of water as also rendering the soil unfit for cultivation – Supreme Court by its judgment dated 13.2.1996 directing to close down the industrial units and attachment of their plants, machinery and all other immovable assets as also directing remediation at the cost of the polluters industrial units – By order dated 4.11.1997, the cost of remediation assessed to Rs.37.385 crores – Review and curative petitions dismissed – Several interim applications filed by the industrial units also dismissed – Again two I As filed by the industrial units– HELD: This is a classic example of abuse of the process of law and is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex Court in particular – All the issues raised in the instant applications had already been argued and determined by an authoritative judgment of the Court – The applications have been filed to avoid liability to pay the amount for remediation and costs imposed by the Court on the 'polluter pays' principle – Permitting the parties to reopen the concluded judgment of the Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching

adverse impact on the administration of justice – The applicants had adequate opportunity and were heard by the Court on a number of occasions – The applications being devoid of any merit are dismissed with costs of Rs. 10 lakhs which would be utilised for carrying out remedial measures in the affected area – Environmental Law – 'Polluter pays' principle – Costs.

Finality of judgment – Chemical industrial units causing damage to ecology – Judgment by Supreme Court directing closure of industrial units and remediation at their cost – Review and curative petitions dismissed – Industrial units keeping on filing interim applications – Judgment of the Court not complied with – HELD: It should be presumed that every proceeding has gone through infiltration several times before the decision of the apex Court – The controversy between the parties must come to an end at some stage and the judgment of the apex Court must be permitted to acquire finality – Various cases of different jurisdictions discussed and exceptions indicated – A final judgment of the Court cannot be reopened by merely filing interlocutory applications where all possible legal remedies have been fully exhausted – In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of the Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice – The principles laid down in judgments of various cosurts summed up – Maxim, 'interest republicae ut sit finis litium' – Explained – Environmental law.

UNJUST ENRICHMENT:

Unjust enrichment –Concept of – Discussed – Held: Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another – In the instant case, by the judgment dated

13.2.1996 Supreme Court fixed the liability of the polluter industries – It was on the lines of a preliminary decree – By order dated 4.11.1997 the Court accepting the ascertainment, fixed the amount at Rs. 37.385 crores – The liability to pay arose on 4.11.1997 – This was in the lines of a final decree pursuant to a preliminary decree – Thus, the position of the polluter industrial units was of a 'judgment-debtor' – The industrial units did not pay the amount but sought to postpone the payment and in the meantime utilised the said amount and thereby got themselves benefited – As a consequence, State authorities were deprived of the use of that amount for taking remedial measures – It is settled principle that no one can take advantage of his own wrong – Whatever benefits a person has had or could have had by not complying with the judgment must be disgorged and paid to the judgment-creditor and not allowed to be retained by the judgment-debtor – This is the bounden duty and obligation of the court – Environmental Law.

RESTITUTION:

'Unjust enrichment' and 'restitution' – Explained – Held: The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders – Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money – It is not only disgorging all the benefits but making the creditor whole, i.e., ordering restitution in full, and not dependent on what he might have made or benefited is what justice requires – The need for restitution in relation to court proceedings gives full jurisdiction to the court to pass appropriate orders that levelises – The court has only to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether – Environmental law.

COMPOUND INTEREST:

Compound interest, keeping in view unjust enrichment

and restitution – Discussed – Chemical industries causing damage to ecology – Supreme Court directing remediation at the cost of polluter industries – On 4.11.1997 industries directed to pay Rs.37.385 crores as remediation cost – Non-compliance of the order – Held: To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment, or to simply levelise, interest has to be calculated on compound basis as it also takes into account the inflationary trends – Some of the statute law provide only for simple interest and not compound interest – It is a matter of law reform which the Law Commission must take note of – Law Commission is suggested to consider and recommend necessary amendments in relevant laws – However, the power of the court to order compound interest by way of restitution is not fettered in any way – the applicants are directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid/recovered – Environmental law — Restitution – Unjust enrichment – Legislation – Code of Civil Procedure, 1908 – s.34.

COSTS:

Imposition of realistic costs and punitive costs – Held: In consonance with the principle of equity, justice and good conscience, courts should ensure that legal process is not abused by litigants in any manner – It is the bounden duty of courts to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and courts must ensure that there is no wrongful, unauthorised or unjust gain for anyone by the abuse of the process of court – Besides the realistic costs, courts would be fully justified even imposing punitive costs where legal process has been abused.

Writ Petition No.967 of 1989 was filed before the Supreme Court, stating that the chemical industries, namely, respondents no. 4 to 8 which were controlled by

the same group, namely, Hindustan Agro Chemicals Limited (respondent no. 4) set up in village Bichhri, of district Udaipur in Rajashtan, had caused damage to the ecology of the village and the surrounding area inasmuch as the untreated toxic sludge had been thrown in the open in and around the complex by the said industrial units, and the toxic substances had percolated deep into the bowels of the earth polluting the aquifers and the sub-terrain supply of water rendering the water in the wells and the streams unfit for human consumption. It had even become unfit for cattle to drink and for irrigating the land. The soil had become polluted and unfit for cultivation, which was the main source of livelihood for the villagers. The Court by its judgment dated 13.2.1996, directed closure of all the plants and factories of respondents no. 4 to 8 located in the village, and attachment of their factories, plant, machinery and all other immovable assets; and applying the 'polluter pays' principle, directed that the whole of the contaminated area be developed as a green belt at the expense of respondents no. 4 to 8. On the basis of the report of the NEERI, the extent of contamination done by the plants of respondents 4 to 8 was evaluated; and, by order dated 4.11.1997 the industrial units were asked to pay Rs. 37.385 crores towards the costs of remediation to the government. The review the curative petitions were dismissed. However, the orders of the Court could not be implemented till date because respondent nos. 4 to 8 kept on filing interlocutory applications.

Respondent no. 4 (HACL) filed the instant I.A. 36 stating that as on date there was no pollution existing in the area, no remediation was required to be done in the area and, therefore, there was no necessity for the Court to sell its assets in order to carry out any remediation in the area. The applicant, in support of its case sought to introduce before the Court the opinions of various

experts engaged by it for the purpose. It was prayed that the Court may pass the consequential order directing forclosing the proceedings and to lift the attachment order dated 13.2.1996. By I.A. No. 44 respondent no. 4, prayed to seek an investigation into the reports of April, 1994 prepared by the NEERI, which was employed by the R.S.P.C.B. to evaluate the extent of contamination done by the applicant's plants in the village concerned.

Dismissing the I. As., the Court

HELD: 1.1. This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this Court delivered on 13.2.1996, the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex Court in particular. [para 1] [170-D-F]

IAs 36 and 44

1.2. The applications are a serious attempt to discredit the NEERI report of 1996 once again. The sole object of filing of the application is to introduce before this Court recent reports prepared by experts at the behest of the applicant to demonstrate to the Court that before embarking upon remediation measures and for the said purposes putting the properties of the applicant to sale, the status and conditions of water, soil and environment in the area be reviewed with a view to realistically ascertain whether any measures for remediation are called for at all in the area and if yes, then the nature and

the current cost of the same may be ascertained. According to the applicant, the report of NEERI relied upon by this Court was not the authentic report which was officially prepared. There is a serious attempt to reopen the entire case which stands fully concluded by the judgment of this Court delivered on 13.2.1996. It may be pertinent to mention that even the review and curative petitions have also been dismissed but the applicant did not comply with the orders passed by this Court. The report had been considered by this Court at length on its own merits and the observations of the Court on the report are contained in the judgment pronounced by it on 13.2.1996. [para 29-31, 42, 49 and 64] [196-B-G; 199-G; 211-G; 220-G-H; 221-A]

1.3. All issues raised in the applications have been argued and determined by an authoritative judgment of this Court in its judgment dated 13.2.1996. The applications have been filed to avoid liability to pay the amount for remediation and costs imposed by the Court on the settled legal principle, i.e. "polluter pays" principle. The applicant is making an effort to avoid compliance of the order/judgment of this Court delivered fifteen years ago. The tendency must be effectively curbed. The applicant cannot be permitted to avoid compliance of the final order of this Court by abusing the legal process and keep the litigation alive. The Court must discourage such tactics and ensure effective compliance of the Court's order. It is also the obligation and bounden duty of the court to pass such order where litigants are prevented from abusing the system. [para 47-48] [211-B-F]

1.4. In its order dated 4.11.1997, this Court held that the remedial measures taken on the basis of the NEERI report shall be treated as final; and *accepted the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National*

Productivity Council as the Project Management Consultant and held that the Ministry of Environment and Forests, Government of India has rightly made a demand for Rs.37.385 crores. **The applicants had adequate opportunity and were heard by the court at length on number of occasions and only thereafter the writ petition was disposed of. The applicants now want to reopen the case by filing these interlocutory applications. [para 84 and 156] [227-G-H; 228-A-B; 257-B]**

1.5. The applicants certainly cannot be provided an entry by back door method nor can the unsuccessful litigants to be permitted to re-agitate and reargue their cases. The applicants have filed these applications merely to avoid compliance of the order of the court. The applicants have been successful in their endeavour and have not permitted the judgment delivered on 3.2.1996 to acquire finality till date. It is strange that other respondents did not implement the final order of this Court without there being any order or direction of this Court. These applications being devoid of any merit deserve to be dismissed with heavy costs. [para 157] [257-D-E]

M.C. Mehta and Another v. Union of India and Others (Oleum Gas Leak Case) **1987 (1) SCR 819 = (1987) 1 SCC 395;** *Rupa Ashok Hurra v. Ashok Hurra & Another* **2002 (2) SCR 1006 = (2002) 4 SCC 388;** *Indian Council for Enviro-Legal Action and others v. Union of India* and *Others* **1996 (2) SCR 503 = (1996) 3 SCC 212;** *M.C. Mehta v. Kamal Nath and others* **2000 (1) Suppl. SCR 389 = (2000) 6 SCC 213 – referred to.**

Minister for the environment and Heritage v. Greentree ***(No.3) [2004] FCA 1317*****,** *United States v. Hooker Chems and Plastics Corp.,* **722 F. Supp 960 (W.D.N.Y. 1989) – referred to.**

Public Liability Insurance Act, ***1991*** **111– referred to.**

FINALITY OF JUDGMENT

2.1. The maxim '*interest republicae ut sit finis litium*' says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage, it is necessary to put a quietus. It is not rare that in an adversarial system, despite the judges of the highest Court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door for a further appeal could be opening a flood gate which will cause more wrongs in the society at large at the cost of rights. It should be presumed that every proceeding has gone through infiltration several times before the decision of the apex Court. [para 114-115] [238-D-F]

2.2. Departure from the normal principle that the court's judgment is final would be justified only when compelling and substantial circumstances make it necessary to do so. Such circumstances may be that a material statutory provision was not drawn to the court's attention at the original hearing or a manifest wrong has been done. Reviewing of various cases of different jurisdictions lead to irresistible conclusion that though the judgments of the apex Court can also be reviewed or recalled but it must be done in extremely exceptional circumstances where there is gross violation of principles of natural justice. It is reiterated that the finality of the judgment of the apex Court has great sanctity and unless there are extremely compelling or exceptional circumstances, the judgments of the apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed. [para 118, 153 and 219] [239-D-E; 255-D-E; 278-C]

Union of India & Another v. Raghubir Singh (Dead) by L.Rs. **1989 (3) SCR 316 = (1989) 2 SCC 754;** *Mohd. Aslam*

v. Union of India & Others **1996 (3) SCR 782 = (1996) 2 SCC 749;** *Khoday Distilleries Ltd. and Another v. Registrar General, Supreme Court of India* **1995 (6) Suppl. SCR 190 = (1996) 3 SCC 114;** *Gurbachan Singh & Another v. Union of India & Another* **1996 (2) SCR 400 = (1996) 3 SCC 117;** *Babu Singh Bains and others v. Union of India and Others* **1996 (6) Suppl. SCR 120 = (1996) 6 SCC 565;** *P. Ashokan v. Union of India & Another* **1998 (1) SCR 717 = (1998) 3 SCC 56;** *Ajit Kumar Barat v. Secretary, Indian Tea Association & Others* **(2001) 5 SCC 42;** *Naresh Shridhar Mirajkar v. State of Maharashtra and another* **1966 SCR 744 = AIR 1967 SC 1;** *Mr. "X" v. Hospital "Z"* **(2000)9 SCC 439;** *Triveniben v. State of Gujarat* **1989 (1) SCR 509 = (1989) 1 SCC 678;** *Sumer v. State of U.P.* **2005 (7) SCC 220 (2005) 7 SCC 220;** *Sita Ram Bhandar Society, New Delhi v. Lieutenant Governor, Government of NCT, Delhi & Others* **2009 (14) SCR 507 = (2009) 10 SCC 501;** *M. Nagabhushana v. State of Karnataka and others* **2011 (2) SCR 435 = (2011) 3 SCC 408 – relied on.**

Regina v. Gough, **[1993] 1 A.C. 646;** *Dimes v. Proprietors of Grand Junction Canal,* **(1852) 3 H.L. Cases 759;** *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* **(No 2) (1999) 2 W.L.R. 272;** *Regina (Edwards) v Environment Agency and others* **[2010] UKSC 57,** *The (U.K.) Supreme Court Rules, 2009*, **2009 No. 1603 (L. 17);** *Wewaykum Indian Band v. Canada* **[2003] 2 SCR 259;** *Taylor Ventures Ltd. (Trustee of)* v. *Taylor* **2005 BCCA 350;** *State Rail Authority of New South Wales v. Codelfa Constructions Propriety Limited* **(1982) 150 CLR 29;** *Bailey v. Marinoff* **(1971) 125 CLR 529;** *DJL v. Central Authority* **(2000) 170 ALR 659;** *Lexcray Pty. Ltd. v. Northern Territory of Australia* **2003 NTCA 11;** *United States of America v. Ohio Power Company* **353 US 98 (1957), 149;** *Raymond G. Cahill v. The New York, New Haven and Hartford Railroad Company* **351 US 183;** *Re Transferred Civil Servants (Ireland) Compensation* **(1929) AC 242, 248-52; and** *State Rail*

Authority NSW v Codelfa Construction Pty Ltd **(1982) HCA 51 : (1982) 150 CLR 29,** *Smith v NSW Bar Association* **(1992) 176 CLR 252; and** *Autodesk Inc v Dyason* **(No 2) (1993) HCA 6 : (1993) 176 CLR 300 – referred to.**

2.3. However, a case stands on different footing where the aggrieved party filing a review or curative petition was not a party to the lis but the judgment adversely affected his interest or he was party to the lis was not served with notice of the proceedings and the matter proceeded as if he had notice. [para 155] [255-G]

State of M.P. v. *Sugar Singh & Others* **2010 (3) SCR 159 - relied on**

2.4. This Court has consistently taken the view that the judgments delivered by this Court while exercising its jurisdiction under Article 136 of the Constitution cannot be reopened in a writ petition filed under Article 32 of the Constitution. In view of this legal position, a final judgment of this Court cannot be reopened by merely filing interlocutory applications where all possible legal remedies have been fully exhausted. In the facts of the instant case, it becomes abundantly clear that this Court delivered final judgment in this case way back in 1996. The said judgment has not been permitted to acquire finality because the respondent Nos. 4 to 8 had filed multiple interlocutory applications and has ensured non-compliance of the judgment of this Court. It may be pertinent to mention that even after dismissal of review and the curative petition on 18.7.2002, the applicants (respondent Nos. 4 to 8) have been repeatedly filing one petition or the other in order to keep the litigation alive. It is indeed astonishing that the orders of this Court have not been implemented till date. The applicants have made all possible efforts to avoid compliance of the judgment

of this Court. This is a clear case of abuse of process of the court. [para 220] [278-D-F; 280-D-E]

2.5. The controversy between the parties must come to an end at some stage and the judgment of this Court must be permitted to acquire finality. It would hardly be proper to permit the parties to file application after application endlessly. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice. [para 115] [238-F-H; 239-A]

Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur **1976 (3) SCR 99 = (1976) 4 SCC 124;** *Green View Tea & Industries* v. *Collector, Golaghat and Another* **(2002) 1 SCC 109;** *M/s Northern India Caterers (India) Ltd*. v. *Lt. Governor of Delhi* **1980 (2) SCR 650 = (1980) 2 SCC 167 – relied on**

2.6. The principles laid down in the judgments of various courts, can be enumerated as follows:

(i) The judgment of the apex Court has great sanctity and unless there are extremely compelling, overriding and exceptional circumstances, the judgment of the apex Court should not be disturbed, particularly, in a case where review and curative petitions have already been dismissed

(ii) The exception to this general rule is where in the proceedings the judge concerned failed to disclose the connection with the subject matter or the parties giving scope of an apprehension of bias and the judgment adversely affected the petitioner.

(iii) The other exception to the rule is that the circumstances incorporated in the review or curative petition are such that they must inevitably shake public confidence in the integrity of the administration of justice if the judgment or order is allowed to stand. [para 221] [278-G-H; 279-A-C]

These categories are illustrative and not exhaustive but only in such extremely exceptional circumstances the order can be recalled in order to avoid irremedial injustice. [para 222] [279-C-D]

UNJUST ENRICHMENT

3.1. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice, equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. [para 171] [260-C-D]

Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573;_"Justice, Courts and Delays" **by Dr. Arun Mohan – referred to.**

3.2. By the judgment dated 13.02.1996 this court fixed the liability but did not fix any specific amount, which was ordered to be ascertained. It was on the lines of a preliminary decree in a suit which determines the liability, but leaves the precise amount to be ascertained in further proceedings and upon the process of ascertainment being completed, a final decree for payment of the precise amount is passed. By judgment dated 4.11.1997 this Court, accepting the ascertainment,

fixed the amount i.e. Rs.37.385 crores. The exact liability was quantified which the applicant- HACL was under an obligation to pay. The liability to pay arose on that particular date i.e. 4.11.1997. This was in the lines of a final decree pursuant to a preliminary decree. On that judgment being passed, the position of the applicant in I.A. No.44 was that of 'judgment-debtor' and the applicant became liable to pay forthwith. [para 159-162] [257-F-H; 258-A-F]

3.3. Admittedly, the amount has not been paid. Instead, the applicants sought to postpone the payment by raising various challenges in this Court and in the meantime 'utilised' that money, i.e., benefited. As a consequence, the non-applicants (respondents-states herein) were 'deprived' of the use of that money for taking remedial measures. The challenge has now – nearly 14 years later – been finally decided against them. It is settled principle of law that no one can take advantage of his own wrong. [para 163 and 165] [258-F-G; 259-D]

3.4. Unless courts disgorge all benefits that a party availed by obstruction or delays or non-compliance, there will always be incentive for non compliance. Whatever benefits a person has had or could have had by not complying with the judgment must be disgorged and paid to the judgment creditor and not allowed to be retained by the judgment-debtor. This is the bounden duty and obligation of the court. In fact, it has to be looked from the position of the creditor. Unless the deprivation by reason of delay is fully restituted, the creditor as a beneficiary remains a loser to the extent of the un-restituted amount. [para 167-168] [259-F-G]

Schock v. *Nash*, **732 A.2d 217, 232-33 (Delaware. 1999). USA);** *Fibrosa v. Fairbairn*, **[1942] 2 All ER 122;** *Nelson v. Larholt* **[1947] 2 All ER 751 – referred to.**

3.5. In order to neutralize any unjust enrichment and undeserved gain made by the litigants, while adjudicating, the courts must keep the following principles in view:

(i) It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

(ii) When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

(iii) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

(iv) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

(v) No litigant can derive benefit from the mere pendency of a case in a court of law.

(vi) A party cannot be allowed to take any benefit of his own wrongs.

(vii) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

(viii) The institution of litigation cannot be permitted

to confer any advantage on a party by delayed action of courts. [para 223] [279-D-H; 280-A-D]

RESTITUTION

4.1. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. The terms 'unjust enrichment' and 'restitution' are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. The terms 'unjust enrichment' and 'restitution' are like the two shades of green – one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders. [para 179 and 182] [262-F-G; 263-D]

South-Eastern Coalfields **2003 (4) Suppl. SCR 651 = 2003 (8) SCC 648;** *Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs* **2005 (2) SCR 606 = (2005) 3 SCC 738 – relied on**

American Jurisprudence **2d. Volume 66 Am Jur 2d – referred to.**

4.2. Restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the

parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the court's own process, along with time delay, to do injustice. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether. [para 183-184] [263-F-H; 264-A]

Bank of America Canada vs Mutual Trust Co. **[2002] 2 SCR 601 = 2002 SCC 43 – referred to.**

Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another **[2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294 – referred to.**

4.3. The liability may also be understood in the form of recovery of a bank loan. If payment of an amount equivalent of what the ledger account in the bank on a clean loan would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. This is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefitted is what justice requires. [para 188-190] 264-G-H; 265-A-C]

Grindlays Bank Limited vs Income Tax Officer, Calcutta **(1980) 2 SCC 191;** *Ram Krishna Verma and Others vs State of U.P. and Others* **1992 (2) SCR 378 = (1992) 2 SCC** *Kavita Trehan vs Balsara Hygiene Products* **1994 (1) Suppl. SCR 340 = (1994) 5 SCC 380 ;** *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another* **1999 (1) SCR 311 = (1999) 2 SCC 325 - relied on**

Padmawati vs Harijan Sewak Sangh **- CM (Main) No.449 of 2002 decided by the Delhi high Court on 6.11.2008, approved .**

Compound Interest

4.4. 'Compound interest' is 'interest paid on both the principal and the previously accumulated interest.' It is a method of arriving at a figure which nears the 'Time Value of Money'. Compound interest is a norm for all commercial transactions. [para 205-206] [271-E-F]

Alok Shanker Pandey vs Union of India & Others **2007 (2) SCR 737 = (2007) 3 SCC 545 – relied on.**

Black's Law Dictionary, **Eighth Edition (Bryan A. Garner) page 830;and** '*The Principles of the Law of Restitution*" **(at pp26-27) by Graham Virgo – referred to.**

4.5. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment– or to simply levelise – a convenient approach is calculating interest. But here interest has to be calculated on compound basis – and not simple – for the latter leaves much uncalled for benefits in the hands of the wrongdoer. [para 202] [270-G-H; 271-A]

4.6. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest

takes into account, by reason of prevailing rates, both these factors, i.e., use of the money and the inflationary trends, as the market forces and predictions work out. [para 203] [271-B]

Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another **1999 (1) SCR 311 = (1999) 2 SCC 325;** *Ouseph Mathai and others v. M. Abdul Khadir* **2001 (5) Suppl. SCR 118 = (2002) 1 SCC 319;** *South Eastern Coalfields Limited v. State of M.P. and others* **2003 (4) Suppl. SCR 651 = (2003) 8 SCC 648;** *Amarjeet Singh and others v. Devi Ratan and others* **2009 (15) SCR 1010 = (2010) 1 SCC 417;** *Kalabharati Advertising v. Hemant Vimalnath Narichania and others* **2010 (10) SCR 971 = (2010) 9 SCC 437 – relied on.**

LEGAL POSITION UNDER THE CODE OF CIVIL PROCEDURE

4.7. One reason the law has not developed on this is because of the wording of s. 34 of the Code of Civil Procedure, 1908 which still proceeds on the basis of simple interest. In fact, it is this difference which prompts much of our commercial litigation because the debtor feels – calculates and assesses – that to cause litigation and then to contest with obstructions and delays will be beneficial because the court is empowered to allow only simple interest. A case for law reform on this is a separate issue. [para 191] [256-E-F]

4.8. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on administration of justice. The Law Commission is requested to consider and recommend necessary amendments in relevant laws. However, the power of the court to order compound interest by way of restitution is not fettered in any way. [para 204] [271-C-D]

4.9. In the point under consideration, which does not arise from a suit for recovery under the Code of Civil Procedure, the inherent powers of the Court and the principles of justice and equity are each sufficient to enable an order directing payment of compound interest. The power to order compound interest as part of restitution cannot be disputed, otherwise there can never be restitution. [para 192] [265-G]

4.10. The Court in its order dated 04.11.1997 while accepting the report of the MOEF directed the applicant – M/s Hindustan Agro Chemical Ltd. to pay a sum of Rs.37.385 crores towards the costs of remediation. The amount which ought to have been deposited way back in 1997 has yet not been deposited by keeping the litigation alive. This Court is clearly of the opinion that the applicant-industry concerned must deposit the amount as directed by this Court by order dated 4.11.1997 with compound interest. The applicant-industry has deliberately not complied with the orders of this court since 4.11.1997. Thousands of villagers have been adversely affected because no effective remedial steps have been taken so far. The applicant-industry has succeeded in their design in not complying with the court's order by keeping the litigation alive. Consequently, the applicant-industry is directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid or recovered. [para 225- 227] [280-F-H; 281-A-C]

Costs:

5.1. In consonance with the principle of equity, justice and good conscience judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to

abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.[para 216] [276-G-H; 277-A-B]

5.2. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases. [para 217] [277-C-D]

Ramrameshwari Devi and Others v. Nirmala Devi and Others **2011(6) Scale 677 – relied on.**

5.3. Even after final judgment of this Court, the litigation has been kept alive for almost 15 years. The respondents have been compelled to defend this litigation for all these years. Enormous court's time has been wasted for all these years. On consideration of the totality of the facts and circumstances of this case, the applicant-industry is directed to pay costs of Rs.10 lakhs in both the Interlocutory Applications. The amount of costs would also be utilized for carrying out remedial measure in village Bichhri and surrounding areas in Udaipur District of Rajasthan on the direction of the

authorities concerned. [para 228-229] [281-D-F]

Case Law Reference:

1987 (1) SCR 819	referred to	para 21
2002 (2) SCR 1006	referred to	para 66
1996 (2) SCR 503	referred to	para 75
2000 (1) Suppl. SCR 389	referred to	para 102
[2004] FCA 1317	referred to	para 104
722 F. Supp 960		
(W.D.N.Y. 1989)	referred to	para 106
1976 (3) SCR 99	relied on	para 116
2002 (1) SCC 109	relied on	para 117
1980 (2) SCR 650	relied on	para 118
1989 (3) SCR 316	relied on	para 119
1996 (3) SCR 782	relied on	para 120
1995 (6) Suppl. SCR 190	relied on	para 121
1996 (2) SCR 400	relied on	para 122
1996 (6) Suppl. SCR 120	relied on	para 123
1998 (1) SCR 717	relied on	para 124
2001 (5) SCC 42	relied on	Para 125
1966 SCR 744	relied on	para 125
(2000)9 SCC 439	relied on	para 127
1989 (1) SCR 509	relied on	para 128
2005 (7) SCC 220	relied on	para 130

2009 (14) SCR 507	relied on	para 131
2011 (2) SCR 435	relied on	para 132
[1993] 1 A.C. 646	referred to	para 136
(1852) 3 H.L. Cases 759	referred to	para 136
(No 2) (1999) 2 W.L.R. 272	referred to	para 137
2010] UKSC 57	referred to	para 139
2009 No. 1603 (L. 17)	referred to	para 139
[2003] 2 SCR 259	referred to	para 141
2005 BCCA 350	referred to	para 141
(1982) 150 CLR 29	referred to	para 144
(1971) 125 CLR 529	referred to	para 145
(2000) 170 ALR 659	referred to	para 146
2003 NTCA 11	referred to	para 147
353 US 98 (1957)	referred to	para 148
351 US 183	referred to	para 149
(1929) AC 242, 248-52	referred to	para 151
(1982) HCA 51	referred to	para 151
(1992) 176 CLR 252	referred to	para 151
(No 2) (1993) HCA 6 : (1993) 176 CLR 300	referred to	para 152
2010 (3) SCR 159	relied on	para 155
732 A.2d 217, 232-33 (Delaware. 1999). USA	referred to	para 172
1942] 2 All ER 122	referred to	para 174

[1947] 2 All ER 751	**referred to**	**para 175**
2003 (4) Suppl. SCR 651	**relied on**	**para 180**
2005 (2) SCR 606	**relied on**	**para 180**
2007] UKHL 34=[2007] 3 WLR 354=[2008] 1 AC 561 =		
[2007] All ER (D) 294	**referred to**	**para 184**
[2002] 2 SCR 601	**referred to**	**para 186**
1980 (2) SCR 765	**relied on**	**para 193**
1992 (2) SCR 378	**relied on**	**para 194**
1994 (1) Suppl. SCR 340	**relied on**	**para 195**
1999 (1) SCR 311	**relied on**	**para 196**
CM (Main) No.449 of 2002 decided		
by the Delhi High Court		
on 6.11.2008,	**approved**	**para 197**
2007 (2) SCR 737	**relied on**	**para 201**
1999 (1) SCR 311	**relied on**	**para 208**
2001 (5) Suppl. SCR 118	**relied on**	**para 209**
2003 (4) Suppl. SCR 651	**relied on**	**para 210**
2009 (15) SCR 1010	**relied on**	**para 213**
2010 (10) SCR 971	**relied on**	**para 214**
2011(6) Scale 677	**relied on**	**para 217**

CIVIL ORIGINAL JURISDICTION : I.A. No. 36 & 44.

In

Writ Petition (Civil) No. 967 of 1989.

Under Article 32 of the Constitution of India.

Gopal Subramanium, SG, Dr, Manish Singhvi, Shanti Bhushan, Vikas Singh, Dr. Rajeev Dhawan, M.C. Mehta, K.R. Rajasekaran Pillai, Prashant Bhushan, Rohit Kumar Singh, Amrita Narayan, Udita Singh, Satyakam, B.V. Balram Das, K.B. Rohtagi, Manoj Aggarwal, Aparna Rohatgi Jain, Mahesh Kasana, Devander Kr. Devesh, R. Gopalakrishnan, S.K. Dhingra, Milind Kumar (for Aruneshwar Gupta), T. Raja Shail Kumar Dwivedi, B. Vijayalkshmi Menon, Dinesh Mathur, Saurabh Jain, Rameshwar Prasad Goyal, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this court (date of judgment 13th February, 1996) the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex court in particular.

2. An environmentalist organisation brought to light the sufferings and woes of people living in the vicinity of chemical industrial plants in India. This petition relates to the suffering of people of village Bichhri in Udaipur District of Rajasthan. In the Writ Petition No.967 of 1989, it was demonstrated how the conditions of a peaceful, nice and small village of Rajasthan were dramatically changed after respondent no. 4 Hindustan Agro Chemicals Limited started producing certain chemicals like Oleum (concentrated form of sulphuric acid) and Single Super Phosphate. Respondent numbers 4 to 8 are controlled

by the same group and they were known as chemical industries. The entire chemical industrial complex is located within the limits of Bichhri village, Udaipur, Rajasthan. Pursuit of profit of entrepreneurs has absolutely drained them of any feeling for fellow human beings living in that village.

3. The basic facts of this case are taken from the judgment delivered in the Writ Petition No.967 of 1989. In the beginning of the judgment of this court delivered on February 13, 1996, it is observed as under:

> "It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialisation and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them -particularly, if they are men with means. Strong words indeed - but nothing less would reflect the deep sense of hurt, the hearing of this case has instilled in us."

4. It seems that the court was prophetic when it made observation that at times men with means are successful in avoiding compliance of the orders of this court. This case is a classic illustration where even after decade and a half of the pronouncement of the judgment by this court based on the principle of 'polluter pays', till date the polluters (concerned industries in this case) have taken no steps to ecologically restore the entire village and its surrounding areas or complied with the directions of this court at all. The orders of this court were not implemented by keeping the litigation alive by filing interlocutory and interim applications even after dismissal of the

writ petition, the review petition and the curative petition by this court.

5. In the impugned judgment, it is mentioned that because of the pernicious wastes emerging from the production of 'H' acid, its manufacture is stated to have been banned in the western countries. But the need of 'H' acid continues in the West and that need is catered to by the industries like the Silver Chemicals and Jyoti Chemicals in this part of the world.

6. In the impugned judgment, it is also mentioned that since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic sludge was thrown in the open in and around the complex, the toxic substances have percolated deep into the bowels of the earth polluting the aquifers and the sub-terrain supply of water. The water in the wells and the streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating the land. The soil has become polluted rendering it unfit for cultivation, which is the main source of livelihood for the villagers. The resulting misery to the villagers needs no emphasis. It spreads disease, death and disaster in the village and the surrounding areas. This sudden degradation of earth and water had an echo in Parliament too and the concerned Minister said that action was being taken, but nothing meaningful was done on the spot. The villagers then rose in virtual revolt leading to the imposition of Section 144 of the Criminal Procedure Code by the District Magistrate in the area and the closure of Silver Chemicals in January, 1989. It is averred by the respondents that both the units, Silver Chemicals and Jyoti Chemicals have stopped manufacturing 'H' acid since January, 1989 and are closed. We may assume it to be so, yet the consequences of their action remain - the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy.

7. The Rajasthan State Pollution Control Board (for short

"R.S.P.C.B.") in pursuance of the show cause notice filed a counter affidavit and stated the following averments:

(a) Re.: Hindustan Agro Chemicals Limited (respondent for short) [R-4]: The unit obtained 'No-Objection Certificate' from the R.S.P.C.B. for manufacturing sulphuric acid and Aluminum sulphate. The Board granted clearance subject to certain conditions. Later 'No-Objection Certificate' was granted under the Water [Prevention and Control of Pollution] Act, 1974 [Water Act] and Air (Prevention and Control of Pollution) Act, 1981 [Air Act], again subject to certain conditions. However, this unit changed its product without clearance from the Board. Instead of sulphuric acid, it started manufacturing Oleum and Single Super Phosphate [S.S.P.]. Accordingly, consent was refused to the unit on February 16, 1987. Directions were also issued to close down the unit.

(b) Re.: Silver Chemicals [R-5]: This unit was promoted by the fourth respondent without obtaining 'No-Objection Certificate' from the Board for the manufacture of 'H' acid. The waste water generated from the manufacture of 'H' acid is highly acidic and contains very high concentration of dissolved solids along with several dangerous pollutants. This unit was commissioned in February, 1988 without obtaining the prior consent of the Board and accordingly, notice of closure was served on April 30, 1988. On May 12, 1988, the unit applied for consent under Water and Air Acts which was refused. The Government was requested to issue directions for cutting off the electricity and water to this unit but no action was taken by the Government. The unit was found closed on the date of inspection, viz., October 2, 1989.

(c) Re.: Rajasthan Multi Fertilizers [R-6]: This unit was installed without obtaining prior 'No-Objection Certificate' from the Board and without even applying for consent under Water and Air Acts. Notice was served on this unit on February 20, 1989. In reply thereto, the Board was informed that the unit was closed since last three years and that electricity has also been cut off since February 12, 1988.

(d) Re.: Phosphates India [R-7]: This unit was also established without obtaining prior 'No-Objection Certificate' from the Board nor did it apply for consent under the Water and Air Acts. When notice dated February 20, 1989 was served upon this unit, the Management replied that this unit was closed for a long time.

(e) Re.: Jyoti Chemicals [R-8]: This unit applied for 'No-Objection Certificate' for producing ferric alum. 'No-Objection Certificate' was issued imposing various conditions on April 8, 1988. The 'No-Objection Certificate' was withdrawn on May 30, 1988 on account of non-compliance with its conditions. The consent applied for under Water and Air Acts by this unit was also refused. Subsequently, on February 9, 1989, the unit applied for fresh consent for manufacturing 'H' acid. The consent was refused on May 30, 1989. The Board has been keeping an eye upon this unit to ensure that it does not start the manufacture of 'H' acid. On October 2, 1989, when the unit was inspected, it was found closed.

8. The Government of Rajasthan filed counter-affidavit on January 20, 1990. The Para 3 of the affidavit reads as under:-

"That the State Government is now aware of the pollution

of under-ground water being caused by liquid effluents from the firms arrayed as Respondent Nos. 4 to 8 in the writ petition. Therefore, the State Government has initiated action through the Pollution Control Board to check further spread of pollution."

9. The State Government stated that the water in certain wells in Bichhri village and some other surrounding villages has become unfit for drinking for human beings and cattle, though in some other wells, the water remains unaffected.

10. The Ministry of Environment and Forests, Government of India (for short 'MOEF') in its counter affidavit filed on February 8, 1990 stated that M/s. Silver Chemicals was merely granted a Letter of Intent but it never applied for conversion of the Letter of Intent into industrial licence. Commencing production before obtaining industrial licence is an offence under Industries [Development and Regulation] Act, 1951. So far as M/s. Jyoti Chemicals is concerned, it is stated that it has not approached the Government at any time even for a Letter of Intent. The Government of India stated that in June, 1989, a study of the situation in Bichhri village and some other surrounding villages was conducted by the Centre for Science and Environment. A copy of their report was enclosed with the counter affidavit. The report states the consequences emanating from the production of 'H' acid and the manner in which the resulting wastes were dealt with by Respondents Nos. 4 to 8 thus:

"The effluents are very difficult to treat as many of the pollutants present are refractory in nature. Setting up such highly polluting industry in a critical ground water area was essentially ill-conceived. The effluents seriously polluted the nearby drain and overflowed into Udaisagar main canal, severely corroding its cement-concrete lined bed and banks. The polluted waters also seriously degraded some agricultural land and damaged standing crops. On being ordered to contain the effluents, the industry installed an

unlined holding pond within its premises and resorted to spraying the effluent on the nearby hill-slope. This only resulted in extensive seepage and percolation of the effluents into ground water and their spread down the aquifers. Currently about 60 wells appear to have been significantly polluted but every week a few new wells, down the aquifers start showing signs of pollution. This has created serious problems for water supply for domestic purposes, cattle-watering crop irrigation and other beneficial uses, and it has also caused human illness and even death, degradation of land and damage to fruit, trees and other vegetation. There are serious apprehensions that the pollution and its harmful effects will spread further after the onset of the monsoon as the water percolating from the higher parts of the basin moves down carrying the pollutants lying on the slopes - in the holding pond and those already underground."

11. This court passed number of orders during the period 1989-1992.

12. On February 17, 1992, this Court passed a fairly elaborate order observing that respondent nos. 5 to 8 are responsible for discharging the hazardous industrial wastes; that the manufacture of 'H' acid has given rise to huge quantities of iron sludge and gypsum sludge - approximately 2268 MT of gypsum-based sludge and about 189 mt. of iron-based sludge; that while the other respondents blamed respondent no.9 as the main culprit but respondent no. 9 denied any responsibility, therefore, according to the Courts, the immediate concern was the appropriate remedial action. The report of the R.S.P.C.B. presented a disturbing picture. It stated that the respondents have deliberately spread the hazardous material/sludge all over the place which has only heightened the problem of its removal and that they have failed to carry out the orders of this Court dated April 4, 1990. Accordingly, this Court directed the MOEF to depute its experts

immediately to inspect the area to ascertain the existence and extent of gypsum-based and iron-based sludge, to suggest the handling and disposal procedures and to prescribe a package for its transportation and safe storage. The cost of such storage and transportation was to be recovered from the concerned respondents.

13. Pursuant to the above order, a team of experts visited the area and submitted a report along with an affidavit dated March 30, 1992. The report presented a highly disturbing picture. It stated that the sludge was found inside a shed and also at four places outside the shed but within the premises of the complex belonging to the respondents. It further stated that the sludge has been mixed with soil and at many places it is covered with earth. A good amount of sludge was said to be lying exposed to sun and rain.

14. The report stated: "Above all, the extent of pollution in the ground water seems to the very great and the entire aquifer may be affected due to the pollution caused by the industry. The organic content of the sludge needs to be analysed to assess the percolation property of the contents from the sludge. It is also possible that the iron content in the sludge may be very high which may cause the reddish colouration. As the mother liquor produced during the process (with pH-1) was highly acidic in nature and was indiscriminately discharged on land by the unit, it is possible that this might have eroded soil and caused the extensive damage. It is also possible that the organic contents of the mother liquor would have gone into soil with water together with the reddish colour." The report also suggested the mode of disposal of sludge and measures for re-conditioning the soil.

15. In view of the above report, the Court made an order on April 6, 1992 for entombing the sludge under the supervision of the officers of the MOEF. Regarding revamping of the soil, the Court observed that for this purpose, it might become necessary to stop or suspend the operation of all the units of

the respondent but that, the Court said, requires to be examined further.

16. The work of entombment of sludge again faced several difficulties. While the respondents blamed the Government officers for the delay, the Government officials blamed the said respondents of non-cooperation. Several Orders were passed by this Court in that behalf and ultimately, the work commenced.

Orders passed in 1993, filing of Writ Petition (C) No. 76 of 1994 by Respondent No. 4 and the orders passed therein:

17. With a view to find out the connection between the wastes and sludge resulting from the production of 'H' acid and the pollution in the underground water, the Court directed on 20th August, 1993 that samples should be taken of the entombed sludge and also of the water from the affected wells and sent for analysis. Environment experts of the MOEF were asked to find out whether the pollution in the well water was on account of the said sludge or not. Accordingly, analysis was conducted and the experts submitted the Report on November 1, 1993. Under the heading "Conclusion", the report stated:

5.0 Conclusion

5.1 On the basis of the observations and analysis results, it is concluded beyond doubt that the sludge inside the emoted pit is the contaminated one as evident from the number of parameters analysed.

5.2 The ground water is also contaminated due to discharge of H- acid plant effluent as well as H-acid sludge/ contaminated soil leachiest as shown in the photographs and also supported by the results. The analysis result revealed good correlation between the colour of well water and H-acid content in it. The analysis results show high degree of impurities in sludge/soil and also in well water

which is a clear indication of contamination of soil and ground water due to disposal of H-acid waste.

The report which is based upon their inspection of the area in September, 1993 revealed many other alarming features. It represents a commentary on the attitude and actions of the respondents. In Para-2, under the heading "Site Observations & Collection of Sludge/Contaminated Soil Samples", the following facts are stated:

2.1. The Central team, during inspection of the premises of M/s. HACL, observed that H-acid sludge (iron gypsum) and contaminated soil are still lying at different places, as shown in Figure 1, within the industrial premises(Photograph 1) which are the left overs. The area, where the solar evaporation pond was existing with H-acid sludge dumped here and there, was observed to have been leveled with borrowed soil (Photograph 2). It was difficult to ascertain whether the sludge had been removed before filling. However, there are visual evidences of contaminated soil in the area.

2.2 As reported by the R.S.P.C.B. representatives, about 720 tonnes out of the total contaminated soil and sludge scraped from the sludge dump sites is disposed of in six lined entombed pits covered by lime/flash mix, brick soling and concrete (Photographs were placed on record). The remaining scraped sludge and contaminated soil was lying near the entombed pits for want of additional disposal facility. However, during the visit, the left over sludge and contaminated soil could not be traced at site. Inspection of the surrounding area revealed that a huge heap of foreign soil of 5 metre height heap of foreign soil of 5 metre height (Photograph was placed on record) covering a large area, as also indicated in Fig. I, was raised on the sloppy ground at the foot hill within the industry premises. The storm water run-off pathway over the area showed indication of H-acid sludge leachate coming out of the

heap. Soil in the area was sampled for analysis.

2.3 M/s. HACL has a number of other industrial units which are operating within the same premises without valid consents from the R.S.P.C.B. These plants are sulphuric acid (H2SO4), fertilizer (SSP) and vegetable oil extraction. The effluents of these units are not properly treated and the untreated effluent particularly from the acid plant is passing through the sludge dump area playing havoc (Photograph was placed on record). The final effluent was collected at the outlet of the factory premises during operation of these units, at the time of groundwater monitoring in September 1993, by the RSPCB. Its quality was observed to be highly acidic (pH : 1.08, Conductivity : 37,100 mg/1, SO4 : 21,000 mg/1, Fe : 392 mg/1, COD : 167 mg/1) which was also revealed in the earlier visits of the Central teams. However, these units were not in operation during the present visit.

Under Para 4.2.1, the report stated inter alia:

The sludge samples from the surroundings of the (presently nonexistent) solar evaporation and the contaminated soil due to seepage from the newly raised dump site also exhibited very high values of the above mentioned parameters. This revealed that the contaminated soil is buried under the new dump found by the team.

25. So much for the waste disposal by the respondents and their continuing good conduct. To the same effect is the Report of the R.S.P.C.B. which is dated October 30, 1993.

26. In view of the aforesaid Reports, all of which unanimously point out the consequences of the 'H' acid production, the manner in which the highly corrosive waste water (mother liquor) and the sludge resulting from the production of 'H' acid was disposed of and the continuing

discharge of highly toxic effluents by the remaining units even in the year 1993, the authorities [R.S.P.C.B.] passed orders closing down, in exercise of their powers Under Section 33A of the Water Act, the operation of the Sulphuric Acid Plant and the solvent extraction plant including oil refinery of the fourth respondent with immediate effect. Orders were also passed directing disconnection of electricity supply to the said plants.

The fourth respondent filed Writ Petition (C) No. 76 of 1994 in this Court, under Article 32 of the Constitution, questioning the said Orders in January, 1994. The main grievance in this writ petition was that without even waiting for the petitioner's [Hindustan Agro Chemicals Limited] reply to the show-cause notices, orders of closure and disconnection of electricity supply were passed and that this was done by the R.S.P.C.B. with a malafide intent to cause loss to the industry. It was also submitted that sudden closure of its plants is likely to result in disaster and, may be, an explosion and that this consideration was not taken into account while ordering the closure. In its Order dated March 7, 1994, this Court found some justification in the contention of the industry that the various counter-affidavits filed by the R.S.P.C.B. are self-contradictory. The Board was directed to adopt a constructive attitude in the matter. By another Order dated March 18, 1994, the R.S.P.C.B. was directed to examine the issue of grant of permission to re-start the industry or to permit any interim arrangement in that behalf. On April 8, 1994, a 'consent' order was passed whereunder the industry was directed to deposit a sum of Rupees sixty thousand with R.S.P.C.B. before April 11, 1994 and the R.S.P.C.B. was directed to carry on the construction work of storage tank for storing and retaining ten days effluents from the Sulphuric Acid Plant. The construction of temporary tank was supposed to be an interim measure pending the construction of an E.T.P. on permanent basis.

The Order dated April 28, 1994 noted the Report of the R.S.P.C.B. stating that the construction of temporary tank was completed on April 26, 1994 under its supervision. The industry was directed to comply with such other requirements as may be pointed out by R.S.P.C.B. for prevention and control of pollution and undertake any works required in that behalf forthwith. Thereafter, the matter went into a slumber until October 13, 1995.

NEERI REPORT:

27. At this juncture, it would be appropriate to refer to the Report submitted by NEERI on the subject of "Restoration of Environmental Quality of the affected area surrounding Village Bichhri due to past Waste Disposal Activities". This Report was submitted in April, 1994 and it states that it is based upon the study conducted by it during the period November, 1992 to February, 1994. Having regard to its technical competence and reputation as an expert body on the subject, we may be permitted to refer to its Report at some length:

18. The judgment also dealt with damaging of crops and fields. The finding of the Court was that the entire contaminated area comprising of 350 hectares of contaminated land and six abandoned dump sites outside the industrial premises has been found to be ecologically fragile due to reckless past disposal activities practised by M/s. Silver Chemicals Ltd. and M/s. Jyoti Chemicals Ltd. Accordingly, it is suggested that the whole of the contaminated area be developed as a green belt at the expense of M/s. Hindustan Agrochemicals Ltd. during the monsoon of 1994.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the respondents-industries made the following submissions:

(1) The respondents are private corporate bodies. They are not 'State' within the meaning of Article

12 of the Constitution. A writ petition under Article 32 of the Constitution, therefore, does not lie against them.

(2) The RSPCB has been adopting a hostile attitude towards these respondents from the very beginning. The Reports submitted by it or obtained by it are, therefore, suspect. The respondents had no opportunity to test the veracity of the said Reports. If the matter had been fought out in a properly constituted suit, the respondents would have had an opportunity to cross-examine the experts to establish that their Reports are defective and cannot be relied upon.;

(3) Long before the respondents came into existence, Hindustan Zinc Limited was already in existence close to Bichhri village and has been discharging toxic untreated effluents in an unregulated manner. This had affected the water in the wells, streams and aquifers. This is borne out by the several Reports made long prior to 1987. Blaming the respondents for the said pollution is incorrect as a fact and unjustified.

(4) The respondents have been cooperating with this Court in all matters and carrying out its directions faithfully. The Report of the R.S.P.C.B. dated November 13, 1992 shows that the work of entombment of the sludge was almost over. The Report states that the entire sludge would be stored in the prescribed manner within the next two days. In view of this report, the subsequent Report of the Central team, R.S.P.C.B. and NEERI cannot be accepted or relied upon. There are about 70 industries in India manufacturing 'H' acid. Only the units of the respondents have been picked upon by the Central and Sate authorities while taking no

action against the other units. Even in the matter of disposal of sludge, the directions given for its disposal in the case of other units are not as stringent as have been prescribed in the case of respondents. The decision of the Gujarat High Court in Pravinbhai Jashbhai Patel case shows that the method of disposal prescribed there is different and less elaborate than the one prescribed in this case.

(5) The Reports submitted by the various so-called expert committees that sludge is still lying around within and outside the respondents' complex and/ or that the toxic wastes from the Sulphuric Acid Plant are flowing through and leaching the sludge and creating a highly dangerous situation is untrue and incorrect. The R.S.P.C.B. itself had constructed a temporary E.T.P. for the Sulphuric Acid Plant pursuant to the Orders of this Court made in Writ Petition (C) No. 76 of 1994. Subsequently, a permanent E.T.P. has also been constructed. There is no question of untreated toxic discharges from this plant leaching with sludge. There is no sludge and there is no toxic discharge from the Sulphuric Acid Plant.

(6) The case put forward by the R.S.P.C.B. that the respondents' units do not have the requisite permits/ consents required by the Water Act, Air Act and the Environment [Protection] Act is again unsustainable in law and incorrect as a fact. The respondents' units were established before the amendment of Section 25 of the Water Act and, therefore did not require any prior consent for their establishment.

(7) The proper solution to the present problem lies in ordering a comprehensive judicial enquiry by a

sitting Judge of the High court to find out the causes of pollution in this village and also to recommend remedial measures and to estimate the loss suffered by the public as well as by the respondents. While the respondents are prepared to bear the cost of repairing the damage, if any, caused by them, the R.S.P.C.B. and other authorities should be made to compensate for the huge losses suffered by the respondents on account of their illegal and obstructionist policy adopted towards them.

(8) The decision in Oleum Gas Leak. Case has been explained in the opinion of Justice Ranganath Misra, CJ., in the decision in *Union Carbide Corporation etc. etc. v. Union of India etc. etc.* AIR 1992 SC 248. The law laid down in Oleum Gas leak Case is at variance with the established legal position in other Commonwealth countries.

20. The Court dealt with the submissions of the respondents in great detail and did not find any merit in the same.

21. In the impugned judgment, the Court heavily relied on the observations of the Constitution Bench judgment in *M.C. Mehta and Another v. Union of India and Others* (1987) 1 SCC 395 popularly known as *Oleum Gas Leak* Case, wherein it was held thus:

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The

enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently. dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not.…We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule

in *Ryland v. Fletcher* (1868) LR 3 HL 330.

We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be corelated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."

22. This court in *M.C. Mehta's case (supra)* further observed as under:

31. We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in *Rylands v. Fletcher* apply or is there any other principle on which the liability can be determined? The rule in *Rylands v. Fletcher* was evolved in the year 1866 and it provides that a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the

land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out part of the developmental programme, this rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule

of strict and absolute liability in cases of hazardous or inherently dangerous activities or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and exceptions. We in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England.

23. This Court applied the principle of Polluter pays and observed thus:

"The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The 'polluter pays' principle was promoted by the Organisation for Economic Co-operation and Development [OECD] during the 1970s when there was great public interest in environmental issues. During this time there were demands on government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialised society. Since then there has been considerable discussion of the nature of the polluter pays principle, but the precise scope of the principle and its implications for

those involved in past, or potentially polluting activities have never been satisfactory agreed."

24. After hearing the learned counsel for the parties at length, this Court gave the following directions:

"1. The Central Government shall determine the amount required for carrying out the remedial measures including the removal of sludge lying in and around the complex of Respondents 4 to 8, in the area affected in village Bichhri and other adjacent villages, on account of the production of 'H' acid and the discharges from the Sulphuric Acid Plant of Respondents 4 to 8. Chapters-VI and VII in NEERI Report [submitted in 1994] shall be deemed to be the show-cause notice issued by the Central Government proposing the determination of the said amount. Within six weeks from this day, Respondents 4 to 8 shall submit their explanation, along with such material as they think appropriate in support of their case, to the Secretary, Ministry of Environment and Forests, Government of India (for short, M.E.F.). The Secretary shall thereupon determine the amount in consultation with the experts of his Ministry within six weeks of the submission of the explanation by the said Respondents. The orders passed by the Secretary, [M.E.F.] shall be communicated to Respondents 4 to 8- and all concerned - and shall also be placed before this Court. Subject to the Orders, if any, passed by this Court, the said amount shall represent the amount which Respondents 4 to 8 are liable to pay to improve and restore the environment in the area. For the purpose of these proceedings, the Secretary, [M.E.F.] and Respondents 4 to 8 shall proceed on the assumption that the affected area is 350 ha, as indicated in the sketch at Page 178

of NEERI Report. In case of failure of the said respondents to pay the said amount, the same shall be recovered by the Central Government in accordance with law. The factories, plant, machinery and all other immovable assets of Respondents 4 to 8 are attached herewith. The amount so determined and recovered shall be utilised by the M.E.F. for carrying out all necessary remedial measures to restore the soil, water sources and the environment in general of the affected area to its former state.

2. On account of their continuous, persistent and insolent violations of law, their attempts to conceal the sludge, their discharge of toxic effluents from the Sulphuric Acid Plant which was allowed to flow through the sludge, and their non-implementation of the Orders of this Court - all of which are fully borne out by the expert committees' Reports and the findings recorded hereinabove - Respondents 4 to 8 have earned the dubious distinction of being characterised as "rogue industries". They have inflicted untold misery upon the poor, unsuspecting villagers, despoiling their land, their water sources and their entire environment - all in pursuance of their private profit. They have forfeited all claims for any consideration by this Court. Accordingly, we herewith order the closure of all the plants and factories of Respondents 4 to 8 located in Bichhri village. The R.S.P.C.B. is directed to seal all the factories/ units/plants of the said respondents forthwith. So far as the Sulphuric Acid Plant is concerned, it will be closed at the end of one week from today, within which period Respondent No. 4 shall wind down its operations so as to avoid risk of any untoward consequences, as asserted by Respondent No. 4 in Writ Petition (C) No. 76 of

1994. It is the responsibility of Respondent No. 4 to take necessary steps in this behalf. The R.S.P.C.B. shall seal this unit too at the end of one week from today. The re-opening of these plants shall depend upon their compliance with the directions made and obtaining of all requisite permissions and consents from the relevant authorities. Respondents 4 to 8 can apply for directions in this behalf after such compliance.

3. So far as the claim for damages for the loss suffered by the villagers in the affected area is concerned, it is open to them or any organisation on their behalf to institute suits in the appropriate civil court. If they file the suit or suits in forma pauperis, the State of Rajasthan shall not oppose their applications for leave to sue in forma pauperis.

4. The Central Government shall consider whether it would not be appropriate, in the light of the experience gained, that chemical industries are treated as a category apart. Since the chemical industries are the main culprits in the matter of polluting the environment, there is every need for scrutinising their establishment and functioning more rigorously. No distinction should be made in this behalf as between a large-scale industry and a small-scale industry or for that matter between a large-scale industry and a medium-scale industry. All chemical industries, whether big or small, should be allowed to be established only after taking into considerations all the environmental aspects and their functioning should be monitored closely to ensure that they do not pollute the environment around them. It appears that most of these industries are water-intensive industries. If so, the advisability of allowing the establishment of these

industries in arid areas may also require examination. Even the existing chemical industries may be subjected to such a study and if it is found on such scrutiny that it is necessary to take any steps in the interests of environment, appropriate directions in that behalf may be issued under Section 3 and 5 of the Environment Act, the Central Government shall ensure that the directions given by it are implemented forthwith.

5. The Central Government and the R.S.P.C.B. shall file quarterly Reports before this Court with respect to the progress in the implementation of Directions 1 to 4 aforesaid.

6. The suggestion for establishment of environment courts is a commendable one. The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the work-load in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All this points to the need for creating environment courts which alone should be empowered to deal with all matters, civil and criminal, relating to environment. These courts should be manned by legally trained persons/ judicial officers and should be allowed to adopt

summary procedures. This issue, no doubt, requires to be studied and examined indepth from all angles before taking any action.

7. The Central Government may also consider the advisability of strengthening the environment protection machinery both at the Center and the States and provide them more teeth. The heads of several units and agencies should be made personally accountable for any lapses and/or negligence on the part of their units and agencies. The idea of an environmental audit by specialist bodies created on a permanent basis with power to inspect, check and take necessary action not only against erring industries but also against erring officers may be considered. The idea of an environmental audit conducted periodically and certified annually, by specialists in the field, duly recognised, can also be considered. The ultimate idea is to integrate and balance the concern for environment with the need for industrialisation and technological progress."

25. The orders of this Court have not been implemented till date because by filing of number of interlocutory applications the respondent nos.4 to 8 have kept the litigation alive. These respondents have been successful in avoiding compliance of the judgment of this Court for more than fifteen years.

ORDER IN CONTEMPT PETITION

26. The original record of Writ Petition No. 967 of 1989 shows that the R.S.P.C.B. has filed a report of the National Environmental Engineering Research Institute, for short 'NEERI' in this Court on 6.1.1996. It is on this report that reliance was placed by the Court while disposing off the said writ petition. If the report which was submitted in this Court by the R.S.P.C.B. was different from the final report which was submitted by NEERI

to the said Board, then it may have been possible to contend that the R.S.P.C.B. and its officers were guilty of fabrication. The affidavit of Mr. S.N. Kaul, Acting Director of NEERI clearly shows that what was filed in this Court was the copy of the final report dated 16.5.1994 which has been prepared by the NEERI. In other words, the NEERI itself states that the report filed in this Court by the Board was a copy of the final report and that there was no fabrication made therein by the Board or any of its officials.

27. It appears that the two scientists had inspected the report in the office of the NEERI and then observed that there has been a fabrication carried out by the Pollution Control Board. From what has been stated hereinabove, the charge of fabrication is clearly unfounded. It is possible that these two scientists may have seen the draft report which would be with NEERI but the original report when prepared would be one which was, ultimately, submitted to the sponsoring agency, namely, the R.S.P.C.B., and it is only a copy of the same which could have been retained by NEERI. Be that as it may, it is clear that what has been filed in this Court as being the final report of the NEERI was the copy of the final report which was received by it. There is no basis for contending that any of the respondents have been guilty of fabrication. The whole application to our mind is devoid of any merit. The contempt petition was dismissed with costs.

IA NO.36 IN WRIT PETITION (C) No.967 OF 1989

28. This Interlocutory Application has been filed on behalf of M/s Hindustan Agro Chemical Ltd. (for short "HACL") whose industrial units situated in Udaipur were directed to be closed down by this Court on the premise that the said units had caused pollution in village Bichhri. This Court while directing for closure of the industrial units of HACL vide its order dated 13.2.1996 had further held that the units be not permitted to run until they deposit the remediation costs for restoring the environment in the area. The Court accordingly directed for the

attachment of the properties of HACL.

29. There is a serious attempt to reopen the entire concluded case which stands fully concluded by the judgment of this Court delivered on 13th February, 1996. It may be pertinent to mention that even the review and curative petitions have also been dismissed. By this application, the applicant has also made an attempt to introduce before this Court the opinion of various experts, such as, Dr. M.S. Govil, Mr. S.K. Gupta, Dr. P.S. Bhatt and Ms. Smita Jain who visited the Bichhri village at the instance of the applicant in the year 2004 to provide a different picture regarding the conditions of water and soil in the area. These experts submitted reports to demonstrate that now hardly any remediation measures are required in Bichhri village or adjoining areas.

30. The applicant in this application is seeking a declaration that as of now there is no pollution existing in the area which may have been caused by HACL and accordingly there is no necessity for this Court to sell the assets of HACL in order to carry out any remediation in the area. This application also is a serious attempt to discredit the NEERI report of 1996 once again.

31. The sole object of filing of the present application is to introduce before this Court recent reports prepared by experts at the behest of the applicant to demonstrate to the Court that before embarking upon remediation measures and for the said purposes putting the properties of the applicant to sell, the status and conditions of water, soil and environment in the area as at present be reviewed with a view to realistically ascertain whether any measures for remediation are called for at all in the area and if yes, then the nature and the current cost of the same may be ascertained.

32. The applicant submitted that the report of the NEERI which was the basis for the earlier orders of this Court does not specify the nature of remediation measures which were

considered necessary. The report merely indicates a lump sum amount without giving its break up as being a rough estimate of amount considered by them necessary for carrying out remediation measures.

33. It is stated in the application that the Secretary, MOEF after issuing notices to the parties called for the expert opinion of Water and Power Consultancy (WAPCO) and of Engineers India Limited (EIL), both these institutions were established by the Government of India. Both these institutions wrote to the Secretary that the data available was not sufficient to determine the cost of remediation, if any. The Secretary, who under the directions of the Court was directed to determine the amount within six weeks was left with no alternative but to simply affirm the lump sum amount determined by the NEERI.

34. It is stated that now almost fifteen years have passed since the final judgment of this Court and the situation in the area needs to be inspected again to find out as to whether any remediation is necessary or whether with passage of time nature on its own has taken care of the pollution in the area and because of the same no further remediation is required to be done in the area. This submission is being made without prejudice to the right of the applicant to contend that the applicant had not caused any pollution in the area but the applicant for the limited purpose of this application is ready to assume for the sake of arguments that the applicant had caused pollution in the area and that the nature in the last so many years has taken care of the pollution and on that basis there is no pollution existing in the area at present.

35. One of the issues that came up for consideration before this Court was the liability of the Union of India to take remediation measures in the area even if the applicant were not to pay the remediation costs as determined by the Secretary, MOEF. In these proceedings the counsel on behalf of the applicant made a suggestion to the Court that a fresh team be sent to the units of the applicant to find out whether

there is still any pollution existing in the area and also whether any remediation as of today is required to be done or not. It was suggested during the course of hearing that the remediation cost being sought to be recovered from the applicant is not some kind of a decree in which the applicant is a judgment debtor but is merely a cost which the applicant is being made liable to pay on the "Polluter Pays" principle and there is no necessity of payment if there is no pollution existing. Till date there is no working out as to how the cost of remediation has been worked out by NEERI which had been affirmed by the Secretary, MOEF and which had been further affirmed by this Court.

36. According to the applicant, on the basis of the reports of some experts it is quite evident that there is no pollution in and around the factory premises of the applicant and accordingly there is no need for any remediation to be done in the area and the factory of the applicant is required to be handed over to the applicant forthwith so that the applicant may take proper steps to re-start the factory and generate resources to meet the liabilities of the financial institutions and banks.

37. It is further prayed that if this Court for any reason doubts the opinion of the experts placed by the applicant in any manner, then this Court may appoint any reputed expert/ experts to visit the area and to submit a detailed report to this Court relating to the pollution existing in the area as of now. In other words, the effort is to reopen the concluded case and that also after the review and the curative petitions have been dismissed by this Court.

38. There are two main prayers in this application, the first prayer is that no remediation is required to be done in and around the industrial units of the applicant on the basis of the four reports placed by the applicant along with this application or on the basis of the report submitted by the expert/experts appointed by this Court; and *secondly,* that the Court may pass consequential order directing for closing of these proceedings

and thus lift the attachment order dated 13.2.1996.

39. Reply Affidavits to the Interlocutory Application have been filed by the Union of India and other respondents. In the reply affidavits of the respondents it is mentioned that on 13.2.1996 this Court directed closure of the units of the applicant for the reason that the said industries had caused environmental pollution in and around the areas where applicant's units are located. This Court had further directed that the units of the applicant would be permitted to operate only after depositing necessary costs for taking measures to restore the environment of the areas. The judgment of this Court was based upon a report dated 5.4.1994 of the NEERI which was filed by the R.S.P.C.B. on 6.1.1996.

40. The applicant questioned the credibility of the NEERI's report. It is submitted that the remediation cost for restoring the environmental quality of the area was only Rs.3 crores whereas in the report submitted in this Court the remediation cost was stated to be Rs.37.385 crores.

41. The applicant prayed that in the interest of justice the report dated 25.1.2005 submitted by the expert group to the MOEF be ignored and either accept the reports prepared at the instance of the applicant or fresh direction be issued for constitution of an independent expert group not having any association with NEERI to carry out investigation with relation to the environment in the village Bichhri.

42. According to the applicant, the report of NEERI relied upon by this Court was not the authentic report which was officially prepared. Even the copy which was actually filed in this matter was without any supporting affidavit and the same was merely handed over to this Court at the time of hearing. The applicant made his own enquiry and was officially given the report of NEERI. After comparing the report made available to the applicant from the one filed in this matter it came to light that the report actually filed in this Court was not bearing any

resemblance to the conclusion and findings mentioned in the actual report.

43. It was also submitted that there have also been attempts on the part of authorities to shield the role of M/s. Hindustan Zinc Limited in causing environment damage in village Bichhri. This issue needs to be addressed and the same can be possible only if an organization having credibility and not having any association with the NEERI actually carries out a detailed investigation.

44. Reply affidavit has also been filed by the R.S.P.C.B. It is stated in the said affidavit:

> 3 (i) That M/s. Hindustan Agro Chemical Ltd., Village Bichhri, Tehsil Girva, District Udaipur, Rajasthan; respondent no.4, established its Sulphuric Acid and Oleum Plant in the year 1985 without obtaining prior consent of the State Board under the provisions of Sections 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974; and section 21 of the Air (Prevention an Control of Pollution) Act, 1981;
>
> (ii) That the State Board vide its letter dated 16.2.1987 refused consent to respondent no.4 under the provisions of section 25 and 26 of the Water Act for discharging trade effluent from its Sulphuric Acid Plant.
>
> (iii) That the State Board issued directions vide order dated 26.11.1993, for closure of Sulphuric Acid Plant under the provisions of section 33A of the Water Act, 1974 as it was discharging trade effluent without proper treatment and in excess of the prescribed standards. The District Collector Udaipur implemented the directions of closure of Sulphuric Acid Plant passed by the State Board.

4 (i) That M/s. Hindustan Agro Chemical Ltd., Village Bichhri, Tehsil Girva, District Udaipur, Rajasthan; respondent no.4 established its Solvent Extraction coupled with Oil Refinery Plant in the year 1991 without obtaining prior consent of the State Board under the provisions of section 25 and 26 of the Water Act and section 21 of the Air Act.

(ii) That the State Board vide its letter dated 24.7.1992 refused consent to respondent no.4 under the provisions of section 25, 26 of the Water Act for discharging trade effluent from its Solvent Extraction Plant.

(iii) That the State Board issued directions, vide order dated 26.11.1993, for closure of Solvent Extraction Plant under the provisions of section 33A of the Water Act, as it was discharging trade effluent without proper treatment and in excess of the prescribed standards. The District Collector Udaipur implemented the directions of closure of Solvent Extraction Plant passed by the State Board.

5 (i) That respondent no.4 preferred a petition before this Court being Writ Petition (C) No.76 of 1994 Hindustan Agro Chemical Ltd. & Anr. v. State of Rajasthan & Ors. challenging the directions dated 26.11.1993 of the State Board closing down Sulphuric Acid Plant and Solvent Extraction Plant under the provisions of section 33A of the Water Act, 1974. It was alleged that the action of the State Board closing down Sulphuric Acid Plant and Solvent Extraction Plant was arbitrary and highhanded.

(ii) That this Court during hearing in the matter on 7.3.94, in WP (C) No.76/94 passed the following direction *inter-alia*:-

"We thought of having the complaints of the petitioner as to harassment, examined by an independent Commissioner to ascertain the bona fides of the action taken by the officers of the Pollution Control Board and also to fix their responsibility. But we thought that at this stage it would be appropriate to ask the learned Advocate-General, who appears for the State of Rajasthan, to have the matter examined at his instance and direct the Pollution Control Board to act more constructively and to suggest measures by which the Plant could be re-commissioned immediately."

(iii) That the said writ petition again came up for hearing on 18.3.94 before this Court. This Court was pleased to pass the following directions *inter alia*:-

"In the meanwhile, the Pollution Control Board is not prevented from and it shall indeed by its duty to indicate what, according to it, are such minimal requirements for grant of permission to re-start the industries or to permit any interim arrangements in this behalf."

(iv) That in pursuance of the aforesaid order dated 18.3.94, the respondent Board took appropriate steps and granted permission to restart industry subject to certain conditions communicated vide permission order.

It is submitted that the industry was restarted. However, on subsequent inspection it was found that the industry was violating the prescribed norms and also has not bothered to comply with the conditions mentioned in the permission order. As such an application was moved before this Court for appropriate directions in the matter.

(v) That despite all efforts for re-commissioning of the plants, respondent no.4 failed to take measures required for prevention and control of pollution.

(vi) That this court vide order and judgment dated 13.2.96, dismissed the above mentioned writ petition in view of the decision in writ petition (Civil) No.967 of 1989.

6(i) That M/s. Hindustan Agro Chemical Ltd., Village Bichhri, Tehsil Girva, District Udaipur, Rajasthan, respondent no.4, established its Chlorosulphonic Acid Plant in June 1992 without obtaining prior consent of the State Board under the provisions of Section 25 and 26 of the Water Act and section 21 of the Air Act.

(ii) That the State Board issued directions vide order dated 30.12.1992, for closure of Chlorosulphonic Acid Plant under the provisions of section 33A of the Water Act and 31A of Air Act. The District Collector Udaipur implemented the directions of closure of Chlorosulphonic Acid Plant passed by the State Board.

(iii) That respondent no.4 preferred a petition before this Court being Writ Petition (C) No.824 of 1993, Hindustan Agro Chemical Ltd. & Anr. v. State of Rajasthan & Ors., challenging the directions dated 30.12.1992 of the State Board closing down Chlorosulphonic Acid Plant under the provisions of Section 33A of the Water Act, and 31A of the Air Act. It was alleged that the action of the State Board closing down Chlorosulphonic Acid Plant was arbitration and highhanded.

(iv) That this Court dismissed the above mentioned writ petition by judgment dated 13.2.96 in W.P. (Civil)

No.824 of 1993 in view of the decision in Writ Petition (Civil) 967 of 1989.

7(i) That M/s Silver Chemicals, Village Bichhri, Tehsil Girva, District Udaipur Rajasthan, respondent no.5 came into existence in February 1988 to manufacture H-Acid and continued its operations upto March 1989 without obtaining prior consent of the State Board under the provisions of section 25 and 26 of the Water Act and Section 21 of the Air Act.

(ii) That the State Board vide its letter dated 9.1.1989 refused consent application submitted by M/s. Silver Chemicals under the provisions of Section 25/26 of the Water Act as the unit was discharging trade effluent beyond the prescribed standard and without having installed a plant for the treatment of trade effluent. The State Board under the provisions of section 25(5) of the Water Act also imposed several conditions on the industry and informed it that failure to make compliance of the conditions of the conditions shall render it liable for prosecution.

(iii) That the industry however continued its operations and looking to the continued violations of the provisions of the aforesaid Acts, the State Board filed an injunction application under the provisions of section 33 of the Water Act for restraining the industry from discharging polluted trade effluent in excess of the prescribed standards and from causing pollution of underground water n 24.3.89 before the court of Chief Judicial Magistrate, Udaipur.

(iv) That the Court of Chief Judicial Magistrate, Udaipur by order dated 15.6.1989 issued injunction against M/s. Silver Chemicals restraining it from

discharging polluted trade effluent without any treatment.

(v) That the State Board also filed a criminal complaint No.176/99 against M/s. Silver Chemicals and its Director on 24.3.89 under the provisions of section 43 and 44 for violation of the provisions of section 24, 25 and 26 of the Water Act.

(vi) That the court of Chief Judicial Magistrate, Udaipur by order and judgment dated 11.8.2004 has convicted M/s. Silver Chemicals with fine of Rs.10 lakh each under section 43 & 44 of the Act. The Court has also sentenced Shri O.P. Agarwal, Director of the said company with simple imprisonment of one year and fine of Rs.10,000/- under section 43 and simple imprisonment of six months and fine of Rs.10,000/- under section 44 of the Act. The company and its Director have preferred criminal appeal no.92 of 2004 under section 374 (3)(a) of the Code of Criminal Procedure before the Sessions Judge, Udaipur. The appeal is pending before the Ld. Sessions Judge.

8(i) That M/s. Rajasthan Multi Fertilizers, Vilalge Bichhri, Tehsil Girva, District Udaipur, Rajasthan respondent no.6, established NKP Fertilizer Plant at the site, without obtaining previous consent of the State Board under the provisions of section 25, 26 of the Water Act and section 21 of the Air Act.

(ii) That the State Board on 20.2.89 issued a notice and directed respondent no.6 to obtain consent of the State Board under the provision of the Water Act for discharging trade effluent from its plant.

9(i) That M/s. Phosphate India, Vilalge Bichhri, Tehsil

Girva, District Udaipur, Rajasthan, respondent no.7 established Single Super Phosphate Plant at the site, without obtaining previous consent of the State Board under the provisions of section 25, 26 of the Water Act and section 21 of the Air Act.

(ii) That the State Board on 20.2.89 issued a show cause notice and directed respondent no.7 to obtain consent of the State Board under the provisions of the Water Act for discharging trade effluent from its plant.

10(i) That M/s Jyoti Chemicals, Village Bichhri, Tehsil Girva, District Udaipur, Rajasthan; respondent no.8 established its plant, at the site, in the year 1987, to manufacture Ferric Alum without obtaining previous consent of the State Board under the provisions of section 25 and 26 of the Water Act and section 21 of the Air Act.

(ii) That the State Board vide its letter dated 4.8.1988 issued N.O.C. to respondent no.8 for adequacy of pollution control measures for Ferric Alum Plant. The respondent No.8, however, started manufacturing H-Acid and continued its operation till March, 1989.

(iii) That the State Board vide letter dated 30.5.88 withdrew the NOC for the reason that respondent no.8 violated the conditions of the NOC.

(iv) That the State Board vide its letter dated 30.5.89 also refused application filed by respondent no.8 for discharging trade effluent under section 25, 26 of the Water Act for the reasons, *inter alia*, that it failed to install pollution control measures and changed its product from Ferric alum to H-Acid without the consent of the State Board.

11. That this Court by its common order and judgment dated 13.2.96 in the aforesaid Writ Petition (Civil) No.967/89, Indian Council for *Enviro Legal Action v. Union of India & Others;* Writ Petition (Civil) No.76/94 Hindustan Agro Chemical v. State Pollution Control Board & Others and Writ Petition (Civil) No.824/93 Hindustan Agro Chemical v. State Pollution Control Board and Others attached the factories, plant, machinery and all other immovable assets of respondent nos.4 to 8. The State Pollution Control Board was directed to seal all the factories, plants of respondent nos.4 to 8 forthwith. The State Board in compliance of the aforesaid direction sealed the plants of respondent nos.4 to 8 as directed by this Court.

45. The written submissions were also filed by the Union of India and the R.S.P.C.B. in response to the order dated 03.05.2005 in IA No.36. It is stated in the said affidavit:

2. That the Ministry of Environment & Forests, Government of India vide its affidavit dated 29.1.2005 submitted a summary report prepared by a consortium of SENES Consultants Limited, Canada; and NEERI, Nagpur before this Court. The Ministry of Environment & Forest, Government of India and the Rajasthan State Pollution Control Board are making joint submissions herein below for remediation of the environmental damage caused in village Bichhri. Based on the recommendations given in the report of July, 2002, prepared by SENES/NEERI for remediation of degraded environment of Bichhri, District Udaipur, Rajasthan, the following works will be undertaken on priority-wise:

First Priority:

Phase-I: Source Remediation (Short Term)

- Clean up of water near the plant site with highest H-acid contamination.
- Remediation of contaminated soil and sludge management within the plant site.

Second Priority:

Phase-II: Hot Spots Remediation (Medium Term)

- Clean up of ground water at hot spots.

Third Priority:

Phase-III: Residual Contamination Remediation (Long Term)

- Clean up of residual contaminated water.

Fourth Priority:

Phase-IV (long-term):

- Clean up of contaminated soil outside plant boundary.

3. While dealing with the first phase called as short-term remedies, it has been divided in two parts namely:-

(i) Clean up of water near the plant site with highest H-acid contamination.

(ii) Soil and Sludge management within the plant site.

46. The said recommendation given in the SENES/NEERI report further suggests as follows:

"Considering the available water quality data the following alternatives were evaluated in the preliminary review:

- Lime soda process plus Fe coagulation
- Reverse osmosis (RO)
- Electro-dialysis
- Ion exchange
- Activated carbon Sorption and
- Activated carbon filtration

Similarly, for the second short-term measures namely, the remediation of soil and sludge management many alternative suggestions have been made. The said report has suggested the following four alternatives for clean up of soil:

- Excavation and relocation in a capped landfill.
- Ex-situ remediation (soil washing)
- Phyto-remediation
- Natural attenuation

4. That out of the aforesaid alternative technologies, the most suitable alternative with regard to the human habitation, plantation and vegetation etc., will have to be decided keeping in view the local conditions and priority requirement. This job will have to be done by Technical Advisory Committee having sufficient technical know-how in respect of the remedial measures. The committee may also like to look into the techno-economic feasibility in this regard.

5. In order to go ahead with the above mentioned works on priority-wise, the following steps will be taken:

a) Reconfirmation of National Productivity Council (NPC) New Delhi as the Project Management Consultant (PMC) by the Ministry of Environment & Forests (MoEF). NPC was the PMC for the purpose of conducting feasibility studies by SENES & NEERI in pursuance of the directions dated 4.11.1997 of this Court. The role of PMC will be to -

(i) Co-ordinate preparatory activities such as bidding and selection of a suitable expert agency for undertaking remediation work before execution of the remediation works.

(ii) Organise Technical Advisory Committee meetings from time to time to guide, review and supervise the progress of remediation works.

(iii) Co-ordinate activities/works pertaining to actual remediation and submit progress reports to the MoEF.

(b) Constitution of a Technical Advisory Committee by the MoEF having representations of MoEF, CPCB, Government of Rajasthan, RSPCB, NEERI, NPC & Technical Experts of National repute in the relevant fields to –

(i) Evaluation the recommendations of SENES NEERI Report (July 2002);

(ii) Finalise the detailed line of action and plan for remediation of environmental damages;

(iii) Review the alternative technologies from the technologies recommended in the SENES-NEERI report and to recommend suitable technology for remediation of contaminated

water and soil.

(iv) Supervise the work of actual remediation.

6. As the remediation of environmental damage would require a large sum of money…

47. All issues raised in this application have been argued and determined by an authoritative judgment of this Court about fifteen years ago. This application has been filed to avoid liability to pay the amount for remediation and costs imposed by the Court on the settled legal principle that polluter pays principle. In other words, the applicant through this application is seriously making an effort to avoid compliance of the order/judgment of this Court delivered fifteen years ago. The tendency must be effectively curbed. The applicant cannot be permitted to avoid compliance of the final order of this court by abusing the legal process and keep the litigation alive.

48. The applicant is in business where sole motto of most businessmen is to earn money and increase profits. If by filing repeated applications he can delay in making payment of huge remediation costs then it makes business sense as far as the applicant is concerned but the Court must discourage such business tactics and ensure effective compliance of the Court's order. It is also the obligation and bounden duty of the court to pass such order where litigants are prevented from abusing the system.

I.A. NO. 44 IN W.P.(C)No.967 OF 1989

49. In this matter the final judgment of the court was delivered on 13.2.1996. A Review Petition filed was also dismissed. Thereafter, a Curative Petition was filed and that was also dismissed on 18.7.2002. The applicant did not comply with the orders passed by this court even after dismissal of curative petition and has filed this application.

50. This application has been filed by respondent No. 4,

Hindustan Agro Chemicals Limited. By this application respondent No. 4 sought an investigation into the reports of April, 1994 prepared by the NEERI, which was employed by the R.S.P.C.B. in September, 1992 to evaluate the extent of contamination done by the applicant's plant in Bichhri village in Rajasthan.

51. It is on the basis of the report that applicant's units in Bichhri village were closed down and the applicant was asked to pay a sum of Rs.37.385 crores towards the costs of remediation to the government. The reports of April, 1994 had alleged that the applicant's units polluted the whole area by discharging its H-acid on the land which would cost Rs.37.385 crores to clean-up.

52. According to the applicant various experts employed by the applicant had found no evidence of H-acid pollution from the applicant's units in the area. In the application, serious effort has been made to discredit the NEERI report. It may be pertinent to mention all objections of the said reports were heard and disposed by the judgment dated 13.2.1996:

"In fact, while one report mentioned the cost of remediation to be 3 crores, the one which was presented to the Court showed it as 37.385 crores.

As per the original report it was reported by RSPCB that most of wells within 1.5 k.m. radius of the plants were contaminated while the modified report says, wells within 6.5 k.m. radius.

While the original report noted that the sludge had been stored under the supervision of the RSPCB whereas the modified report stated that the industry had scattered the sludge in an unmindful-clandestine manner causing gross pollution to avoid penal liability."

53. According to the reports of the experts, (who visited the site at the instance of the applicant, after the dismissal of

Review and Curative petition) the report of the NEERI filed in April 1994 was untenable and unsustainable. According to the applicant the said report was fabricated. In the application it is also mentioned that this is a fraud in which this court had been unwittingly dragged by the officers of the RSPCB and the NEERI to destroy several industries and the livelihood of about 1700 persons and it has been prayed that this court to direct an investigation into the report of April, 1994 prepared by the NEERI at the instance of the RSPCB to examine whether it was false or malafide.

54. A reply has been filed on behalf of the RSPCB. At the outset it has been mentioned that similar challenge by the respondent Nos. 4 to 8 regarding the factum of pollution in village Bichhri and it being attributed to the said respondents had been dismissed by this court on many occasions. This court conclusively reached the finding that the respondent Nos. 4 to 8, by indiscriminate discharge of their polluted trade effluent is in utter disregard and violation of the provisions of the Pollution Control and Environmental Protection Laws had caused intense severe pollution of underground water and of soil in village Bichhri. The veracity of the report of the NEERI has already been upheld by this court. This court on 4.11.1997 passed the following order:

> "… … …In the affidavit of Progress Report, the Government of India has proposed that for the purpose of undertaking the work relating to remedial measures for the National Productivity Council (NPC) may be appointed as the Project Management Consultants and on the basis of the feasibility report submitted by the NPC, tenders may be invited for entrusting the remedial work. It is also proposed that a High Level Advisory Committee would be constituted consisting of the representatives from (1) Ministry of Environment & Forests (2) National Productivity Council (3) Central Pollution Control Board (4) NEERI and (5) Rajasthan State Pollution Control Board to review

> periodically and give directions and also to approve decisions to be taken. According to the said affidavit work would be undertaken in two phases. The cost of Phase-I would be Rs.1.1 crores (Rs.50.00 lakhs for Project Management Consultancy and Rs.60.00 lakhs for feasibility studies) and the cost of Phase-II (Actual Remediation) would come to Rs.40.1 crores. In the additional affidavit of Dr. M. Sengupta detailed reasons have been given why it has not been possible to accept the report of the Experts on which reliance was placed by the respondents. We have perused the said reasons given in the said additional affidavit filed on behalf of the Ministry of Environment and Forests and keeping in view the reasons given therein. We are unable to accept the report of the Experts on which reliance has been placed by the respondents. We accept the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National Productivity Council as the Project Management Consultant. In our opinion, the Ministry of Environment & Forests, Government of India has rightly made a demand of Rs.37.85 crores.
>
> … … …Since, we have accepted the aforesaid proposal of the Government of India, we put it to Shri N.D. Nanavati that in order that further steps as per the said proposal are taken the respondents should immediately deposit a sum of Rs.5.00 crores in advance so that the National Productivity Council may be asked to undertake the work of Project Management Consultant and have the feasibility studies conducted and prepare the Terms of Reference for inviting the tenders. Shri Nanavati, after taking instructions from the representative of the respondents, expressed the inability of the respondents to deposit the said amount and states that they are in a position to deposit Rs.5.00 lakhs only. In these circumstances, the only alternative left is to direct that the Ministry of Environment and Forests shall take the necessary steps to implement the directions

contained in the judgment of this Court. All that we will say at this stage is that the decision regarding remedial measures taken on the basis of the NEERI Report shall be treated as final. The I.As. are disposed of accordingly."

55. In the reply of RSPCB it is mentioned that respondent No. 4 had preferred a Contempt Petition (Criminal) No. 7/1999 entitled *Hindustan Agro Chemical v. Alka Kala and others* and this court dismissed the contempt petition with the costs computed at Rs.10,000/- while observing that there was no basis for contending that any of the respondents have been guilty of fabrication and the whole contempt application was without any merit.

56. In the reply it is also mentioned that the respondent Nos. 4 to 8 had been operating their industrial plants without obtaining consent from the State Board, as required under the provisions of the Water (Prevention & Control of Pollution) Act, 1974 and the Air (Prevention & Control of Pollution) Act, 1981 and discharging polluted trade effluent indiscriminately without providing any treatment so as to bring it in conformity to the prescribed standards. Discharge of this trade effluent by the respondent Nos. 4 to 8 resulted into severe pollution of underground water and of soil. For the above violation, the State Pollution Control Board filed a Criminal complaint No. 176/1999, under the provisions of Section 43 read with Sections 24 and 44 read with Sections 25/26 of the Water Act before the Court of Chief Judicial Magistrate, Udaipur. The learned Chief Judicial Magistrate, Udaipur by its order dated 11.8.2004 found the accused guilty and convicted him with imprisonment and fine both under Sections 43 and 44 of the Water Act. The said conviction and sentence was upheld by the learned Session Judge, Udaipur in its judgment dated 21.7.2005. Against the judgment dated 21.7.2005 of the learned Sessions Judge, the accused preferred Criminal Revision Petition No. 634/2004 before the Rajasthan High Court at Jodhpur. The Criminal Revision Petition is pending adjudication before the

High Court of Rajasthan at Jodhpur.

57. While denying the averments of the application, the RSPCB has relied on paragraphs 14 and 15 of the affidavit dated 18.9.2007 filed by M. Subba Rao, Director, MOEF. The said paras reads as under:

"14. The applicant is making reference and reliance upon the recent affidavit filed by the Ministry of Environment and Forests, Government of India dated 08.03.2007 to contend that the earlier report submitted by the NEERI was a result of falsehood/malafide on the parts of some officers responsible for preparing the report. At the outset it is submitted that neither in the report nor in the affidavit of the Union of India dated 08.03.2007 it has been stated that the earlier report submitted by National Environmental Engineering Research Institute was incorrect. The affidavit submitted by the Union of India on 08.03.2007 has only given the present status. The report submitted by Union of India along with the affidavit has not dealt with the correctness/incorrectness of the earlier reports submitted by National Environmental Engineering Research Institute to this Hon'ble Court. It is submitted that on the basis of the affidavit filed by Union of India on 08.03.2007 and the report submitted therewith, it cannot be contended that the report submitted by National Environmental Engineering Research Institute in April 1994 was incorrect. It is further submitted that the experts of Union of India have also not gone into an examined the merits of the earlier reports.

15. It is seen from paras 46-47 of the judgment of this Hon'ble Court reported in the order dated 13.2.1996 (reported at (1996) 3 SCC 212 at 227-231) that a challenge was already attempted by the respondents on the reports of NEERI before this Hon'ble Court at the time of hearing."

58. It may be pertinent to mention here that on 22.8.1990

this court had appointed Mr. Mohinder Vyas as Commissioner to inspect the wells and assess the degree of pollution created by the operation of H-acid plant and the nature and extent of the remedial operations. In pursuance of the directions, the Commissioner visited the site from 31st August to 4th September, 1990, conducted detailed survey and also collected samples from a number of wells and drains. The Commissioner in his report dated 20.7.1991 indicated that the overall quality of ground water in the area had become highly polluted, the water had become unfit for consumption by man or animal and was not even fit for irrigation.

59. This Court by its order dated 17.2.1992 further directed that the MOEF to inspect the area and ascertain about the existence and extent of Gypsum and Iron based sludge over there. In pursuance of the above directions, a team of experts of MOEF visited the site on 6.3.1992 and assessed the position in regard to storage of sludge collected from various sites and presence of sludge in the factory premises. Samples of water of wells around the factory were also collected for analysis. The Union of India in an affidavit filed before this court in pursuance of the said directions stated as follows:

> "… … … That the report would reveal that the extent of pollution in ground water seems to be very great and the entire aquifer may be effected due to the pollution caused by the industry.
>
> … … …As the mother liquor produced during the process (with pH-1.0) was highly acidic in nature and was indiscriminately discharged on land by the unit, it is possible that this might have eroded the soil and caused the extensive damage. It is also possible that organic contents of mother liquor would have gone into soil with water to give radish colour.
>
> In another inspection in July, 1992 carried out by a team of experts of Ministry of Environment & Forests and

Central Pollution Control Board, it was observed:

> "… … …A part of effluent from Sulphuric Acid Plant is being discharged inside the factory. The effluent dissolves H-acid sludge, which on percolation is likely to cause further pollution of ground water… … …"

60. In pursuance to the order dated 15.7.1992 of this court, the officials of the MOEF conducted inspection on 7.10.1992 and observed as under:

> "… … …Untreated effluent from the solvent extraction plant and the sulphuric acid plant were passing through the sludge dump sites unabated, which was resulting in further leaching of colour to ground water. … … …"

61. The MOEF in the month of September, 1993 submitted a report which reads as under:

> "5.0 Conclusion
>
> 5.1 On the basis of the observations and analysis results, it is concluded beyond doubt that the sludge inside the entombed pit is the contaminated one as is evident from the number of parameters analysed.
>
> 5.2 The ground water is also contaminated due to discharge of H-acid plant effluent as well as H-acid sludge/ contaminated soul leachates as shown in the photographs and also supported by the results. The analysis results revealed good correlation between the colour of well water and H-acid content in it. The analysis results show high degree of impurities in sludge/soil and also in well water which is a clear indication of contamination of soil and ground water due to disposal of H-acid waste."

62. The report which was based upon the inspection of the area in September, 1993 revealed many other alarming

features. In para 2, under the heading "Site Observations and Collection of Sludge/Contaminated Soil Samples", the following facts were stated:

"2.1 The Central team, during inspection of the premises of M/s. HACL observed that H-acid sludge (iron/ gypsum) and contaminated soil are still lying at different places, as shown in Fig.1, within the industrial premises (photograph 1) which are the leftovers. The area, where the solar evaporation pond was existing with H-acid sludge dumped here and there, was observed to have been leveled with borrowed soil (photograph 2). It was difficult to ascertain whether the sludge had been removed before filling. However, there are visual evidences of contaminated soil in the area.

2.2 As reported by the Rajasthan State Pollution Control Board (RSPCB) representatives, about 720 tonne out of the total contaminates soil and sludge scraped from the sludge dump sites id disposed in six lined entombed pits covered by lime/fly ash mix, brick soling and concrete (photographs 3 and 4). The remaining scrapped sludge and contaminated soil was lying near the entombed pits for want of additional disposal facility. However, during the visit, the left over sludge and contaminated soil could not be traced at site. Inspection of the surrounding area revealed that a huge heap of foreign soil of 5 meter height (photograph 5) covering a large area, as also indicated in Fig. 1, was raised on the sloppy ground at the foothill within the industry premises. The storm water run-off pathway over the area showed indication of H-acid sludge leachates coming out of the heap. Soil in the area was sampled for analysis.

2.3 M/s. HACL has a number of other industrial units which are operating within the same premises without valid consents from the Rajasthan State Pollution Control Board (RSPCB). These plants are Sulphuric Acid (H2SO4), fertilizer (SSP) and vegetable oil extraction. The effluent of these units are not properly treated and the untreated effluent particularly from the acid plant is passing through the sludge dump area playing havoc (photograph 7). The final effluent was collected at the outlet of the factory premises during operation of these units, at the time of ground water monitoring in September, 1993, by the RSPCB. Its quality was observed to be highly acidic (pH: 1.08, Conductivity: 37,100 mg/l, SO4:21,000 mg/l, Fe: 392 mg/l, COD: 167 mg/l) which was also revealed in the earlier visits of the Central teams. However, these units were not in operation during the present visit."

63. Under para 4.2.1, the reported stated *inter alia:*

"The sludge samples from the surroundings of the (presently non-existent) solar evaporation and the contaminated soil due to seepage from the newly raised dump site also exhibited very high values of the above mentioned parameters. This revealed that the contaminated soil is buried under the new dump found by the team."

64. In the reply it is also mentioned that the NEERI submitted its report in April, 1994 on the restoration of environmental quality of the area surrounding village Bichhri, severally affected due to discharge of trade effluent and other industrial wasters by respondent Nos. 4 to 8. The report was submitted before this court in pursuance of its directions in the matter. The report states that the studies were carried out by the NEERI between September, 1992 and February, 1994. The report had been considered by this court at length on its own

merits and the observations of the court on the report are contained in the judgment pronounced by it on 13.2.1996.

65. In the reply it is also stated that this court besides considering the report of the NEERI also looked into a number of reports pertaining to inspections, surveys, studies and analysis of wastes and waste waters carried out by the experts of the MOEF, Central Pollution Control Board (for short 'CPCB') and the R.S.P.C.B on various occasions, while hearing the matter and pronouncing the judgment therein on 13.2.1996. Therefore, it is totally incorrect and erroneous to contend that the order dated 13.2.1996 was solely based upon the report submitted by the NEERI. Para IV of the conclusions of the judgment dated 13.2.1996 observed as follows:

> "… … …this court has repeatedly found and has recorded in the orders that it is respondents who have caused the said damage. The analysis reports obtained pursuant to the directions of the court clearly establish that the pollution of the wells is on account of the wastes discharged by respondent Nos. 4 to 8 i.e. production of 'H' Acid… … …"

66. In its reply the RSPCB further stated that the respondent Nos. 4 to 8 filed a Writ Petition No. 338/2000 challenging the judgment of this court dated 13.2.1996. This court dismissed the petition, by order dated 18.7.2002, having regard to the principles laid down in *Rupa Ashok Hurra v. Ashok Hurra & Another* (2002) 4 SCC 388.

67. The RSPCB also stated in its reply that this court by order dated 4.11.1997 directed the MOEF to take necessary steps to implement the directions contained in the judgment dated 13.2.1996 and accepted the proposals submitted by the MOEF for the purpose of taking remedial measures by appointing National Productivity Council (for short NPC), New Delhi as Project Management Consultant. Pursuant to these directions, the MOEF awarded the work of conducting

feasibility studies for suggesting alternative methods for remediation of affected environment in Bichhari, to a consortium of consultants namely: M/s. SENES Consultant Limited, Canada and the NEERI, Nagpur. The above consultants in their report stated that an area of 540 hectares had been affected due to industrial waste and needed remediation of contaminated ground water and soil. The said report categorically stated about contamination of ground water and of soil by H-acid. The report has been submitted by the MOEF before this court in January, 2005. This court on 9.12.2004 made the following order:

> "… … …The company M/s. Hindustan Agro Chemical Limited, which is one of the respondents in the main Writ Petition has filed a Petition supported by an affidavit of one Shri D.P. Agarwal, a Director in the respondent Nos. 4-8 companies enclosing therewith certain reports of the experts. It is the claim of the applicant that at present, the effects caused by pollution on account of operation of the concerned industries do not exist and remedial measures, as contemplated in the main judgment of this Court need not be undertaken. The respondents namely: UOI, the State of Rajasthan and the Rajasthan State Pollution Control Board as well as the petitioner will give their responses, if any, to this I.A. The Government of India may depute an expert and be along with the expert nominated by the Rajasthan State Pollution Control Board and the nominee of the State Rajasthan shall visit the spot after giving intimation to the Petitioner-Indian Council for Enviro Legal Action and verify the facts stated in the affidavit and report the latest position to the Court by the next date of hearing… … …"

68. An additional affidavit was also filed on behalf of MOEF on the same lines and graphic description of existence of the pollution has affected the ground water to an extent that the entire aquifer may be affected due to the pollution caused

by the industry. The report further reveals that the problem in relation to the area in question is basically the contamination of water and the major factor contributing to the cause has been the improper disposal of sludge and liquid wastes from the unit. It has been recommended by the expert team that due to leachable components of the sludge the industry should prepare a double line pit containing impervious liners comprising impervious clay and polyethylene sheets. The sludge should be placed in this lined pit and covered with water proof layering to such extent that no water can percolate through the stored sludge. The soil in the premises of the industry has also been contaminated by the disposal of liquid effluents as well as the sludge on the ground. The contaminated soil needs to be removed and the entire area should be revamped. All industrial activities going on in the premises should be stopped to enable the revamping process.

69. Mr. Shanti Bhushan and Mr. Prashant Bhushan, learned senior counsel in the written submissions filed by the respondent Nos. 4 to 8 have quoted this court's direction. The same is reproduced as under :-

> "The Central Government shall determine the amount required for carrying out the remedial measures….The Secretary shall thereupon determine the amount in consultation with the experts of the Ministry……the said amount shall represent the amount which respondents 4 to 8 are liable to pay to improve and restore the environment in the area….the factories, plant, machinery and all other immovable assets of respondents 4 to 8 are attached herewith. The amount so determine and recovered shall be utilized by the MEF for carrying out all necessary remedial measures to restore the soil, water resources and the environment in general of the affected area to its former state."

70. According to respondent nos. 4 to 8, two reports of the NEERI of the same date were at variance with each other. In

one report, the cost of remediation is mentioned as Rs.3 crores whereas in other report presented before the court, the amount was 37.385 crores.

71. Mr. Bhushan, learned senior counsel has submitted in his written submission that according to the original report, it was reported by the RSPCB that most of the wells within 1.5 km radius of the chemical plants of the respondents were contaminated whereas according to the modified report those wells were located within 6.5 km radius.

72. Mr. Bhushan has also submitted that the sludge had been stored under the supervision of the RSPCB whereas according to the modified report the industry had scattered the sludge in an unmindful clandestine manner causing gross pollution to avoid penal liability.

73. Reference has been made to the opinion of some experts whose opinions were obtained at the behest of respondent nos. 4 to 8. Their reports are contrary to the earlier reports given by the other experts.

74. In the written submissions it is mentioned that M/s Hindustan Zinc Limited was responsible for discharging noxious and polluting effluents.

75. According to the applicant-industry, the RSPCB has not taken a consistent stand.

76. In the supplementary submissions filed by Mr. K.B. Rohatagi, the learned counsel appearing on behalf of R.S.P.C.B., it is mentioned that in Interlocutory Application Nos. 36 and 44 the applicant-industry has resurrected the same grounds which have previously been settled by this court in *Indian Council for Enviro-Legal Action and others v. Union of India* and *Others* (1996) 3 SCC 212.

77. Mr. Rohatagi also submitted in the supplementary

submissions that the question of liability and the amounts payable by the applicants based on the NEERI report has been decided by the judgment in the writ petition. The review petition against the said judgment was also dismissed by this court. On 4.11.1997 the applicants had even given an undertaking that they would not dispute any fresh estimate for remedial measures as prepared by the NEERI. The question of fraud and tampering of the NEERI report of 1994 has been dealt with by this court while dismissing the contempt petition filed by the applicants against the R.S.P.C.B. Even the Curative Petition filed by the applicants was also dismissed by this court on 18.7.2002.

78. In the supplementary submissions it is also mentioned that through Interlocutory Application Nos. 36 and 44 the applicants are merely trying to evade paying the amounts to be paid as remedial measures by reopening issues already settled by this court. In the submissions Mr. Rohatagi has drawn our attention to para 66 of the said judgment regarding the applicant's liability, which reads as under:

> "66. Once the law in Oleum Gas Leak case is held to be the law applicable, it follows, in the light of our findings recorded hereinbefore, that Respondents 4 to 8 are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants lying the affected area (by affected area, we mean the area of about 350 has indicated in the sketch at p. 178 of NEERI report) and also to defray the cost of the remedial measures required to restore the soil and the underground water resources."

79. It is also submitted in the written submissions that the Central Government was directed to determine the amounts for remedial measures for the affected area of 350 hectares, as mentioned in the NEERI report, after allowing the applicants to

make a representation. This court in para 70 of the said judgment observed as under:

> "Chapters VI and VII in the NEERI Report (submitted in 1994) shall be deemed to be the show cause notice issued by the Central Government proposing the determination of the said amount. Within six weeks from this day, Respondents 4 to 8 shall submit their explanation, along with such material as they think appropriate in support of their case, to the Secretary, Ministry of Environment and Forests, Government of India (MOEF). The Secretary shall thereupon determine the amount in consultation with the experts of his Ministry within six weeks of the submission of the explanation by the said respondents. The orders passed by the Secretary (MOEF) shall be communicated to Respondents 4 to 8 – and all concerned – and shall also be placed before this Court"

80. This court in the said judgment also directed that the factories, plant, machinery and all other immovable assets of Respondents 4 to 8 are attached herewith. The court also observed that the amount so determined and recovered shall be utilized by the MOEF for carrying out all necessary remedial measures to restore the soil, water resources and the environment in general of the affected area in the former state.

81. It is also submitted in the supplementary submissions of RSPCB that this court in para 70 of the said judgment also observed that the applicants have inflicted untold misery upon the poor, unsuspecting villagers, despoiling their land, their water resources and their entire environment, all in pursuance of their private profit. They have forfeited all claims for any consideration by this court.

82. In the supplementary submissions filed by Mr. Rohatagi it is also mentioned that the court even settled the issue of the alleged hostility of the RSPCB towards the applicants and felt no reason to suspect the veracity of the reports submitted by

the RSPCB. This court in para 39 of the said judgment observed as under:

> "If the respondents establish and operate their plants contrary to law, flouting all safety norms provided by law, the RSPCB was bound to act. On that account, it cannot be said to be acting out of animus or adopting a hostile attitude. Repeated and persistent violations call for repeated orders. That is no proof of hostility. Moreover, the reports of RSPCB officials are fully corroborated and affirmed by the reports of the Central team of experts and of NEERI. We are also not prepared to agree with Shri Bhat that since the report of NEERI was prepared at the instance of RSPCB, it is suspect."

83. It is further submitted in the supplementary submissions that in para 55 of the said judgment this court specifically held that Hindustan Zinc Limited is not responsible for the pollution at Bichhri village. The court has observed as under:

> "No report among the several reports placed before us in these proceedings says that Hindustan Zinc Limited is responsible for the pollution at Bicchhri village. Shri Bhat brought to our notice certain reports stating that the discharges from Hindustan Zinc Limited were causing pollution in certain villages but they are all downstream, i.e., to the north of Bichhri village and we are not concerned with the pollution in those villages in these proceedings. The bringing in of Hindustan Zinc Limited in these proceedings is, therefore, not relevant. If necessary, the pollution, if any, caused by Hindustan Zinc Limited can be the subject-matter of a separate proceeding."

84. It is also further mentioned in the written submission of RSPCB that the issue of quantification of amounts to be paid by the industry has been settled by this court in its order dated 4.11.1997. The relevant portion of the order reads as under:

> "… … …remedial measures taken on the basis of the NEERI report shall be treated as final.
>
> We accept the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National Productivity Council as the Project Management Consultant. In our opinion the Ministry of Environment and Forests, Government of India has rightly made a demand for Rs.37.385 crores."

85. It is also mentioned in the supplementary submissions that this court on 3.8.2005 directed that the sale should take place expeditiously to realize the amount for remedial measures. The assessment of areas affected by the pollution and settled by the District Collector at 642 hectares was also accepted by this court vide its order dated 3.8.2005.

86. It may be pertinent to mention that this court had accepted the affidavit of Mr. S.N. Kaul, Acting Director, NEERI regarding tampering with the report and this court by its order dated 1.10.1999 observed as under:

> "It appears that two scientists appointed by the petitioner had inspected a report in the office of NEERI and then observed that there has been a fabrication carried out by the Pollution Control Board. From what has been stated hereinabove, the charge of fabrication is clearly unfounded. It is possible that these two scientists may have seen the draft report which would be with the NEERI but the original report when prepared would be one which was, ultimately, submitted to the sponsoring agency, namely the Rajasthan Pollution Control Board and it is only a copy of the same which could have been retained by the NEERI. Be that as it may, it is clear that what has been filed in this Court as being the final report of NEERI was the copy of the final report which was received by it. There is no basis for contending that any of the respondents have been guilty of fabrication. The whole application to our mind is without

any merit."

87. It is further submitted in his supplementary submissions that this court in para 54 of its order dated 13.2.1996 had upheld the integrity of the reports submitted by the NEERI. Para 54 of order dated 13.2.1996 reads as under:

"Moreover, the reports of RSPCB officials are fully corroborated and affirmed by the reports of the central team of experts and of the NEERI. We are also not prepared to agree with Shri Bhat that since the report of the NEERI was prepared at the instance of RSPCB, it is suspect. This criticism is not only unfair but is also uncharitable to the officials of NEERI who have no reason to be inimical to the respondents. If, however, the actions of the respondents invite the concern of the experts and if they depict the correct situation in their reports, they cannot be accused of any bias.

… … …

… … …

The persons who made the said reports are all experts in their field and under no obligation either to the RSPCB or for that matter to any other person or industry. It is in view of their independence and competence that their reports were relied upon and made the basis of passing orders by this court from time to time."

88. In the supplementary submissions it is also mentioned that the report of 25th January, 2005 is a joint report by the NEERI, R.S.P.C.B. and officers of Department of Environment, Government of Rajasthan. The team collected soil samples from 7 sites, one sample from lake Udaisagar and 17 well water samples from the impacted and nearby areas. The report concluded as under:

"All the well water samples in the impacted zone have also

shown colour from pale yellow to dark brown. As the industries located within the HACL plant premises were the only source of H-acid, HACL alone is responsible for causing pollution by H-acid and its derivatives in the impacted area. Considering the remediation goal of Omg/l for H-acid and its derivatives are potential carcinogenic, all well waters, contaminated with H-acid and its derivatives, require remediation.

… … …

… … …

Sudden emergence of H-acid in wells W7(Aug.99) and W9 (Aug. 99) clearly indicate that the plume of H-acid contaminated groundwater is moving away from the source of origin and spreading in the direction of groundwater flow. This is further confirmed from another fairly conservative parameter TDS whose emergence has been documented in all the wells (W7, W9, W1, W13 and W16) from time to time. Similar trend could be observed with respect to sulphate and chloride in well water samples collected from these five wells. Comparison of the results obtained in the present study with that of earlier studies establish that the ground water plume contaminated by H-acid and its derivatives is still moving in the direction of ground water flow thereby contamination area being larger than that earlier. This was predicted in the joint report prepared by SENES and the NEERI (SENES and the NEERI, 2002)."

89. This report was submitted to the court along with the affidavit dated 8.3.2007 filed by the Union of India.

90. In the supplementary submissions it is also submitted that due to some alleged variations, the Director of ITRC (Indian Toxicological Research Centre) was asked to make a rapid assessment on 6.5.2006. In response, the Director of ITRC

stated that there may be a variation due to a lapse of time between the 2002 and 2005 reports. Based on this, MOEF asked the National Chemical Laboratory, Pune to undertake a study, the results of which (placed before the Court in affidavits of 22.1.07 and 8.3.2007) showed that no aspersions can be cast on the NEERI report of 1994. Further, it would be incorrect to suggest that the remedial measures as imposed on the applicants were limited to neutralizing the presence of H-acid in the soil alone, in fact it is clear from the judgment of 1996 and subsequent reports that what has to be done is:

(a) removal of sludge which has also percolated down in the soil; and

(b) restoration of the area including perforce, making it possible for farmers and others to return to the natural uses of the affected land.

91. It is further submitted in the supplementary submissions of RSPCB that the Interlocutory Applications Nos. 36 and 44 are just another example of obstructive litigation undertaken to avoid responsibility. Since 1996 the applicants have filed various applications and petitions in this court to delay the payment of damages. It is also submitted that any delay caused in the payment of damages for remedial measures has, therefore, been on the part of the applicants. It would be wrong to suggest that the Union is responsible for the delay in sale of assets of the industry. The applicants have violated orders of this court in relation to disclosure of assets dated 18.8.04, 9.12.04 and 17.3.05, because of which it was impossible for the Union of India to sell the applicant's attached properties.

92. Mr. Rohatagi submitted that the applicants relied upon a series of reports by private consultants, filed subsequent to the decision, which are as follows:

(a) IIT Bombay Report of May 2005 suggesting that the samples collected on 5th April, 2005 show that there is no

H-acid or other pollutants.

(b) A report by Dr. BR Bamniya dated 22.4.04 stating that no soil pollutants or water pollutants found and

> "…the presence of H-acid has not been recorded in any water sample of well and in tube well."

(c) Report of Expert Group on Water Pollution of March 1981 showing that pollution caused by M/s. Hindustan Zinc Ltd. Further no action has been taken against M/s. Hindustan Zinc Limited on the basis of that report.

(d) Report of M/s. Shah Doctor Associates of April, 1994 critical of the analysis in the NEERI report.

(e) Report of SP Mahajan of IIT Bombay dated 19.8.1999 stating that no H-Acid found in the well waters.

93. It is further submitted in the supplementary submissions that the NEERI report of 2005 also dealt with three private reports which were rejected on the basis that they were superficial.

94. Mr. Rohatagi further submitted that the liability of the applicants-industries has been fixed far back in 1996. Merely because there may be a diminution in respect of some pollutants due to the passage of time does not, in any way, take away from the responsibility on the applicant to undertake remedial measures for the past and continuing damage to the people and the environment caused by the applicants-industries. The individual claims of farmers may be dealt within individual cases, which would not obviate the need for restoration of the area. This flows from a joint reading of directions of the court in para 71 of the judgment reported in *Indian Council for Enviro-Legal Action* (supra).

95. According to the RSPCB Interlocutory Application Nos. 36 and 44 are blatant examples of vexatious litigation indulged

in to avoid the responsibility fixed by this court. These applications should be dismissed with heavy costs on the applicants.

96. Mr. M.C. Mehta, Advocate has filed written submissions on behalf of Indian Council for Enviro Legal Action. It is reiterated in the submissions that these applications are blatant disregard towards complying with the directions of this court. They have made mockery with the environmental justice delivery system by filing these applications. They have shown no contrition for causing irreparable damage to the life, health and property of the people affected by their commercial activities. The applicants are trying to delay the payment of Rs.37.385 crores for carrying out remedial measures. This court in para 70 of the judgment reported in *Indian Council for Enviro-Legal Action* (supra) observed as under:

> "On account of (the respondents) continuous, persistent and insolent violations of the law….and their non-implementation of the orders of this….(the respondents) have earned the dubious distinction of being characterized as "rogue industries". They have inflicted untold misery upon the poor, unsuspecting villagers, despoiling their land, their water sources and their entire environment – all in pursuit of private profit."

97. Mr. Mehta also submitted in his submissions that the applicants (respondent Nos. 4 to 8) are related to the discharge of untreated chemical effluents in violation of the laws of the land in Bichhri and surrounding villages and caused grave harm to the environment and people in Bichhri and surrounding villages.

98. In the written submissions Mr. Mehta also submitted that the reports procured by the respondent companies by hiring consultants do not hold any weight due to lack of substantial scientific investigations. They cannot in any way question the credibility of nine scientific reports, submitted following

extensive field visits, survey and research by scientists from reputed scientific institutions such as the CPCB, NEERI, SENES, RSPCB and the Centre for Science and Environment and other reports, respectively submitted by the district collector and the Court Commissioner appointed by this court.

99. Mr. Mehta also mentioned in his written submissions that the veracity of the contents of the NEERI report has been affirmed in at least four subsequent reports from reputed scientific organizations, MOEF, State of Rajasthan as well as the district collector.

100. Mr. Mehta has also submitted that assuming, though not conceding, that there is currently no pollution in Bichhri village, this cannot absolve the applicants-industries from the obligation to pay monies necessary for eco-restoration and damages caused to the life and health of the people as well as their property in the past. The polluters/respondents recklessly destroyed the environment, surface and underground water and the soil and killed fruit trees, animals and vegetation apart from causing suffering and irreparable damages to the lands, property, life and health of the people in flagrant violation of environmental laws and directions given by various authorities including the orders of this court. The civil and criminal liability upon the respondents for the environmental crimes, irreparable damages caused to the environment, flora and fauna, life, health and property of innocent people living in Bichhri and surrounding villages cannot be condoned at any cost.

101. Mr. Mehta submitted that even if it was possible to accept that all H-acid traces have been removed, the presence of other contaminants in the affected area (including highly toxic wastes emanating from the Sulphuric Acid Plant and other plants) would necessitate remediation. The amount can be deposited in a Fund and utilized for remediation, providing potable water, tree plantation, and such other measures which would be helpful to the environment of the area apart from

paying damages to the people.

102. Mr. Mehta has further submitted that this court may impose upon the errant industries as exemplary punitive damages apart from the amount required for eco-restoration by way of remediation of the land, water and the environment. This may be considered in the light of the continuing public nuisance and suffering due to pollution, severely degraded environment, loss to the property, irreparable damage to the ecology and precious natural resources – land, air, aquifers, surface water, flora and fauna – for over twenty years since the original petition was filed. The implications of failing to remediate the affected land, water and environment over such an extensive period of time are far more severe than had the applicants-industries immediately complied with the orders of this court.

103. Mr. Mehta also placed reliance on a judgment of this court in the case of *M.C. Mehta v. Kamal Nath and others (2000) 6 SCC 213,* in which the court observed as under:

> "…pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exempla y damages so that it may act as a deterrent for oth rs not to cause pollution in any manner."ı104. Mr. Mehta su mitted that having regard to the respondent's conduct in t e present case, it would be reasonable to impose an addition l pecuniary penalty on them. Reliance is placed on *M nister for the environment and Heritage v. Greentree (No.3)*

[2004] FCA 1317, wherein the Federal Court imposed a pecuniary penalty against the respondents totaling $450,000 for having illegally cleared declared a Ramsar wetland. A strong factor contributing to the imposition of a substantial penalty was because the actions of the respondent were deliberate, sustained and serious, they took place over a substantial period of time and the respondents did not exhibit any contrition.

105. Mr. Mehta also submitted that the present case would warrant a severe penalty because the respondents carried out their activities without even possessing any appropriate licenses. Respondents must be required to pay exemplary damages so as to act as a deterrent for others, as also to remedy the harm they have caused to the environment and the villagers of Bichhri.

106. Mr. Mehta has also placed reliance on the famous "Love Canal Case" *United States v. Hooker Chems and Plastics Corp.,* 722 F. Supp 960 (W.D.N.Y. 1989). This case was initiated after it was discovered that a school, homes and rental units were built over approximately 21,000 tonnes of chemical waste at Niagara Falls, New York. The Federal Court of New York allowed a claim against the defendants based on public nuisance. This case was ultimately settled with the defendant agreeing to pay $129 million to the Environment Protection Authority. This case led to the development of the *Comprehensive Response Compensation and Environmental Liability Act, 1980,* more commonly referred to as the "Superfund", into which polluters contribute monies to enable clean-up of toxic sites.

107. In the written submissions filed by Mr. Mehta he has also mentioned about principle of accountability and it is the duty and obligation of the court to protect the fundamental rights of the citizens under Article 32 of the Indian constitution. Pollution and public nuisance resulting from mis-regulation infringes on the fundamental rights, including the right to life under Article 21 of the Indian constitution. Mr. Mehta also

submitted that applicants are liable for causing continuous suffering to the people in Bichhri and surrounding villages.

108. Mr. Mehta also submitted in his written submissions that in several cases of environmental pollution the courts have ordered the payment of damages by the errant industries/ individuals responsible for causing pollution in violation of environmental related issues and the money recovered be spent for remediation or eco-restoration and damages be paid to the victims or spent for their benefit. It is the duty of the government to ensure proper administration of this fund in a transparent and accountable manner. The establishment of such a fund would ensure that polluters take responsibility for their actions and that monies derived from penalties, damages and settlement are directly invested towards remediating the environmental damage that has occurred.

109. Mr. Mehta further mentioned in his submissions that creation of such a fund would be consistent with the precautionary principle which has been evolved and accepted by this court. He has also mentioned that similar funds have been set-up in United States of America, Canada, Australia, Malaysia and other countries.

110. Mr. Mehta also made a reference regarding *Public Liability Insurance Act, 1991* which makes it mandatory for industries handling hazardous material to be insured against environmental hazards. However, this legislation only provides relief to persons affected by accidents whilst handling hazardous materials, who are most likely to be workers. Members of the local community would not obtain relief under this legislation, though they are also adversely affected by hazardous industries. This is most pertinently exemplified in the present case.

111. In his written submissions Mr. Mehta also submitted that the applicants clearly show defiance of the environmental laws and the orders of this court. Mr. Mehta prayed for

dismissal of Interlocutory Application Nos. 36 of 2004 and 44 of 2007 with heavy costs and direct the respondents to deposit Rs.37.385 crores with the MOEF as per the judgment of this court.

112. This case raises many substantial questions of law. We would briefly deal with some of them.

113. We would also like to discuss the concept of Finality of the Judgment passed by the Apex Court.

FINALITY OF JUDGMENT

114. The maxim 'interest Republicae ut sit finis litium' says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage, it is necessary to put a quietus. It is rare that in an adversarial system, despite the judges of the highest court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door for a further appeal could be opening a flood gate which will cause more wrongs in the society at large at the cost of rights.

115. It should be presumed that every proceeding has gone through infiltration several times before the decision of the Apex Court. In the instant case, even after final judgment of this court, the review petition was also dismissed. Thereafter, even the curative petition has also been dismissed in this case. The controversy between the parties must come to an end at some stage and the judgment of this court must be permitted to acquire finality. It would hardly be proper to permit the parties to file application after application endlessly. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this court by filing repeated interlocutory applications is clearly an abuse of the process of law and would

have far reaching adverse impact on the administration of justice.

116. In *Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur* (1976) 4 SCC 124 this court held that the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so.

117. In *Green View Tea & Industries* v. *Collector, Golaghat and Another* (2002) 1 SCC 109 this court reiterated the view that finality of the order of the apex court of the country should not lightly be unsettled.

118. A three-Judge Bench of this court in *M/s Northern India Caterers (India) Ltd*. v. *Lt. Governor of Delhi* (1980) 2 SCC 167 held that a party is not entitled to seek a review of this court's judgment merely for the purpose of rehearing and for a fresh decision of the case. Departure from the normal principle that the court's judgment is final would be justified only when compelling our substantial circumstances make it necessary to do so. Such circumstances may be that a material statutory provision was not drawn to the court's attention at the original hearing or a manifest wrong has been done.

119. Relying on *Union of India & Another v. Raghubir Singh (Dead) by L.Rs.* (1989) 2 SCC 754, this Court in Krishna Swami v. Union of India and others (1992) 4 SCC 605 held that the plea for reconsideration is not to be entertained merely because the petitioner chooses to reagitate the points concluded by the earlier decision in *Sub-committee on Judicial Accountability v. Union of India* (1991) 4 SCC 699.

120. In *Mohd. Aslam v. Union of India & Others* (1996) 2 SCC 749, the Court considered the earlier decisions and held that the writ petition under article 32 of the Constitution assailing the correctness of a decision of the Supreme Court on merits or claiming reconsideration is not maintainable.

121. In *Khoday Distilleries Ltd. and Another v. Registrar General, Supreme Court of India* (1996) 3 SCC 114, the Court held the reconsideration of the final decision of the Supreme Court after review petition is dismissed by way of writ petition under article 32 of the Constitution cannot be sustained.

122. In *Gurbachan Singh & Another v. Union of India & Another* (1996) 3 SCC 117, the Court held that the judgment order of this court passed under Article 136 is not amenable to judicial review under Article 32 of the Constitution.

123. Similar view was taken in *Babu Singh Bains and others v. Union of India and Others* (1996) 6 SCC 565, a three-Judge bench of this Court held that a writ petition under Article 32 of the Constitution against the order under Article 136 of the Constitution is not maintainable.

124. Another three-Judge bench of this Court in *P. Ashokan v. Union of India & Another* (1998) 3 SCC 56, relying upon the earlier cases held that the challenge to the correctness of a decision on merits after it has become final cannot be questioned by invoking Article 32 of the Constitution. In the instant case the petitioner wants to reopen the case by filing the interlocutory application.

125. In *Ajit Kumar Barat v. Secretary, Indian Tea Association & Others* (2001) 5 SCC 42, the Court placed reliance on the judgment of a nine-judge Bench in *Naresh Shridhar Mirajkar v. State of Maharashtra and another* AIR 1967 SC 1 and the Court observed as under:

> "It is difficult to see how this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself…. In view of this decision in *Mirajkar case* it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof."

126. The Court in the said case observed that having regards to the facts and circumstances of the case, this is not a fit case to be entertained to exercise jurisdiction under Article 32 of the Constitution.

127. In *Mr. "X" v. Hospital "Z"* (2000)9 SCC 439, this Court held thus:

> "Writ petition under Article 32 of the Constitution against the judgment already passed by this Court cannot be entertained. Learned counsel for the petitioner stated that prayer (*a*) which seeks overruling or setting aside of the judgment already passed in *Mr X* v. *Hospital Z* may be deleted. This prayer shall accordingly be deleted. So also, the other prayers which indirectly concern the correctness of the judgment already passed shall stand deleted. Learned counsel for the petitioner stated that the petition may not be treated as a petition under Article 32 of the Constitution but may be treated as an application for clarification/directions in the case already decided by this Court, viz., *Mr X* v. *Hospital Z* (CA No. 4641 of 1998)."

128. In *Triveniben v. State of Gujarat* (1989)1 SCC 678 speaking for himself and other three learned Judges of the Constitution Bench through Oza, J., reiterated the same principle. The court observed: (SCC p. 697, para 22)

> "…It is well settled now that a judgment of court can never be challenged under Articles 14 or 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in *Naresh Shridhar Mirajkar* (supra) and also in *A.R. Antulay* v. *R.S. Nayak*, the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned

> prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper…."

129. In *Rupa Ashok Hurra (supra)*, this Court observed thus:

> 24. … when reconsideration of a judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge. It is, therefore, relevant to note that so much was the value attached to the precedent of the highest court that in *The London Street Tramways Co. Ltd.* v. *London County Council* (1898 AC 375) the House of Lords laid down that its decision upon a question of law was conclusive and would bind the House in subsequent cases and that an erroneous decision could be set right only by an Act of Parliament.
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> … … …
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> … … …
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> 26. …This Court will not sit as a court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be reopened and reheard:

> "There is a salutary maxim which ought to be observed by all courts of last resort — *interest reipublicae ut sit finis litium*. (It concerns the State that there be an end of lawsuits. It is in the interest of the State that there should be an end of lawsuits.) Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."

32. "…When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions."

33. In *Maganlal Chhaganlal* (1974) 2 SCC 402 *case* a Bench of seven learned Judges of this Court considered, inter alia, the question: whether a judgment of the Supreme

Court in *Northern India Caterers case* (1967) 3 SCR 399 was required to be overruled. Khanna, J. observed: (SCC p. 425, para 22)

> "At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in law would be considerably eroded and suffer a serious setback if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law."

42. The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. "We are faced with competing principles — ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principles of natural justice or giving scope for apprehension of bias due to a Judge who participated in

the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice — a concept which is not disputed but by a few. We are of the view that though Judges of the highest court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question, we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in the public interest that a final judgment of the final court in the country should not be open to challenge, yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice."

130. A four-judge bench of this court in *Sumer v. State of U.P.* (2005) 7 SCC 220 observed as under:

"In *Rupa Ashok Hurra* (supra) while providing for the remedy of curative petition, but at the same time to prevent abuse of such remedy and filing in that garb a second review petition as a matter of course, the Constitution Bench said that except when very strong reasons exist, the court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of review petition. In this view, strict conditions including filing of certificate by a Senior Advocate were provided in *Rupa Ashok Hurra* (supra). Despite it, the apprehension of the Constitution Bench that

the remedy provided may not open the flood gates for filing a second review petition has come true as is evident from filing of large number of curative petitions. It was expected that the curative petitions will be filed in exceptional and in rarest of rare case but, in practice, it has just been opposite. This Court, observing that neither it is advisable nor possible to enumerate all the grounds on which curative petition may be entertained, said that nevertheless the petitioner is entitled to relief ex debito justitiae if he establishes (*1*) violation of principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (*2*) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner. To restrict filing of the curative petitions only in genuine cases, *Rupa Ashok Hurra* (supra) provided that the curative petition shall contain a certification by a Senior Advocate with regard to the fulfilment of all the requirements provided in the judgment. Unfortunately, in most of the cases, the certification is casual without fulfilling the requirements of the judgment."

131. In *Sita Ram Bhandar Society, New Delhi v. Lieutenant Governor, Government of NCT, Delhi & Others* (2009)10 SCC 501, this Court held thus:

"41. We must also observe that the petitioner has been able to frustrate the acquisition and development of the land right from 1980 onwards by taking recourse to one litigation after the other. The record reveals that all the suits/ writ petitions, etc. that had been filed had failed. Undoubtedly, every citizen has a right to utilise all legal means which are open to him in a bid to vindicate and

protect his rights, but if the court comes to the conclusion that the pleas raised are frivolous and meant to frustrate and delay an acquisition which is in public interest, deterrent action is called for. This is precisely the situation in the present matter.

42. The appeals are, accordingly, dismissed with costs which are determined at rupees two lakhs. The respondents, shall, without further loss of time proceed against the appellant."

132. This court in a recent judgment in *M. Nagabhushana v. State of Karnataka and others (2011) 3 SCC 408* observed that principle of finality is passed on high principle of public policy. The court in para 13 of the said judgment observed as under:

"That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the color and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties."

133. In order to discourage a litigation which reopens the final judgment of this court, while dismissing the petition imposed costs of rupees 10 lakhs.

134. We find full corroboration of this principle from the

cases of other countries. We deem it appropriate to mention some of these relevant cases in the succeeding paragraphs.

ENGLAND

135. The England cases have consistently taken the view that the judgments of final court must be considered final and conclusive. There must be certainty in the administration. Uncertainty can lead to injustice. Unless there are very exceptional or compelling reasons the judgment of apex courts should not be reopened.

136. In *Regina v. Gough*, [1993] 1 A.C. 646, with regards to setting aside judgments due to judicial bias, the House of Lords held that there "is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in *Dimes v. Proprietors of Grand Junction Canal* , (1852) 3 H.L. Cases 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category." Lord Goff of Chievely stated that

"I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter." The principle is expressed in the maxim that

nobody may be judge in his own cause (nemo judex in sua causa)... In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand" (p. 661).

137. In *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) (*1999) 2 W.L.R. 272*,* the House of Lords set aside one of its earlier orders. In this case, the majority at the House of Lords had earlier ruled whether Augusto Pinochet, the former dictator of Chile, could be extradited to Spain in order to stand trial for alleged crimes against humanity and was not entitled to sovereign immunity. Amnesty International had been an intervener in this case in opposition to Pinochet. Lord Hoffman, one of the majority judges, was a director of Amnesty International Charitable Trust, an organization controlled by Amnesty International, and Lady Hoffman had been working at AI's international secretariat since 1977. The respondent was not aware of Lord Hoffman's relationship to AI during the initial trial. In this case, the House of Lords cited with approval the respondents' concession acknowledging the House of Lords' jurisdiction to review its decisions -

"In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered."

138. According to the English law, the judgment of the Apex Court can be reviewed in exceptional circumstances

particularly when the judge associated with any of the organizations to be a good ground for reviewing the judgment.

139. In *Pinochet* test in *Regina (Edwards) v Environment Agency and others* [2010] UKSC 57, the Supreme Court of the United Kingdom overruled an earlier order of costs made by the erstwhile apex court, the House of Lords, on the grounds that the House of Lords had made a substantive error in the original adjudication. However, this appeal was lodged under Rule 53 of the *The (U.K.) Supreme Court Rules, 2009*, 2009 No. 1603 (L. 17). Rule 53 provides as follows:

53. (1) A party who is dissatisfied with the assessment of costs made at an oral hearing may apply for that decision to be reviewed by a single Justice and any application under this rule must be made in the appropriate form and be filed within 14 days of the decision.

(2) The single Justice may (without an oral hearing) affirm the decision made on the assessment or may, where it appears appropriate, refer the matter to a panel of Justices to be decided with or without an oral hearing.

(3) An application may be made under this rule only on a question of principle and not in respect of the amount allowed on any item in the claim for costs.

140. In this case, Lord Hope, citing the *Pinochet* case stated that:

The Supreme Court is a creature of statute. But it has inherited all the powers that were vested in the House of Lords as the ultimate court of appeal. So it has the same powers as the House had to correct any injustice caused by an earlier order of the House or this Court... In this case it seems that, through no fault of the appellant, an injustice may have been caused by the failure of the House to address itself to the correct test in order to comply with the requirements of [certain EU] directives [at para. 35].

CANADA

141. The Canadian Supreme Court is of the same view that judicial bias would be a ground for reviewing the judgment. In *Wewaykum Indian Band v. Canada* [2003] 2 SCR 259 the court relied on *Taylor Ventures Ltd. (Trustee of)* v. *Taylor* 2005 BCCA 350 where principle of judicial bias has been summarized.

142. The principles stated in *Roberts* regarding judicial bias were neatly summarized in *Taylor Ventures Ltd. (Trustee of)* (supra), where Donald J.A. stated –

(i) a judge's impartiality is presumed;

(ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(iv) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is *more likely than not that the judge*, whether consciously or unconsciously, *would not decide fairly;*

(v) the test requires demonstration of serious grounds on which to base the apprehension;

(vi) each case must be examined contextually and the inquiry is fact-specific (at para 7).

143. Cases from Australia also support the proposition that

a final judgment cannot ordinarily be reopened, and that such steps can be taken only in exceptional circumstances.

144. In *State Rail Authority of New South Wales v. Codelfa Constructions Propriety Limited* (1982) 150 CLR 29, the High Court of Australia observed:

> "… it is a power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional. …"

145. In *Bailey v. Marinoff* (1971) 125 CLR 529, Judge Gibbs of the High Court of Australia observed in a dissenting opinion:

> "It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it. .. ….The rule tests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. *However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court.* Indeed, as the way in which I have already stated the rule implies, the court has the power to vary an order so as to carry out its own meaning or to make plain language which is doubtful, *and that power does not depend on rules of court, but is inherent in the court…."*

And, further:

"The authorities to which I have referred leave no doubt that a superior court has an inherent power to vary its own orders in certain cases. The limits of the power remain undefined, although the remarks of Lord Evershed already cited suggest that it is a power that a court may exercise "if, in its view, the purposes of justice require that it should do so".

146. In *DJL v. Central Authority* (2000) 170 ALR 659, the High Court of Australia observed:

"…It is now recognized both in Australia and England that *orders made by ultimate appellate courts may be reopened by such courts in exceptional circumstances* to repair accidents and oversights which would otherwise occasion a serious injustice. In my view, this can be done although the order in question has been perfected. The reopening may be ordered *after due account is taken of the reasons that support the principle of finality of litigation. The party seeking reopening bears a heavy burden to demonstrate that the exceptional course is required "without fault on his part. …"*

147. Lastly, in *Lexcray Pty. Ltd. v. Northern Territory of Australia* 2003 NTCA 11, the Court appeals of the Supreme Court of the Northern Territory expressly stated:

"…As a final court of appeal the High Court of Australia has inherent jurisdiction to vacate its orders in cases where there would otherwise *be an irremediable injustice…."*

148. American courts also follows a similar pattern. In *United States of America v. Ohio Power Company* 353 US 98 (1957), the U.S. Supreme Court vacated its earlier order denying a timely petition for rehearing, on the ground that "the interest in finality of litigation must yield where interests of justice would make unfair, strict application of Supreme Court's Rules.

149. In *Raymond G. Cahill v. The New York, New Haven and Hartford Railroad Company* 351 US 183, the Supreme Court observed:

"…There are strong arguments for allowing a second petition for rehearing where a rigid application of this rule would cause manifest injustice."

FIJI

150. The Supreme Court of Fiji Islands incorporating Australian and British case law summarized the law applicable to review of its judgments. It has been held that the Supreme Court can review its judgments pronounced or orders made by it. The power of the appellate courts to re-open and review their orders is to be exercised with great caution.

151. The cases establish that the power of appellate courts to re-open and review their orders is to be exercised with great caution. The power, and the occasions for its exercise were considered in *In Re Transferred Civil Servants (Ireland) Compensation* (1929) AC 242, 248-52; and *State Rail Authority NSW v Codelfa Construction Pty Ltd* (1982) HCA 51 : (1982) 150 CLR 29, 38-9, 45-6, where earlier Privy Council cases are referred to. The principles were summarised in *Smith v NSW Bar Association* (1992) 176 CLR 252, 265 where the High Court of Australia said:

"The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation. Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review ... these considerations may tend against the re-opening of a case, but they are not matters which bear on the nature or the review ... once the case is re-opened ... the power to review a judgment ... where the order has not been entered will not ordinarily be exercised to permit a

general re-opening ... But ... once a matter has been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken."

152. The principles were further considered in *Autodesk Inc v Dyason* (No 2) (1993) HCA 6 : (1993) 176 CLR 300, 303 where Mason CJ said:

"What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and this ... cannot be attributed solely to the neglect of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."

153. The ratio of these judgments is that a court of final appeal has power in truly exceptional circumstances to recall its order even after they have been entered in order to avoid irremediable injustice.

154. Reviewing of various cases of different jurisdictions lead to irresistible conclusion that though the judgments of the apex court can also be reviewed or recalled but it must be done in extremely exceptional circumstances where there is gross violation of principles of natural justice.

155. In a case where the aggrieved party filing a review or curative petition was not a party to the lis but the judgment adversely affected his interest or he was party to the lis was not served with notice of the proceedings and the matter proceeded as if he had notice. This court in *State of M.P.* v. *Sugar Singh & Others* on 9th March, 2010 passed the following order in a curative petition :

"Though there were eight accused persons, only four accused were arrayed as party respondents in the said

appeals namely, Sughar, Laxman, Onkar and Ramesh. Other accused, namely,Bhoja, Raghubir, Puran and Balbir were not impleaded as respondents in these Criminal Appeals and consequently notices were not issued to them. This Court, by judgment on 7th November, 2008 in the aforesaid Criminal Appeals, reversed the acquittal of the accused by the High Court and found them guilty of the offences punishable under Section 304 Part-II read with Section 149 of the I.P.C. and sentenced them to undergo imprisonment for a period of six years. The conviction of the accused for the offences punishable under Section 148 as also Section 326 read with the Section 149 of the I.P.C. and the sentence imposed by the Sessions Court in regard to the said offences was upheld by this Court.

We have heard learned counsel for the petitioners. The respondent State, though served with a notice through standing counsel, has not chosen to enter appearance. These Curative Petitions have been filed by accused No.2 (Raghubir) and by accused no.4 and 5 (Sughar Singh and Laxman) on the ground that acquittal of Bhoja, Raghubir, Puran and Balbir have been reversed without affording an opportunity of being heard. We see that there is serious violation of principles of natural justice as the acquittal of all the accused has been set aside even though only four of them were made respondents before this Court and the others were not heard. We are, therefore, constrained to recall the 3 judgment passed by this Court in Criminal Appeal Nos.1362-1363 of 2004 on 7th November, 2008.

Consequently, the accused Sughar Singh, Laxman, Onkar and Ramesh, if they are in custody, are directed to be released forthwith.

In the result, these Curative Petitions are disposed of and the Criminal Appeal Nos.1362-1363 of 2004 are restored to the file for being heard afresh with a direction that the other four accused (Bhoja, Raghubir, Puran and

Balbir) be impleaded as respondents and all accused be served with fresh notices."

156. In the instant case, the applicants had adequate opportunity and were heard by the court at length on number of occasions and only thereafter the writ petition was disposed of. The applicants aggrieved by the said judgment filed a review petition. This review petition was also dismissed. In the instant case even the curative petition has also been dismissed. The applicants now want to reopen this case by filing these interlocutory applications.

157. The applicants certainly cannot be provided an entry by back door method and permit the unsuccessful litigant to re-agitate and reargue their cases. The applicants have filed these applications merely to avoid compliance of the order of the court. The applicants have been successful in their endeavour and have not permitted the judgment delivered on 3.2.1996 to acquire finality till date. It is strange that other respondents did not implement the final order of this court without there being any order or direction of this court. These applications being devoid of any merit deserve to be dismissed with heavy costs.

The other important principles which need elucidation are regarding unjust enrichment, restitution and compound interests.

158. Dr. Arun Mohan, Senior Advocate of this court in a recently published book with the title "Justice, Courts and Delays" analytically, lucidly while taking in view pragmatic realities elucidated concepts of unjust enrichment, restitution and compound interest.

159. By the judgment dated 13.02.1996 this court fixed the liability but did not fix any specific amount, which was ordered to be ascertained. It was on the lines of a preliminary decree in a suit which determines the liability, but leaves the precise

amount to be ascertained in further proceedings and upon the process of ascertainment being completed, a final decree for payment of the precise amount is passed.

160. By judgment dated 4.11.1997 this Court, accepting the ascertainment, fixed the amount. The order reads as under:

> "… … …remedial measures taken on the basis of the NEERI report shall be treated as final.
>
> *We accept the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National Productivity Council as the Project Management Consultant. In our opinion the Ministry of Environment and Forests, Government of India has rightly made a demand for Rs.37.385 crores."*

161. The exact liability was quantified which the applicant-M/s Hindustan Agro Chemical Ltd. was under an obligation to pay. The liability to pay arose on that particular date i.e. 4.11.1997. In other words, this was in the lines of a final decree pursuant to a preliminary decree.

162. On that judgment being passed, the position of the applicant in Application No.44 was that of 'judgment-debtor' and the applicant became liable to pay forthwith.

163. Admittedly, the amount has not been paid. Instead, that payment they sought to postpone by raising various challenges in this court and in the meantime 'utilised' that money, i.e., benefitted. As a consequence, the non-applicants (respondents-states herein) were 'deprived' of the use of that money for taking remedial measures. The challenge has now – nearly 14 years later – been finally decided against them.

164. The appellant they must pay the amount is one thing but should they pay only that amount or something more? If the period were a few days or months it would have been different but here it is almost 14 years have been lapsed and amount

has not been paid. The questions therefore are really three:

1. Can a party who does not comply with the court order be permitted to retain the benefits of his own wrong of non-compliance?

2. Whether the successful party be not compensated by way of restitution for deprivation of its legitimate dues for more than fourteen years? and

3. Whether the court should not remove all incentives for not complying with the judgment of the court?

Answering these questions will necessitate analysis of certain concepts.

165. It is settled principle of law that no one can take advantage of his own wrong.

166. Unless courts disgorge all benefits that a party availed by obstruction or delays or non-compliance, there will always be incentive for non compliance, and parties are ingenious enough to come up with all kinds of pleas and other tactics to achieve their end because they know that in the end the benefit will remain with them.

167. Whatever benefits a person has had or could have had by not complying with the judgment must being disgorged and paid to the judgment creditor and not, allowed to be retained by the judgment-debtor. This is the bounden duty and obligation of the court.

168. In fact, it has to be looked from the position of the creditor. Unless the deprivation by reason of delay is fully restituted, the creditor as a beneficiary remains a loser to the extent of the un-restituted amount.

UNJUST ENRICHMENT

169. Unjust enrichment has been defined as: "A benefit

obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense." See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573.

170. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."

171. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

172. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (*Schock* v. *Nash*, 732 A.2d 217, 232-33 (Delaware. 1999). USA)

173. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain.

174. In the leading case of *Fibrosa v. Fairbairn*, [1942] 2 All ER 122, Lord Wright stated the principle thus :

"....(A)ny civilized system of law is bound to provide

remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

175. Lord Denning also stated in *Nelson v. Larholt*, [1947] 2 All ER 751 as under:-

"It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

176. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.

RESTITUTION AND COMPOUND INTEREST

177. American Jurisprudence 2d. Volume 66 Am Jur 2d defined Restitution as follows:

"The word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or

reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

178. While Section (§) 3 (Unjust Enrichment) reads as under:

"The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

179. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity

belong to another.

180. While the term 'restitution' was considered by the Supreme Court in *South-Eastern Coalfields* 2003 (8) SCC 648 and other cases excerpted later, the term 'unjust enrichment' came to be considered in *Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs* ((2005) 3 SCC 738).ı 181. This Court said:ı"'Unjust enrichment' means retention of a benefit by a person that is unjust or inequi able. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

182. The terms 'unjust enrichment' and 'restitution' are like the two shades of green – one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.

183. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

184. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the

court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.

185. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as *Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another* [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.

186. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in *Bank of America Canada vs Mutual Trust Co.* [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :

> "There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."

187. This view seems to be correct and in consonance with the principles of equity and justice.

188. Another way of looking at it is suppose the judgment-debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.

189. In other words, if payment of an amount equivalent of

what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment.

190. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefitted is what justice requires.

LEGAL POSITION UNDER THE CODE OF CIVIL PROCEDURE

191. One reason the law has not developed on this is because of the wording of Section 34 of the Code of Civil Procedure which still proceeds on the basis of simple interest. In fact, it is this difference which prompts much of our commercial litigation because the debtor feels – calculates and assesses – that to cause litigation and then to contest with obstructions and delays will be beneficial because the court is empowered to allow only simple interest. A case for law reform on this is a separate issue.

192. In the point under consideration, which does not arise from a suit for recovery under the Code of Civil Procedure, the inherent powers in the court and the principles of justice and equity are each sufficient to enable an order directing payment of compound interest. The power to order compound interest as part of restitution cannot be disputed, otherwise there can never be restitution.

PRECEDENTS ON EXERCISE OF POWERS BY THE COURT TOMAKE THE BENEFICIARY WHOLE - RESTITUTION

193. This court in *Grindlays Bank Limited vs Income Tax Officer, Calcutta* (1980) 2 SCC 191 observed as under :-

> "…When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. …"

194. In *Ram Krishna Verma and Others vs State of U.P. and Others* (1992) 2 SCC 620 this court observed as under :-

> "The 50 operators including the appellants/ private operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in *Jeevan Nath Bahl's* case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after Sept. 29, 1959 they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of law they are continuing to ply their vehicles pending hearing of the objections. This Court in *Grindlays Bank Ltd. vs Income-tax Officer* - [1990] 2 SCC 191 held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party

responsible for it. In the light of that law and in view of the power under Article 142(1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operators including the appellants in dragging the litigation to run the stage carriages on the approved route or area or portion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated Feb. 26, 1959. …"

195. This court in *Kavita Trehan vs Balsara Hygiene Products* (1994) 5 SCC 380 observed as under :-

"The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words "Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, ...". The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court."

196. This court in *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another* (1999) 2 SCC 325 observed as under :-

"From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical

accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment creditor, it is necessary to pass appropriate order so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour decree is passed and to protect the property including further alienation."

197. In *Padmawati vs Harijan Sewak Sangh* - CM (Main) No.449 of 2002 decided by the Delhi high Court on 6.11.2008, the court held as under:-

"The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through

the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

198. We approve the findings of the High Court of Delhi in the aforementioned case.

199. The Court also stated: "Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the *lis*, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

200. Against this judgment, Special Leave to Appeal

(Civil) No 29197/2008 was preferred to the this Court. The Court passed the following order:

"We have heard learned counsel appearing for the parties. We find no ground to interfere with the well-considered judgment passed by the High Court. The Special Leave Petition is, accordingly, dismissed."

Interest on interest

201. This court in *Alok Shanker Pandey vs Union of India & Others* (2007) 3 SCC 545 observed as under:-

"We are of the opinion that there is no hard and fast rule about how much interest should be granted and it all depends on the facts and circumstances of the each case. We are of the opinion that the grant of interest of 12% per annum is appropriate in the facts of this particular case. However, we are also of the opinion that since interest was not granted to the appellant along with the principal amount the respondent should then in addition to the interest at the rate of 12% per annum also pay to appellant interest at the same rate on the aforesaid interest from the date of payment of instalments by the appellant to the respondent till the date of refund on this amount, and the entire amount mentioned above must be paid to the appellant within two months from the date of this judgment.

It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital."

Compound Interest

202. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment noted above – or to simply levelise – a convenient approach is calculating interest. But here interest

has to be calculated on compound basis – and not simple – for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

203. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors, i.e., use of the money and the inflationary trends, as the market forces and predictions work out.

204. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on administration of justice. However, the power of the court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws.

205. 'Compound interest' is defined in Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 830 as 'Interest paid on both the principal and the previously accumulated interest.' It is a method of arriving at a figure which nears the time value of money submitted under Head-2 earlier.

206. As noted, compound interest is a norm for all commercial transactions.

207. Graham Virgo in his important book on 'The Principles of the Law of Restitution" at pp26-27 has stated and relevant portion is reproduced as under:

> "In *Westdeutsche Landesbank Girozentrale v London Borough Council* 1996 A.C. 669 the issue for the House of Lords was whether compound interest was available in respect of all restitutionary claims. By a majority it was decided that, since the jurisdiction to award

> compound interest was equitable, compound interest could only be awarded in respect of equitable restitutionary claims. Consequently, where the claim was for money had and received the claimant could only obtain simple interest because this was a common law claim. The majority supported their conclusion by reference to a number of different arguments. In particular, they asserted that, since Parliament had decided in 1981 that simple interest should be awarded on claims at common law, it was not for the House of Lords to award compound interest in respect of such claims. But the Supreme Court Act 1981 does not specifically exclude the award of compound interest in respect of common law claims. Rather, it recognizes that the court can award simple interest for such claims. The equitable jurisdiction to award compound interest is still available in appropriate cases.
>
> In two very strong dissenting judgments, Lords Goff and Woolf rejected the argument of the majority. They asserted that, since the policy of the law of restitution was to remove benefits from the defendant, compound interest should be available in respect of all restitutionary claims, regardless of whether they arise at law or in equity. This argument can be illustrated by the following example. In the straightforward case where the claimant pays money to the defendant by mistake and defendant is liable to repay that money, the liability arises from the moment the money is received by the defendant, who has the use of it and so should pay the claimant for the value of that benefit. This was accepted by all the judges in the case. The difficulty relates to the valuation of this benefit. If the defendant was to borrow an equivalent amount of money from a financial institution, he or she would be liable to pay compound interest to that institution. It follows that the defendant has saved that amount of money and so this is the value of the benefit which the defendant should restore to the claimant, in addition to the value of the money which the defendant

received in the first place. If it could be shown that, had the defendant borrowed the equivalent amount of money, the institution would only have paid simple interest, it would be appropriate for the interest awarded to the claimant to be simple rather than compound. Usually, however, the interest awarded in commercial transactions will be compound interest."

208. In *Marshall sons and company (I) Limited v. Sahi Oretrans (P) Limited and another* (1999) 2 SCC 325 this court in para 4 of the judgment observed as under:

"…It is true that proceedings are dragged for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time. In such a situation, for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, the court may appoint a Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour the decree is passed and to protect the property including further alienation. …"

209. In *Ouseph Mathai and others v. M. Abdul Khadir (2002) 1 SCC 319* this court reiterated the legal position that the stay granted by the court does not confer a right upon a party

and it is granted always subject to the final result of the matter in the court and at the risk and costs of the party obtaining the stay. After the dismissal, of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection.

210. This court in *South Eastern Coalfields Limited v. State of M.P. and others (2003) 8 SCC 648* on examining the principle of restitution in para 26 of the judgment observed as under:

"In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan* v. *Board of Revenue, U.P - (1984) Supp SCC 505*) In law, the term "restitution" is used in three senses: (*i*) return or restoration of some specific thing to its rightful owner or status; (*ii*) compensation for benefits derived from a wrong done to another; and (*iii*) compensation or reparation for the loss caused to another."

211. The court in para 28 of the aforesaid judgment very carefully mentioned that the litigation should not turn into a fruitful industry and observed as under:

"… … …Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the

litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

212. The court in the aforesaid judgment also observed that once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978.

213. In a relatively recent judgment of this court in *Amarjeet Singh and others v. Devi Ratan and others* (2010) 1 SCC 417 the court in para 17 of the judgment observed as under:

"No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. … …"

214. In another recent judgment of this court in *Kalabharati Advertising v. Hemant Vimalnath Narichania and others* (2010) 9 SCC 437 this court in para 15 observed as under:

"No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court."

215. In consonance with the concept of restitution, it was observed that courts should be careful and pass an order neutralizing the effect of all consequential orders passed in pursuance of the interim orders passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits.

216. In consonance with the principle of equity, justice and good conscience judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must

be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

217. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.

218. This court in a very recent case *Ramrameshwari Devi and Others v. Nirmala Devi and Others* 2011(6) Scale 677 had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under:

> "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.
>
> 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."

219. We reiterate that the finality of the judgment of the Apex Court has great sanctity and unless there are extremely compelling or exceptional circumstances, the judgments of the Apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed.

220. This Court has consistently taken the view that the judgments delivered by this Court while exercising its jurisdiction under Article 136 of the Constitution cannot be reopened in a writ petition filed under Article 32 of the Constitution. In view of this legal position, how can a final judgment of this Court be reopened by merely filing interlocutory applications where all possible legal remedies have been fully exhausted? When we revert to the facts of this case, it becomes abundantly clear that this Court delivered final judgment in this case way back in 1996. The said judgment has not been permitted to acquire finality because the respondent Nos. 4 to 8 had filed multiple interlocutory applications and has ensured non-compliance of the judgment of this Court.

221. On consideration of pleadings and relevant judgments of the various courts, following irresistible conclusion emerge:

(i) The judgment of the Apex Court has great sanctity and unless there are extremely compelling, overriding and exceptional circumstances, the judgment of the Apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed

(ii) The exception to this general rule is where in the proceedings the concerned judge failed to disclose the connection with the subject matter or the parties giving scope of an apprehension of bias and the judgment adversely affected the petitioner.

(iii) The other exception to the rule is the circumstances incorporated in the review or curative petition are such that they must inevitably shake public confidence in the integrity of the administration of justice if the judgment or order is allowed to stand.

222. These categories are illustrative and not exhaustive but only in such extremely exceptional circumstances the order can be recalled in order to avoid irremedial injustice.

223. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that

premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts.

224. It may be pertinent to mention that even after dismissal of review petition and of the curative petition on 18.7.2002, the applicants (respondent Nos. 4 to 8) have been repeatedly filing one petition or the other in order to keep the litigation alive. It is indeed astonishing that the orders of this court have not been implemented till date. The applicants have made all possible efforts to avoid compliance of the judgment of this Court. This is a clear case of abuse of process of the court.

225. The Court in its order dated 04.11.1997 while accepting the report of the MOEF directed the applicant – M/s Hindustan Agro Chemical Ltd. to pay a sum of Rs.37.385 crores towards the costs of remediation. The amount which ought to have been deposited way back in 1997 has yet not been deposited by keeping the litigation alive.

226. We have carefully considered the facts and circumstances of this case. We have also considered the law declared by this Court and by other countries in a number of cases. We are clearly of the opinion that the concerned

applicant-industry must deposit the amount as directed by this Court vide order dated 4.11.1997 with compound interest. The applicant-industry has deliberately not complied with the orders of this court since 4.11.1997. Thousands of villagers have been adversely affected because no effective remedial steps have been taken so far. The applicant-industry has succeeded in their design in not complying with the court's order by keeping the litigation alive.

227. Both these interlocutory applications being totally devoid of any merit are accordingly dismissed with costs. Consequently, the applicant-industry is directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid or recovered.

228. The applicant-industry is also directed to pay costs of litigation. Even after final judgment of this Court, the litigation has been kept alive for almost 15 years. The respondents have been compelled to defend this litigation for all these years. Enormous court's time has been wasted for all these years.

229. On consideration of the totality of the facts and circumstances of this case, we direct the applicant-industry to pay costs of Rs.10 lakhs in both the Interlocutory Applications. The amount of costs would also be utilized for carrying out remedial measure in village Bichhri and surrounding areas in Udaipur District of Rajasthan on the direction of the concerned authorities.

230. In case the amount as directed by this Court and costs imposed by this Court are not paid within two months, the same would be recovered as arrears of the land revenue.

231. Both these interlocutory applications are accordingly disposed of.

R.P. Interlocutory Applications dismissed.

PRAHALAD SINGH & ORS.

v.

STATE OF M.P.

(Criminal Appeal Nos. 146-147 of 2008)

JULY 19, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss.302 and 307 r/w s.149 – Death of one person and grievous injury to another – Five accused, viz. 'R', 'B', 'D', 'H' and 'P' – Allegation that 'B' fired a shot causing severe injury on the head of PW-2 while 'R' fired a shot at PW-2's relative which hit him on the abdominal area killing him instantaneously – Trial Court convicted all the accused under ss.302 and 307 r/w s.149 – They filed appeal, during pendency of which, 'B' died – High Court dismissed the appeal – On further appeal by P', 'D' 'H' and 'R', held: Evidence of PW-5 was wholly reliable – The very spontaneity of the FIR indicated that PW-5 was present at the murder site – Likewise PW-6 who had arranged a tractor to take PW-2 to the police station clearly supported the view that PW-5 had been present at the site and the two had carried the injured to the hospital – PW-2 too supported the prosecution to the extent that he admitted the presence of PW-5 at the time of incident – The medical evidence also supported the eye-witnesses account – 'B' and 'R' were both armed with muzzle loading 12 bore shotguns which could have caused the injuries found on the person of the deceased as well as on PW-2 – 'P', 'H' and 'D' were armed with lathis which had not been used by them in any manner and the only allegation against them is that they had exhorted their co-accused to fire at the opposite party – The possibility that these three accused were roped in, on account of animosity cannot be ruled out and they must be given the benefit of doubt on that score – Conviction of 'R' upheld whereas conviction of 'P', 'D' and 'H' set aside.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 146-147 of 2008.

From the Judgment & Order dated 11.09.2007 of the High Court of Madhya Pradesh at Jabalpur in Crl. Appeal No. 2886 & 3027 of 1998.

WITH

Crl. A. No. 1180 of 2008.

Shiv Sagar Tiwari, Dr. V.P. Appan, Vibha Datta Makhija for the appearing parties.

The following order of the Court was delivered

O R D E R

This Order will dispose of all the above appeals as they arise from a common judgment.

The facts of the case are as under:

At 12.50 p.m. on the 30th September, 1996 as the deceased Ganeshram accompanied by his relative Annilal (PW.2) and his son Chandan Singh (PW.5) were about to cross the Narmada river on a boat, the five accused, Rammilan Lodhi and Babulal Lodhi, both armed with shot guns, and Dullam, Hukum and Prahlad armed with lathis came out of a bush. On seeing Ganeshram and the others Prahlad, Hukum and Dullam exhorted Rammilan and Babulal to fire at Ganeshram. On this exhortation Rammilan first fired a shot at Ganeshram which hit him on the abdominal area killing him instantaneously and a shot fired by Babulal caused a severe injury on the head of Annilal (PW.2), Chandan Singh (PW.5) who was behind them at some distance answering the call of nature witnessed the entire incident. He rushed to the spot and first removed the injured Annilal (PW.2)to the village and thereafter conveyed the information about the incident to PW.6 Saheb Singh – his brother. He also arranged for a tractor on which Annilal was

carried to the hospital at Narsinghpur about 20 k.m. away and the first information report was lodged in the police station Narsinghpur at about 2.30 p.m. The Investigating Officer thereafter reached the place of incident and made the necessary inquiries and also sent the dead body for its post-mortem examination. The post-mortem examination revealed a large number of pellet injuries on the person of the deceased. Rammilan was also arrested and on his disclosure statement under Section 27 of the Evidence Act a muzzle loading shot gun was seized along with pellets, gun powder and brass metal caps.

During the course of the trial Annilal(PW.2) did not support the prosecution as he was equally related to the complainant as well as the accused party. The prosecution accordingly relied on the statement of PW.5-Chandan Singh and PW.6-Saheb Singh, as also the medical evidence. The Trial Court however found that the evidence of PW.2 partly supported the other evidence inasmuch that he had admitted his presence and that of Chandan Singh at the time of the incident. The Trial Court also noted that as the charge against the accused was under Sections 302, 307, 148 and 149 of the IPC, all the accused (notwithstanding the fact that they had not fired either at the injured or the deceased) were liable to be roped in on a charge of murder. The Trial Court accordingly convicted all the accused under Sections 302 and 307 read with Section 149 and sentenced them to undergo several terms of imprisonment; all the sentences to run concurrently.

An appeal was thereafter taken by the accused to the High Court and during the pendency of the appeal Babulal, one of the main accused is said to have died. The High Court vide its judgment dated 11th September 2007 which has been impugned before us dismissed the appeal on facts and findings similar to ones recorded by the Trial Court. It is in this background that the matter is before us and after grant of leave and has been heard by us today.

Mr. Shiv Sagar Tiwari, the learned counsel for the appellants-Prahlad, Dullam and Hukum in Crl.A. Nos. 146- 147/2008 at the very outset pointed out that Annilal (PW.2) having disowned the prosecution story, the entire story hinged on the statement of PW.5 and that as there was no evidence to suggest that the appellants had caused any injury to either of the victims although they were armed with lathis, clearly ruled out their participation. He has also urged that the fact that the parties appeared to be at logger heads on account of election rivalries was said to be the reason for murder but as per the statement of Saheb Singh (PW.6), the election dispute was between Gendalalthe father of the Rammilan and the deceased but he had subsequently withdrawn his nomination form, and as such the dispute no longer existed. He has also pointed out that it is by now well settled that in the case of a solitary witness the evidence of that witness had to be wholly credible before the conviction could be recorded thereunder.

Mr. V.P. Apan, the learned counsel representing Rammilan the appellant in Crl.A.No. 1800/2008, has in addition referred to the defence evidence of Sita Ram (DW.1) the Contractor at the river crossing who testified that he had not seen any of the accused and only Annilal had been present and he had told him that some incident had taken place.

We have considered the arguments advanced by the learned counsel for the parties and perused the record. We must emphasis that the evidence of Chandan Singh (PW.5) is wholly reliable. The First Information Report had been recorded in the police station 20 k.m. away within 2 hours of the incident. The very spontaneity of the FIR indicates that Chandan Singh had been present at the murder site. Likewise Sahab Singh (PW.6) who had arranged the tractor to take Annilal to the police station clearly supports the view that Chandan Singh had been present at the site and the two had carried the injured to the hospital. Annilal, too supported the prosecution to the extent that he admitted the presence of PW.5 at the time of incident.

The medical evidence also supports the eyewitnesses account. It is the admitted case that Babulal and Rammilan were both armed with muzzle loading 12 bore shotguns which could have caused the injuries found on the person of the deceased as well as on Annilal (PW.2). Some arguments had been occasioned before the courts below with regard to the distance from which shots had been fired. The Courts have found that the shots had been fired from a short distance. We must however emphasis that where the weapon and ammunition used is of uncertain make and quality the normal pellet pattern based on standard weapons and ammunition, cannot be applied with accuracy. The distance from which the shots have been fired cannot therefore have the effect of dislodging a credible eyewitness account in such a case.

The appellants Prahlad, Hukum Singh and Dullam were armed with lathis which had not been used by them in any manner and the only allegation against them is that they had exhorted their co-accused to fire at the opposite party. We are therefore of the opinion that the possibility that these three accused have been roped in on account of animosity cannot be ruled out and we must give them the benefit of doubt on that score.

The appeal of Rammilan i.e. Crl. A. No. 1180/2008 is dismissed whereas Crl. Appeal Nos. 146-147/2008 are allowed. The accused – appellants Prahlad, Dullam and Hukum are said to be in custody. They shall be released forthwith if not required in connection with any other case.

Fee of the amicus curiae is fixed at Rs.7,000/-.

B.B.B. Appeals disposed of.