SHAH NAWAJ
v.
STATE OF U.P. & ANR.
(Criminal Appeal No. 1531 of 2011)

AUGUST 05, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Juvenile Justice/Care and Protection of Children) Rules, 2007 – Claim of juvenility – FIR lodged against appellant for commission of offence u/ss. 302 and 307 IPC – Application filed by appellant's mother before the Juvenile Justice Board that he was a minor at the time of the alleged occurrence on basis of her son's school leaving certificate – Application allowed – Session Judge set aside the order passed by the Board – Said order upheld by the High Court on the ground of absence of any matriculation or equivalent certificate – On appeal held: Documents furnished-mark sheet of High School Examination issued by the School Authority and the School Leaving Certificate issued by the Preparatory School clearly show that the date of birth of the appellant was noted as 18.06.1989 – Entry relating to date of birth entered in the mark sheet as also school leaving certificate are valid proof of evidence for determination of age of an accused person – Date of birth mentioned in the High School mark sheet produced by the appellant has duly been corroborated by the School Leaving Certificate of the appellant of Class X and has also been proved by the statement of the clerk and the principal of the School – Mother of the appellant corroborated his academic records which clearly depose his date of birth as 18.06.1989 and the appellant was a juvenile on the date of occurrence as alleged in the FIR – Thus, the Additional Sessions Judge and the High Court erred in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to

the Rules – Decision of the Board is upheld and that of the Additional Sessions Judge and the High Court are set aside – Juvenile Justice (Care and Protection of Children) Act, 2000.

An FIR was lodged against the appellant and others for commission of offence under Sections 302 and 307 IPC. The mother of the appellant filed an application before the Juvenile Justice Board that the minor was a juvenile on the alleged date of occurrence. The witnesses were cross-examined and the Board declared the appellant juvenile under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. The complainant-wife of deceased filed an appeal and the order passed by the Board was set aside. The appellant filed criminal revision. The High Court dismissed the revision on the ground that in the absence of any matriculation or equivalent certificate and the language used in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 was with reference to only certificate and not the mark sheet. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which was brought in pursuance of the Act describes four categories of evidence which have been provided in which preference has been given to school certificate over the medical report. Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available. [Paras 19 and 21] [873-B-C; 874-B]

1.2 The documents furnished mark sheet of High School Examination issued by the School Authority and the School leaving certificate dated 11.07.2007 issued by the Preparatory School clearly show that the date of birth of the appellant was noted as 18.06.1989. The entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School mark sheet produced by the appellant has duly been corroborated by the School Leaving Certificate of the appellant of Class X and has also been proved by the statement of the clerk of the School and recorded by the Board. The date of birth of the appellant has also been recorded as 18.06.1989 in School Leaving Certificate issued by the Principal of the School as well as the said date of birth mentioned in the school register of the said school which was proved by the statement of the Principal of that school recorded before the Board. Apart from the clerk and the Principal of the school, the mother of the appellant categorically stated on oath that the appellant was born on 18.06.1989 and his date of birth in his academic records from preparatory to Class X is the same, namely, 18.06.1989, thus, her statement corroborated his academic records which clearly depose his date of birth as 18.06.1989. Thus, the appellant was a juvenile on the date of occurrence as alleged in the FIR. [Para 20] [873-D-H; 874-A-B]

1.3 From the acceptable records, it is held that the date of birth of the appellant is 18.06.1989. Though the Board correctly accepted the entry relating to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents

which is illegal, erroneous and contrary to the Rules. While upholding the decision of the Board, the orders of the Additional Sessions Judge and the High Court are set aside. The appellant is declared to be a juvenile on the date of commission of offence and may be proceeded in accordance with law. [Paras 19 and 22] [873-B-C; 874-C-D]

Raju and Anr. vs. State of Haryana **2010 (3) SCC 235: 2010 (2) SCR 574;** *Hari Ram vs. State of Rajasthan and Anr.* **2009 (13) SCC 211: 2009 (7) SCR 623;** *Bhoop Ram vs. State of U.P.* **1989 (3) SCC 1:** *Rajinder Chandra vs. State of Chhatisgarh and Anr.* **2002 (2) SCC 287;** *Arnit Das vs.State of Bihar* **(2000) 5 SCC 488: 2000 (1) Suppl. SCR 69;** *Ravinder Singh Gorkhi vs. State of U.P.* **2006 (5) SCC 584: 2006 (2) Suppl. SCR 615;** *Pradeep Kumar vs. State of U.P.* **1995 Supp. (4) SCC 419 – referred to.**

Case Law Reference:

2010 (2) SCR 574	**Referred to**	**Para 7**
2009 (7) SCR 623	**Referred to**	**Para 7**
1989 (3) SCC 1	**Referred to**	**Para 8**
2002 (2) SCC 287	**Referred to**	**Para 9**
2000 (1) Suppl. SCR 69	**Referred to**	**Para 10**
2006 (2) Suppl. SCR 615	**Referred to**	**Para 11**
1995 Supp. (4) SCC 419	**Referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1531 of 2011.

From the Judgment & Order dated 10.12.2010 of the High Court of Judicature at Allahabad in Criminal Revision No. 716 of 2009.

Dinesh Kumar Garg, B.S. Billowria, Abhishek Garg, Dhananjay Garg for the Appellant.

R.K. Gupta, Rajeev Dubey, Kamlendra Mishra for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 10.12.2010 passed by the High Court of Judicature at Allahabad in Criminal Revision No. 716 of 2009 whereby the High Court dismissed the criminal revision filed by the appellant herein.

3. Brief facts:

(a) The appellant claims to have born on 18.06.1989 in Village and Post Dadheru Kala, Police Station Charthawal, District Muzaffarnagar, U.P. He was admitted in Class I in Nehru Preparatory School, Khurd, Muzaffarnagar on 05.07.1994 and studied there till 20.05.1998. Thereafter, on 04.07.1998, he got admission in Class VI in the National High School Dadheru, Khurd-O-Kalan, Muzaffarnagar and studied there till Class X. The date of birth in the mark sheet is mentioned as 18.06.1989.

(b) On 04.06.2007, a First Information Report (in short "the FIR") was lodged by Khatizan, wife of Nawab-the deceased, against the appellant herein and three others for the alleged occurrence which culminated into Crime Case No. 215 of 2007 at Police Station Charthawal, District Muzaffarnagar, U.P. under Sections 302 and 307 of the Indian Penal Code, 1860 (in short "the IPC").

(c) On 12.06.2007, the mother of the appellant submitted an application before the Juvenile Justice Board (in short "the Board"), Muzaffarnagar, U.P. stating that the appellant was a minor at the time of the alleged occurrence. After examining

the witnesses, the Board, vide judgment and order dated 24.01.2008, declared the appellant juvenile under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the Act").

(d) Against the judgment of the Board, Khatizan - the wife of the deceased filed Criminal Appeal No. 11 of 2008 before the Additional Sessions Judge, Muzaffarnagar, U.P. under Section 52 of the Act. The State – respondent No.1 did not file any appeal. Vide judgment dated 13.01.2009, the Additional Sessions Judge allowed the appeal and set aside the order dated 24.01.2008 passed by the Board.

(e) Challenging the judgment dated 13.01.2009 passed by the Additional Sessions Judge, the appellant filed Criminal Revision No. 716 of 2009 before the High Court of Allahabad. The High Court, by the impugned judgment dated 10.12.2010, dismissed the criminal revision. Hence this appeal by way of special leave.

4. Heard Mr. Dinesh Kumar Garg, learned counsel for the appellant and Mr. R.K. Gupta, learned counsel for the State. Despite notice, no one has entered appearance on behalf of respondent No.2.

5. Before considering the merits of the claim of the appellant and the stand of the State, let us consider Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as 'the Rules') which reads as under:-

> **"12. Procedure to be followed in determination of Age.**— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence

whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

6. In the light of the above procedure to be followed in determining the age of the child or juvenile, let us consider various decisions of this Court.

7. In *Raju and Anr. vs. State of Haryana* (2010) 3 SCC 235, this Court had admitted "mark sheet" as one of the proof in determining the age of the accused person. In that case, the appellants therein Raju and Mangli along with Anil alias Balli and Sucha Singh were sent up for trial for allegedly having committed an offence punishable under Section 302 read with

Section 34 of the IPC. Accused Sucha Singh was found to be a juvenile and his case was separated for separate trial under the Act. Others were convicted under Section 302 read with Section 34 of the IPC and were sentenced to imprisonment for life and to pay a fine of Rs. 5,000/-. Apart from contending on the merits of the prosecution case, insofar as appellant No. 1, Raju, is concerned, the counsel appearing for him submitted that on the date of the incident that is on (31.03.1994), he was a juvenile and as per his mark sheet, wherein his date of birth was recorded as 1977, he was less than 17 years of age on the date of the incident. Learned counsel submitted that having regard to the recent decision of this Court in *Hari Ram vs. State of Rajasthan & Anr.,* (2009) 13 SCC 211, appellant No. 1 must be held to have been a minor on the date of the incident and the provisions of the Act would apply in his case. Learned counsel further contended that the appellant No. 1 would have to be dealt with under the provisions of the said Act in keeping with the decision in the aforesaid case. On merits, while accepting the claim of the learned counsel for accused-appellant, this Court altered the conviction and sentence and convicted under Section 304 Part I read with Section 34 IPC instead of Section 302 read with Section 34 IPC. As far as appellant No. 1, namely, Raju was concerned, while accepting the entry relating to date of birth in the mark sheet referred his case to the Board in terms of Section 20 of the Act to be dealt under the provisions of the said Act in keeping with the provision of Section 15 thereof. It is clear from the said decision that this Court has accepted mark sheet as one of the proof for determining the age of an accused person.

8. Similarly, this Court has treated the date of birth in School Leaving Certificate as valid proof in determining the age of an accused person. In *Bhoop Ram vs. State of U.P.* (1989) 3 SCC 1, this Court considered whether the appellant therein is entitled lesser imprisonment than imprisonment for life and should have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 (1 of 1952). The

following conclusion in para 7 is relevant which reads as under:-

> "7…..The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars…."

It is clear from the above decision that this Court relied on the entry made in the column "date of birth" in the School Leaving Certificate.

9. In *Rajinder Chandra vs. State of Chhattisgarh and Anr.* (2002) 2 SCC 287, this Court once again considered the entry relating to date of birth in the mark sheet and concluded as under:

> "5. It is true that the age of the accused is just on the border of sixteen years and on the date of the offence and his arrest he was less than 16 years by a few months only. In Arnit Das v. State of Bihar this Court has, on a review of judicial opinion, held that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. The law, so laid down by this Court, squarely applies to the facts of the present case.

10. In *Arnit Das vs. State of Bihar,* (2000) 5 SCC 488, this Court held that while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf

of the accused in support of the plea that he is a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be juvenile in borderline cases.

11. In *Ravinder Singh Gorkhi vs. State of U.P.* (2006) 5 SCC 584 with regard to the entries made in School Leaving Certificate, this Court has observed as under:-

> "17. The school-leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1-8-1967 and his name was struck off from the roll of the institution on 6-5-1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school, there was no reason as to why the same had not been produced."

12. In *Pradeep Kumar vs. State of U.P.* 1995 Supp (4) SCC 419, this Court considered the commission of offence by persons below 16 years of age. The question before a three-Judge Bench was whether each of the appellants in those appeals was a child within the meaning of Section 2(4) of the

U.P. Children Act, 1951 and as such on conviction under Section 302 read with Section 34 IPC should have been sent to an approved school for detention till the age of 18 years. At the time of granting special leave, appellant, by name, Jagdish produced High School Certificate, according to which he was about 15 years of age at the time of occurrence. Appellant - Krishan Kant produced horoscope which showed that he was 13 years of age at the time of occurrence. So far as appellant - Pradeep was concerned, a medical report was called for by this Court which disclosed that his date of birth as 07.01.1959 was acceptable on the basis of various tests conducted by the medical authorities. In the above factual scenario/details, this Court concluded as under:-

> "3. It is thus proved to the satisfaction of this Court that on the date of occurrence, the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Section 302/34 of the Act"

After saying so and after finding that the appellants were aged more than 30 years, this Court directed not to send them to an approved school under the U.P. Children Act for detention, while sustaining the conviction of the appellants under all the charges framed against them, quashed the sentences awarded to them and ordered their release forthwith.

13. The applicability of the Act and the Rules in respect of "Juvenile" and "Juvenile in conflict with law" have been elaborately considered by this Court in *Hari Ram* (supra). After analyzing the Scheme of the Act and various Rules including Rule 12 and earlier decisions of this Court laid down various principles to be followed. After applying those principles and finding that the appellant therein was 16 years of age on the date of the commission of the alleged offence and had not been completed 18 years of age, remitted the matter to the Board for disposal in accordance with law.

Discussion on merits:

14. In the light of the above principles, now let us consider the claim of the appellant. According to him, on 18.06.1989, he was born in Village and Post Dadheru Kala, Police Station Charthawal, District Muzaffarnagar, U.P. On 05.07.1994, he was admitted in Class I in Nehru Preparatory School, Khurd, Muzaffarnagar. The appellant left the said school on 20.05.1998. On 04.07.1998, he was admitted in Class VI in the National High School Dadheru, Khurd-O-Kalan, Muzaffarnagar, U.P. On 21.05.2004, he left the said school, namely, National High School as he failed in High School. From Class VI till Class X the appellant remained and studied continuously in the aforesaid school. The date of birth in the mark sheet is mentioned as 18.06.1989. The alleged occurrence took place on 04.06.2007. The FIR was lodged on 04.06.2007 which culminated into Crime Case No. 215 of 2007 at Police Station Charthawal, District Muzaffarnagar, U.P. under Sections 302 and 307 of the IPC. On 12.06.2007, the mother of the appellant submitted an application before the Board at Muzaffarnagar stating that the appellant was a minor at the time of alleged occurrence. The appellant was provided a School Leaving Certificate dated 11.07.2007 from Nehru Preparatory School, Khurd, Muzaffarnagar. The mother of the appellant made a statement dated 26.07.2007 regarding the age of her son. She was cross-examined at length. On 16.10.2007, the statement of clerk of Nehru Preparatory School was recorded by the Board. The said clerk brought the entire records maintained by the School. The said clerk was also cross-examined at length.

15. The Board, vide judgment and order dated 24.01.2008, declared the appellant juvenile under the Act. Against the judgment of the Board, the complainant Smt. Khatizan, wife of deceased Nawab filed Criminal Appeal No. 11 of 2008 under Section 52 of the Act before the learned Additional Sessions Judge, Muzaffarnagar. It is relevant to point out that the State, who is the prosecuting agency did not file any appeal. The

Additional Sessions Judge, Muzaffarnagar recorded the statement of Guljar Hussain, Principal of Nehru Preparatory School, Dadheru, Khurd-O-Kalan, Muzaffarnagar on 07.08.2008. By order dated 13.01.2009, the Additional Sessions Judge allowed the said appeal filed by the complainant and set aside the order dated 24.01.2008 passed by the Board.

16. Aggrieved by the order of the Additional Sessions Judge, the appellant filed Criminal Revision No. 716 of 2009 before the High Court. The High Court dismissed the said Revision mainly on the ground that in the absence of any matriculation or equivalent certificate and considering the language used in Rule 12 with reference to only "Certificate" and not "mark sheet", dismissed the Revision petition.

17. We have already referred to the decision of this Court about the entry relating to the date of birth made in the mark sheet of High School examination. The appellant has produced mark sheet of High School examination issued by the school authority, namely, National High School, Dadheru, Khurd-O-Kalan, Muzaffarnagar. A perusal of the above said certificate makes reference to appellant's Roll No., his name, Date of Birth, name of the school, details regarding various subjects, maximum marks, marks obtained and ultimate result in the examination. The certificate contained signature of the Clerk Salim Ahmed, who prepared the same, the signature of the examiner and signature and seal of the Head Master. It is dated 21.05.2004.

18. Another document relied on by the appellant is School Leaving Certificate dated 11.07.2007 issued by Nehru Preparatory School, Khurd, Muzaffarnagar wherein it noted the registration no., name of the school, student's name, date of birth (18.06.1989) written in words also, Father's name, occupation, caste, residential address, date of admission in school, date of leaving of school. The certificate contained the

signature and seal of the Head Master and the same is dated 11.07.2007.

19. The documents furnished above clearly show that the date of birth of the appellant had been noted as 18.06.1989. Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules.

20. We are satisfied that the entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School mark sheet produced by the appellant has duly been corroborated by the School Leaving Certificate of the appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd-O-Kalan and recorded by the Board. The date of birth of the appellant has also been recorded as 18.06.1989 in School Leaving Certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-O-Kalan, Muzaffarnagar as well as the said date of birth mentioned in the school register of the said school at S. No. 1382 which have been proved by the statement of the Principal of that school recorded before the Board. Apart from the clerk and the Principal of the school, the mother of the appellant has categorically stated on oath that the appellant was born on 18.06.1989 and his date of birth in his academic records from preparatory to Class X is the same, namely,

18.06.1989, hence her statement corroborated his academic records which clearly depose his date of birth as 18.06.1989. Accordingly, the appellant was a juvenile on the date of occurrence that is 04.06.2007 as alleged in the FIR dated 04.06.2007.

21. We are also satisfied that Rule 12 of the Rules which was brought in pursuance of the Act describes four categories of evidence which have been provided in which preference has been given to school certificate over the medical report.

22. In the light of the above discussion, we hold that from the acceptable records, the date of birth of the appellant is 18.06.1989, the Additional Sessions Judge and the High Court committed an error in taking contrary view. While upholding the decision of the Board, we set aside the orders of the Additional Sessions Judge dated 13.01.2009 and the High Court dated 10.12.2010. Accordingly, the appellant is declared to be a juvenile on the date of commission of offence and may be proceeded in accordance with law. The appeal is allowed.

N.J. Appeal allowed.

BHASKAR MISHRA
v.
STATE OF MADHYA PRADESH
(Special Leave Petition (CRL) No. 5568 of 2011)

AUGUST 8, 2011

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

Bail – Repeated applications – Gross misuse of the process of the Court – Case registered u/s.307 IPC – Accused filed application for anticipatory bail u/s.438 Cr.P.C. before the Court of Sessions which was dismissed – High Court however granted anticipatory bail to the accused for a period of four weeks and also directed him to apply for regular bail in the meanwhile – Accused filed application in the Court of Sessions u/s.439 Cr.P.C. for grant of regular bail – Application dismissed – Accused again moved the High Court praying that the period of four weeks granted by the High Court for moving an application for regular bail be extended – High Court extended the time – Accused filed another application in the High Court u/s.438 r/w ss.439 and 482 of Cr.P.C. for grant of regular bail – Application dismissed by the High Court on the ground that the accused was not in custody – Accused filed yet another application for further extending the period of four weeks which too was dismissed – Accused thereupon filed SLP which was dismissed – Accused filed yet another application u/s.438 CrPC before High Court – Application dismissed – Instant SLP against the said order – Held: The accused-petitioner had been absconding and though he was shown great indulgence by the Sessions as well as the High Court on several occasions, the directions issued by the courts were relentlessly flouted – The repeated applications were a gross misuse of the process of the court – SLP dismissed with direction that no further application for bail anticipatory or otherwise will be entertained

by any Court until and unless the accused-petitioner deposited a sum of Rupees One Lac before the Court of Sessions as a pre-condition for the consideration of any bail application that he may choose to file – Code of Criminal Procedure, 1973 – ss.438 and 439.

Siddharam Satlingapppa Mhetre v. State of Maharashtra and Others, **2011 (1) SCC 694: 2010 (15) SCR 201 – referred to.**

Case Law Reference:

2010 (15) SCR 201	**referred to**	**Para 3**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 5568 of 2011.

From the Judgment & Order dated 29.04.2011 of the High Court of Madhya Pradesh Bench at Indore in M. Cr. C. No. 2171 of 2011.

Vikas Upadhyay, Dr. Vipin Gupta for the Petitioner.

The following order of the Court was delivered

O R D E R

1. This Special Leave Petition is an example of the gross misuse of the process of the Court. The facts are as under:

2.A case under Section 307 of the Indian Penal Code was registered against the petitioner in Police Station MIG, Indore, Madhya Pradesh. Apprehending his arrest, he filed an application for anticipatory bail under Section 438 of the Cr.P.C. on the 3rd of September 2010 before the Court of Sessions which was dismissed on the 7th September 2010. The petitioner thereupon filed a similar application before the Madhya Pradesh High Court and on the 24th September 2010 the High Court granted anticipatory bail to the petitioner for a

period of four weeks and also directed him to apply for regular bail in the meanwhile. The petitioner accordingly filed an application dated 5th of October 2010 in the Court of Sessions, Indore under Section 439 of the Cr.P.C. for the grant of regular bail. The matter was listed on seven different dates between the 5th of October 2010 and the 1st of November 2010 and except for one date (i.e. the 20th October 2010) the petitioner remained absent during the hearing of the bail application pleading sickness. The Sessions Judge finally dismissed the application on the 1st of November 2010. The petitioner again moved the High Court on the 26th October 2010 praying that the period of four weeks granted by the High Court for moving an application for regular bail be extended. The High Court vide its order dated 26th October 2010 extended the time up till 12th November 2010. The petitioner instead of surrendering before the Sessions Court filed another application dated 8th November 2010 in the High Court under Section 438 read with Sections 439 and 482 of the Cr.P.C. for the grant of regular bail. This application was dismissed by the High Court on the 12th of November 2010, by observing that an application under Section 439 would lie only if an accused was in custody. Still undeterred, the petitioner filed yet another application for further extending the period of four weeks which too was dismissed on the 16th of December 2010. The petitioner thereupon filed SLP (CRL) No. 849-850 of 2011 impugning the orders dated 12th November, 2010 and 16th December, 2010 which was dismissed by this Court on the 1st of February 2011. After the dismissal of the SLP, the petitioner filed yet another application under Section 438 of the Criminal Procedure Code before the High Court on the plea that the judgment of this Court in *Siddharam Satlingapppa Mhetre Versus State of Maharashtra and Others* [2011 (1) SCC 694] had not earlier been brought to the notice of the High Court or the Supreme Court. This application too has been dismissed by the impugned order dated 29th April, 2011 observing that the cited judgment was not applicable to the facts of the case as four earlier applications for anticipatory bail had been rejected. This

order has now been impugned before us.

3. We have heard the learned counsel for the petitioner and gone through the record. The facts reproduced above show that the petitioner has been absconding and though he has been shown great indulgence by the Sessions as well as the High Court on several occasions, the directions issued by the courts have been relentlessly flouted. We are, therefore, of the opinion that the repeated applications are a gross misuse of the process of the court and the matter has to be dealt with in that background. We accordingly dismiss the Special Leave Petition and direct that no further application for bail anticipatory or otherwise will be entertained by any Court until and unless the petitioner deposits a sum of Rupees One Lac before the Court of Sessions at Indore as a pre condition for the consideration of any bail application that he may choose to file. A copy of this order be sent to the Registrar General of the Madhya Pradesh High Court as also to the Sessions Judge who is seized of the matter.

4. The Special Leave Petition is dismissed accordingly.

B.B.B. Special Leave Petition dismissed.

RAJENDER SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 1051 of 2009)

AUGUST 08, 2011

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

Narcotic Drugs and Psychotropic Substance Act: s.42 – Non-compliance of – Held: s.42 pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself – s..42(2) is categorical that the information if taken down in writing shall be sent to the superior officer forthwith – Non-compliance with the provisions sub-section (1) and (2) of s.42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced – In the instant case, appellant was convicted u/s.18 on the basis of statement of PW-5, DSP and PW-6, Inspector and recovery of opium from the residence of the appellant – PW-6 clearly admitted that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities – Likewise, PW-5 did not state that he received any written information from his junior officer Inspector – Dispatch of a wireless message to PW-6 does not amount to compliance with s.42(2) of the Act – There was, therefore, complete non-compliance with the provisions of s.42(2) of the Act which vitiated the conviction of the appellant.

The prosecution case was that on 30.1.1997, PW-6, inspector of the CIA staff sent a Ruqa to Police station that while he was present at the bus adda of the village

in connection with the investigation of a case, he had received secret information that the appellant was an opium addict and was also dealing in its sale and that he had kept some opium in the shed used for storing fodder in his farm house. On the basis of said Ruqa, a formal FIR was drawn up for the offence punishable under section 18 of the NDPS Act, 1985. A wireless message was also sent to the DSP, PW-5 to reach the spot. The effort of the police party, however, to join some independent witnesses from the public was unsuccessful. In the meanwhile, PW-5 also reached that place and the police party made its way to the farm house of the appellant. The fodder room was opened after taking the key from the appellant and searched which led to the recovery of 3.500 kilograms of opium. 50 grams was taken out for sampling and the remainder of the opium was sealed. The appellant was also arrested by the DSP and after completion of the investigation, was charged under Section 18 of the Narcotic Drugs and Psychotropic Substance Act and was accordingly brought to trial. The prosecution placed almost exclusive reliance on the statements of PW-5 DSP and PW-6 Inspector as also the recovery of the opium from the residence of the appellant. In his statement under Section 313, Cr.P.C. the appellant admitted that he had already been convicted by the Additional Sessions Judge, Hisar on the 15th March 1997 for having been found in possession of 14 Kilograms of Heroin, though an appeal had been filed against the conviction. He also stated that he was on bail in that appeal.

The trial court relying on the said evidence and circumstances held that the case against the appellant had been proved beyond doubt and merely because no independent witness had been associated with the proceedings could not be taken against the prosecution as an effort had been made to associate some witness,

but no one agreed to the police request. The court also found that the provisions of Sections 52, 55 and 57 of the Act were complied with and no prejudice could, therefore, be claimed by the appellant. The court further observed that it was clear from the evidence of PWs.5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 were recorded by him in a Ruqa which had been sent to the Police Station for registration of a FIR and that he had also informed PW-5 on wireless about the information received by him on which the latter had reached the place of search and seizure. The trial court further noted that as the appellant was a previous convict, a lenient view could not be taken in his case. He was accordingly sentenced to undergo 20 years RI and to pay a fine of Rs.2,00,000/- and in default of payment of fine to undergo RI for 2 years. The judgment of the trial court was confirmed in appeal by the High Court. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. A reading of Section 42 of the Narcotic Drugs and Psychotropic Substance Act pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2) is categorical that the information if taken down in writing shall be sent to the superior officer forthwith. The total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. PW-6 clearly admitted in his cross-examination that he had not prepared any record

about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP did not utter a single word about the receipt of any written information from his junior officer Inspector. The dispatch of a wireless message to PW-6 does not amount to compliance with Section 42(2) of the Act. There was, therefore, complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction. [Paras 4, 5, 6] [886-G-H; 887-A-B; 888-G-H; 889-A-B]

Karnail Singh vs. State of Haryana **(2009) 8 SCC 539: 2009 (11) SCR470;** *State of Karnataka vs. Dondusa Namasa Baddi* **(2010) 12 SCC 495: 2010 (9) SCR 670 – relied on.**

Case Law Reference:

2009 (11) SCR 470	**relied on**	**Para 2**
2010 (9) SCR 670	**relied on**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1051 of 2009.

From the Judgment & Order dated 09.08.2004 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 218-DB of 1999.

Zafar Sadique, Asghar Khan, Balraj Dewan for the Appellant.

Manjit Singh, AAG, Tarjit Singh, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI,J.

This appeal arises out of the following facts.

1. At about 4 p.m. on the 30th January 1997, PW-6

Inspector Kuldip Singh of the CIA Staff, Hisar sent Ruqa Ex. PG to Police Station Bhuna that while he was present at the Bus Adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh @ Chhinder, was an opium addict and also dealing in its sale, and that he had kept some opium in the shed used for storing fodder in his farm house, and if raid was organized, the opium could be recovered. On the basis of the aforesaid Ruqa, a formal First Information Report was drawn up for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the "Act"). A wireless message was also sent to the DSP, Fatehabad PW-5 Charanjit Singh to reach the spot. The effort of the police party, however, to join some independent witnesses from the public was unsuccessful. In the meanwhile, PW-5 also reached that place and the police party made its way to the farm house of the appellant. The lock on the fodder room was opened after taking the key from the appellant and searched which led to the recovery of 3.500 kilograms of opium. 50 grams was taken out for sampling and the remainder of the opium was sealed. The appellant was also arrested by the DSP and after completion of the investigation, was charged under Section 18 of the Act and was accordingly brought to trial. The prosecution placed almost exclusive reliance on the statements of PW-5 Charanjit Singh DSP and PW-6 Kuldip Singh Inspector as also the recovery of the opium from the residence of the appellant. In his statement under Section 313 of the Cr.P.C. the appellant admitted that he had already been convicted by the Additional Sessions Judge, Hisar on the 15th March 1997 for having been found in possession of 14 Kilograms of Heroin, though an appeal had been filed against the conviction. He also stated that he was on bail in that appeal. The trial court relying on the aforesaid evidence and circumstances held that the case against the appellant had been proved beyond doubt and merely because no independent witness had been associated with the proceedings could not be taken against the prosecution as an effort had been made

to associate some witness, but no one agreed to the police request. The court also found that the provisions of Sections 52, 55 and 57 of the Act had been complied with and no prejudice could, therefore, be claimed by the appellant. The court further observed that it was clear from the evidence of PWs.5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 had been recorded by him in a Ruqa which had been sent to the Police Station for registration of a FIR and that he had also informed PW-5 on wireless about the information received by him on which the latter had reached the place of search and seizure. The trial court further noted that as the appellant was a previous convict, a lenient view could not be taken in his case. He was accordingly sentenced to undergo 20 years RI and to pay a fine of Rs.2,00,000/- and in default of payment of fine to undergo RI for 2 years. The judgment of the trial court had been confirmed in appeal by the High Court leading to the present proceedings before us.

2. Mr. Zafar Sadiqui, the learned counsel for the appellant, has made four submissions during the course of the hearing. He has first submitted that as the provisions of Section 42(2) of the Act had not been complied with, the conviction of the appellant could not be sustained in the light of the judgment of the Constitution Bench of this Court in *Karnail Singh vs. State of Haryana* (2009) 8 SCC 539. He has further submitted that no serious effort had been made to associate an independent witness with the search and seizure and that the link evidence in the case was also missing as the Malkhana register pertaining to the recovered opium was deposited had not been produced as evidence. He has finally submitted that as the provisions of Sections 52, 55 and 57 of the Act had not been complied with was an additional reason as to why the conviction could not be sustained. Mr. Manjit Dalal, the learned counsel for the State of Haryana, has however supported the judgments of the courts below and has pointed out that the Ruqa Exhibit PA had been sent to the Police Station for the registration of

the FIR and the fact that information had been conveyed on the wireless to DSP Charanjit Singh was sufficient compliance with the provisions of Section 42(2) of the Act. He has also controverted the other submissions made by Mr. Sadiqui.

3. We have heard the learned counsel for the parties and gone through the judgment impugned. To our mind, the entire controversy hinges on Section 42 which is reproduced below:

> "42. Power of entry, search, seizure and arrest without warrant or authorization. – (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-
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> (a) enter into and search any such building, conveyance or place;
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> (b) in case of resistance, break open any door and remove any obstacle to such entry;
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> (c) seize such drug or substance and all materials used

> in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
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> (d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance.
>
> Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.
>
> (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.
>
> 42(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he

should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith. In Karnail Singh's case, this Court has held that the provisions of Section 42(2) are mandatory and the essence of the provisions has been set out in the following terms:

> "In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
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> (a) The Officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
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> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42 (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
>
> (c) *In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.*
>
> (d) *While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.* To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. *Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."*

5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced.. We have gone through the evidence of PW-6 Kuldip Singh. He

clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.

6. Mr. Dalal, the learned counsel for the respondent-State has, however, referred to paragraph 34 of the judgment of the Constitution Bench in which general observations have been made with regard to the provisions of Section 41 (1) and 42(2) with respect to the latest electronic technology and the possibility that the said provisions may not be entirely applicable in such a situation. Concededly the present case does not fall in this category. In any case the principles settled by the Constitution Bench are in paragraph 35 and have already been re-produced by us hereinabove. Likewise, the dispatch of a wireless message to PW-6 does not amount to compliance with Section 42(2) of the Act as held by this Court in *State of Karnataka vs. Dondusa Namasa Baddi* (2010) 12 SCC 495.

7. In the light of the fact what has been held above, we are not inclined to go to the other issues raised by Mr. Sadiqui. We, accordingly allow the appeal, set aside the judgments of the courts below and order the appellant's acquittal.

D.G. Appeal allowed.

AMIT SINGH
v.
STATE OF MAHARASHTRA & ANR.
(Writ Petition (Criminal) No. 16 of 2010)

AUGUST 08, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000*:*

ss. 2(l), 7-A, 15, 20, Explanation (as amended by Amendment Act, 2006) and s. 64 read with s. 15 – Petitioner, along with others, convicted and sentenced to imprisonment for life u/ss 395, 120-B IPC etc. – Writ petition praying for release of the petitioner in terms of the provisions of the Act on the ground that he was below 18 years of age but on the date of occurrence, i.e., 1.5.1999 – HELD: Explanation to s. 20 which was added in 2006 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of s.2, even if juvenile ceased to be a juvenile on or before 01.04.2001, when the Act came into force and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed – The petitioner was juvenile at the time of commission of the offence and, as such, entitled to the benefit of ss.2(1), 7-A, 20 and 64 of the Act – The claim of juvenility can be raised before any court at any stage, even after final disposal of the case – State Government or the Board could, either suo motu or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order u/s 64 of the Act for immediate release of the juvenile whose period of detention had exceeded the maximum period provided in

s. 15 of the Act i.e. 3 years – As the petitioner has already undergone 12 years in jail, he is directed to be released forthwith – Juvenile Justice (Care and Protection of Children) Rules, 2007 – rr. 12 and 98 – Constitution of India, 1950 – Articles 32 and 21.

The petitioner along with others was convicted of offences punishable u/ss 396, 506, 341 379 read with s. 120-B IPC and was sentenced to imprisonment for life. He filed the instant writ petition contending that his date of birth was 10.5.1982 and, as such, on the date of occurrence, i.e., 1.5.1999, when the offence took place, he was less than 18 years of age. He prayed for a writ in the nature of habeas corpus directing the respondents to release him from jail as his detention was contrary to Article 21 of the Constitution of India and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Allowing the writ petition, the Court

HELD: 1. In the Birth Certificate (Annexure-P1), the Transfer Certificate (Annexure-P2), and the mark sheet issued by the Council for the Indian School Certificate Examinations, the date of birth of the petitioner has been recorded as 10.05.1982 and duly certified and authenticated by the authorities concerned. In view of r. 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000 all these documents are relevant and admissible in evidence. Thus, on the date of the incident which took place on 01.05.1999, the petitioner was below 18 years, and, therefore, he was a juvenile in terms of the Juvenile Justice (Care and Protection of Children) Act, 2000 and, as such, is entitled to get the benefit of provisions u/ss. 2(l), 7A, 20 and 64 of the Act. [para 11] [901-B-F]

Hari Ram vs. *State of Rajasthan and Others* **2009**

(7) SCR 623 = (2009) 13 SCC 211; and *Shah Nawaz* vs. *State of U.P.* **2011 (8) JT 475 – relied on.**

1.2 No doubt, the benefit was not claimed by the petitioner earlier; neither the claim was raised before the trial court nor thereafter up to this Court. The petitioner has substantiated that he was a juvenile as per the Act and he could be tried only by the Board and, therefore, the matter should be referred before the Board for trial. It is further seen that the proceedings were started against him on 01.05.1989 before the regular court and during the pendency of the trial, the Act was enacted and it is his claim that inadvertently he was not advised that he is entitled to get the benefit under the Act after the enactment because he had already completed the age of 18 years as on 01.04.2001. It is relevant to point out that the applicability of the Act was clarified by Amending Act 33/2006 which provided that the benefit of juvenility shall be extended even to juvenile who had completed the age of 18 years on 01.04.2001 and the Act shall have retrospective effect. [para 8] [898-B-E]

Pratap Singh vs. *State of Jharkhand & Anr.*, **2005 (1) SCR 1019 = (2005) 3 SCC 551 – referred to.**

1.3 The Explanation to s. 20 which was added in 2006 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of s.2, even if juvenile ceased to be a juvenile on or before 01.04.2001, when the Act came into force and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular

court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Board concerned for passing sentence in accordance with the provisions of the Act. [para 9] [899-C-F]

1.4 It is clear from s. 7A that the claim of juvenility may be raised before any court at any stage, even after final disposal of the case and it sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. Apart from the provisions of the Act as amended, and the Rules, r. 98, in particular, has to be read along with s. 20 of the Act as amended by the Amendment Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board could, either *suo motu* or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order u/s 64 of the Act for immediate release of the juvenile whose period of detention had exceeded the maximum period provided in s. 15 of the Act i.e. 3 years. It is specifically asserted that the petitioner has already undergone 12 years in jail, which is more than the maximum period for which a juvenile may be confined to a special home. In the circumstances, the petitioner is directed to be released from the custody forthwith. [para 10-12] [900-F-H; 901-A, F-G]

Case Law Reference:

2009 (7) SCR 623	**relied on**	**para 5**
2005 (1) SCR 1019	**referred to**	**para 9**
2011 (8) JT 475	**relied on**	**para 11**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 16 of 2010.

Under Article 32 of the Constitution of India.

Brijender Chahar, Saket Agarwal, Ashish Tayal, Vivek Gupta for the Petitioner.

Shankar Chillarge, Praatik Bombarde, Asha Gopalan Nair, Ameet Singh, P. Swarup, Garvesh Kabra, Alka Sinha, Anuvrat Sharma for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The petitioner has filed this writ petition under Article 32 of the Constitution of India praying for issuance of an appropriate writ in the nature of habeas corpus directing the respondents to release him from Central Jail, Agra forthwith as the detention is contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India and the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the Act').

2. **The facts of the case are:**

(a) On 01.05.1999, at about 8.30 p.m., one Santosh Kumar (since deceased) along with his servant was returning to his house with daily earning cash from his shop. When he reached near the hospital of Dr. Desh Pandey at Ahmednagar, two unknown persons came on a Motorcycle and demanded the money bag which was in his hand but he refused to give that bag. Thereafter, the pillion rider got down from the Motorcycle and threatened to kill him if the bag is not given and taken out a revolver which was kept underneath his shirt and fired which resulted in injury on his chest. In spite of the injury, the deceased ran towards his residence which was nearer to the scene of occurrence but dashed against the window and fell down. His relatives came out and took him to the Hospital where he was declared dead at about 9.05 p.m.

(b) A complaint was registered by the police bearing Crime Case No. I-96/1999 under Sections 307, 392, 341, 34,

506 read with 34 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC") and Sections 3, 5, 25 and 27 of the Arms Act, 1959. The Investigating Officer arrested the accused persons namely, Balu Rangnath Chintamani, Vithal Ramayya Madur, Intekhab Alam Abdul Salam Sain and Amit Singh Thakur, the petitioner herein, and Sessions Case No. 150 of 1999 was registered against the said four accused in the Sessions Court, Ahmednagar.

(c) The Additional Sessions Judge, Ahmednagar, vide order dated 16.04.2001 held all the four accused persons to be guilty of offences punishable under Sections 396, 506, 341, 379 read with Section 120-B of IPC and sentenced each of them to suffer life imprisonment and to pay a fine of Rs.3000/- and also under Section 3 read with Section 25(1-B) and Section 5 read with Section 27 of the Arms Act, 1959 and sentenced them to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.3000/-.

(d) Against the said judgment, all the four accused filed appeals before the High Court. The High Court, by judgment dated 05.08.2005, allowed the appeals filed by A-2 and A-3 and dismissed the appeals filed by A-1 and A-4 (appellant herein).

(e) Challenging the said judgment of the High Court, the appellant filed Special Leave Petition (Crl.) No. 1114 of 2006 before this Court which was dismissed on 05.01.2007.

3. Heard Mr. Brijender Chahar, learned senior counsel for the petitioner and Mr. Shankar Chillarge, learned counsel for the State-respondent No.1 and Mr. Ameet Singh, learned counsel for respondent No.2.

4. This writ petition is filed by the petitioner praying that he was a Juvenile at the time of the alleged offence and therefore, he could be tried only by the Juvenile Justice Board (in short 'the Board').

5. According to the petitioner, he had not completed 18 years of age as on the date of commission of the offence, i.e., 01.05.1999, though he had completed 18 years as on 01.04.2001 i.e. the date of implementation of the Act. According to amending Act 33/2006 in the Act, the benefit of juvenility shall be extended to the petitioner. It was further stated that he is entitled to get the benefit of the said law, which was after due consideration by this Court in the case of Hari Ram vs. State of Rajasthan and Others, (2009) 13 SCC 211 settled the position, whereby this Court gave effect to the Proviso and the Explanation to Sections 20 and 7A which were introduced by the above said Amending Act by applying the provisions of the Act with retrospective effect. Accordingly, it is prayed that the petitioner is entitled to get the benefit of the Act, even after final conviction.

6. We have already adverted to in the earlier paras regarding the petitioner's involvement in the criminal charges framed against him and the orders of conviction imposed. From the materials, it is seen that the petitioner Amit Singh s/o late Bhikamsingh Thakur was born on 10.05.1982 in Jhansi, U.P. and his date of birth is registered with the Registrar, Births and Death, Nagar Palika Parishad, Jhansi. According to the record of Nagar Palika Parishad, Jhansi, the date of birth certificate of the petitioner is recorded as 10.05.1982 bearing registration No. 1184/97 dated 04.08.1997. The petitioner has produced a copy of birth certificate (Annexure-P1) issued by the Registrar, Nagar Palika Parishad, Jhansi. A perusal of the birth certificate issued by the competent authority clearly shows that his date of birth is 10.05.1982.

7. Further information from the materials placed shows that the petitioner started his studies from St. Mark's College, Jhansi w.e.f. 12.06.1985. He left the school on 27.05.1996 and obtained a Transfer Certificate mentioning that his date of birth is recorded as 10.05.1982 in the admission register of the school. Transfer Certificate dated 14.06.1997 issued by the

Principal, St. Mark's College, Jhansi has been marked as Annexure-P2. A perusal of the said Transfer Certificate clearly shows that his date of birth is 10.05.1982 and the same was duly noted by the School Authorities with the seal and signature of the Principal, St. Mark's College, Jhansi. Apart from the above materials, when the petitioner was arrayed as accused in Criminal Case No. 64 of 1997 entitled Amit Singh vs. State of M.P. he moved an application for bail being No. 935 of 1997 before the Special Judge, Murena, M.P. The learned Special Judge considered the above-mentioned High School Certificate, birth certificate, report of Civil Surgeon, report of Dental Surgeon, affidavit of his mother Shakuntala Bai and report of Radiologist. The Special Judge, relying upon the above-mentioned reports, found that the date of birth of the petitioner is 10.05.1982 and his age was below 16 years on the date of occurrence, directed the police to produce him before the Juvenile Court for further action. Copy of the said order dated 13.08.1987 passed by the Special Judge, Murena is placed before this Court (Annexure-P3). A perusal of the order of the Special Judge, Murena also shows that considering various materials relating to the date of birth of the petitioner, he had concluded that the date of birth of the petitioner is 10.05.1982 and the alleged incident took place on 01.05.1999, on the date of the occurrence, the age of the petitioner was 16 years 11 months and 21 days. The Act came into effect from 01.04.2001 which provides that juvenile means who has not completed 18 years of age as substituted for 16 years which was the position under the old Act of 1986. According to the Act, the petitioner was juvenile at the time of commission of offence because he had not completed 18 years of age on the date of offence, and therefore, the petitioner is entitled to get the benefit of provisions under Sections 2(l), 7A, 20 and 64 of the Act.

8. The petitioner-(A-4) was convicted for the offence under Sections 307, 392, 341, 34, 506 read with Section 34 IPC and Sections 3, 5, 25 and 27 of the Arms Act and sentenced him

to life imprisonment with fine of Rs.3,000/-. Though the above said conviction and sentence was confirmed by this Court, vide its impugned judgment and order dated 05.01.2007, the age of the petitioner and the benefit of the Act was not considered by this Court. No doubt, this plea and the benefit was not claimed by the petitioner earlier neither the same was raised before the trial Court nor thereafter up to this Court. We have already observed that from the materials placed, the petitioner had substantiated that he was a juvenile as per the Act and he could be tried only by the Board and hence the matter should be referred before the Board for trial. It is further seen that the proceedings were started against him on 01.05.1989 before the regular Court and during the pendency of the trial, the Act was enacted and it is his claim that inadvertently he was not advised that he is entitled to get the benefit under the Act after the enactment because he had already completed the age of 18 years as on 01.04.2001. It is relevant to point out that the applicability of the Act was clarified by Amending Act 33/2006 which provided that the benefit of juvenility shall be extended even to juvenile who had completed the age of 18 years on 01.04.2001 and the Act shall have retrospective effect.

9. The relief prayed for in this writ petition is squarely covered by the law laid down in the case of *Hari Ram* (supra) whereby this Court had occasion to consider the question elaborately regarding applicability of the Act. This Court considered the decision of the Constitution Bench in the case of *Pratap Singh vs. State of Jharkhand & Anr.,* (2005) 3 SCC 551, wherein this Court formulated two points for consideration:

A. Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as juvenile offender or the date when he is produced in the Court/Competent Authority?

B. Whether the Act of 2000 will be applicable in the case a proceeding is initiated under the 1986 Act

and pending when the Act of 2000 was enforced with effect from 01.04.2001?

The Constitution Bench in the above case held that the benefit of juvenility cannot be extended to the person who has completed the 18 years of age as on 01.04.2001 i.e. the date of enforcement of the Act. In the background of this judgment, the Legislature brought Amendment Act 33/2006 proviso and explanation in Section 20 to set at rest doubts that have arisen with regard to the applicability of the Act to the cases pending on 01.04.2001, where a juvenile, who was below 18 years of age at the time of commission of the offence, was involved. The explanation to Section 20 which was added in 2006 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if juvenile ceased to be a juvenile on or before 01.04.2001, when the Act came into force and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Board concerned for passing sentence in accordance with the provisions of the Act.

10. After the judgment of the Constitution Bench in *Pratap Singh* (supra), this Court in the case of *Hari Ram* (supra) considered the above question of law in the light of Amendment Act 33 of 2006 in the provisions of the Act which substituted Section 2(l) to define a "juvenile in conflict with law" as a "juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence". By way of Amendment Act 33/2006, Section 7A was inserted which reads as follows:-

"7A. Procedure to be followed when claim of juvenility is raised before any court.—(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

It is clear from the above provision, namely, Section 7A the claim of juvenility to be raised before any court at any stage, even after final disposal of the case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. Apart from the aforesaid provisions of the Act as amended, and the Juvenile Justice (Care and Protection of Children) Rules, 2007, (in short 'the Rules') Rule 98, in particular, has to be read along with Section 20 of the Act as amended by the Amendment Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board could, either suo motu or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for immediate release of the

juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act i.e. 3 years. All the above relevant provisions including the amended provisions of the Act and the Rules have been elaborately considered by this Court in *Hari Ram* (supra).

11. We have already referred to the entry relating to the date of birth of the petitioner in the Birth Certificate (Annexure-P1), entry relating to his date of birth in the Transfer Certificate (Annexure-P2), date of birth recorded in the mark sheet issued by the Council for the Indian School Certificate Examinations. In all these documents, his date of birth has been recorded as 10.05.1982 and duly certified and authenticated by the authorities concerned. In a recent decision of this Court dated 05.08.2011 in Criminal Appeal No. 1531 of 2011 arising out of SLP (Criminal) No. 3361 of 2011, *Shah Nawaz vs. State of U.P.* while considering similar documents, namely, certificate issued by the School Authorities and basing reliance on Rule 12 of the Rules held that all those documents are relevant and admissible in evidence. Inasmuch as the date of birth of the petitioner is 10.05.1982 and on the date of the alleged incident which took place on 01.05.1999, his age was 16 years, 11 months and 21 days i.e. below 18 years, hence on the date of the incident, the petitioner was a juvenile in terms of the Act because he had not completed 18 years of age and is entitled to get the benefit of provisions under Sections 2(l), 7A, 20 and 64 of the Act. It is also specifically asserted that the petitioner had already undergone 12 years in jail since then which is more than the maximum period for which a juvenile may be confined to a special home.

12. Under these circumstances, the petitioner is directed to be released from the custody forthwith. The writ petition is allowed.

R.P. Writ Petition allowed.

COMMISSIONER OF CENTRAL EXCISE, MUMBAI
v.
M/S. KALVERT FOODS INDIA PVT. LTD. AND ORS.
(Civil Appeal Nos.4500-4502 of 2003)

AUGUST 9, 2011

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

Central Excise Act, 1944*: s.11A – Demand of duty and levy of penalty – Suppression of facts – Extended period of limitation – Invocation of – Allegation that assessee-company clandestinely removed excisable goods by showing them as non-excisable – Held: The statement of Managing Director was on record where he had admitted the fact of clandestine clearance of excisable goods and, therefore, has voluntarily come forward to sort out the issue and to pay the central excise duty liability – The company was also maintaining two sets of computerized commercial invoices, one for excisable products and the other for non-excisable goods – Plea of company that the goods were not excisable inasmuch as they were not packed in containers under a brand name not tenable since the Managing Director of the company had himself stated that they have been selling their products under the brand name "Kalvert" – Goods manufactured and sold by the company under a brand name "Kalvert" were, therefore, liable to be charged for excise duty – Since there was clandestine removal of excisable goods, the period of limitation has to be computed from the date of knowledge, arrived at upon raids on the premises – Extended period of limitation would be invokable as there was suppression of facts by the company with the intention to evade the excise duty.*

Evidence*: Statement made before Central Excise Officers – Admissibility of – Plea that statement made by the Managing Director of the assessee-company was not reliable*

– Held: Statements of Managing Director of the company and other persons were recorded by the central excise officers and they were not police officers, therefore, their statements containing all the details about the functioning of the company which could be made only with their personal knowledge could not have been obtained through coercion or duress or through dictation – These statements, therefore, can be relied upon.

***Trade Mark**: Registered and unregistered brand name/ trade marks – Held: It is not necessary that "Brand name" should be compulsorily registered – A person can carry on his trade by using a "Brand name" which is not even registered – But in violation/infringement of trade mark, remedy available would be distinctly different to an unregistered brand name from that of remedy available to a registered brand name.*

Respondent no. 1-company was engaged in the manufacture of P & P Food Products, such as, assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. It was also trading in sugar, salt and pepper by packing them into small packs. Respondent no. 2 was the Managing Director of the Company.

On 22.11.2000, on receiving information that respondents were indulging in clandestine removal of its finished P & P food products without payment of central excise duty, the revenue authorities searched its factory premises. Searches were also carried out at the premises of its distributors/wholesale dealers/traders situated in and around Mumbai and other connected premises. During the search conducted at the premises of the respondent-company several incriminating documents, articles and records were found. A huge quantity of finished goods were also found lying in the factory premises. It was also noticed that there was one tempo parked inside the factory premises loaded with cartons containing the excisable goods manufactured by the

company and was about to leave the factory premises. On inquiry from the driver of the said tempo, it was found that the driver was not in possession of any documents relating to the goods loaded in the said tempo. On inspection of invoices at the premises of the respondent-company, it was also found that there were two invoices with the same serial number, in respect of different products. The officers took stock of the goods in the factory and it was found that the finished goods lying in the factory were in excess of the stock shown and accounted for in the RGI Register. Thereafter, search was also carried out at the premises of the dealers/traders, to whom the company allegedly supplied the finished goods. The goods found lying in those premises were also seized on the ground that they were not duty paid. Similarly, the search was carried out by the officers at the premises of the selling agent of the respondent-company (M/s. RTC), a partnership firm of the Managing Director of the respondent-company (M/s. SKC); and at the premises of sole proprietor of M/s RTC and records pertaining to the sale and purchase of the goods lying in the offices of these companies were seized. The searching officers found that, in fact, the respondent-company had cleared jams, syrup, sauces, pickles, etc., from the factory premises to the said selling agents without payment of duty, but had shown those clearances as that of the sugar, in the invoices and had also cleared the branded goods to the dealers/traders.

A show cause notice was issued to the respondent-company, its Director, the proprietor of M/s. RTC, its partner and M/s. SKC. Through notices issued, duty demand was raised from the company and penalty was also proposed to be imposed on the company. The adjudicating authority held that the respondent-company with the connivance of the respondents 2 and 3 had deliberately attempted to pass off excisable goods as

non-excisable goods with an intent to evade payment of excise duty and confirmed the duty demand and ordered confiscation of the seized goods and also imposed penalty equivalent to the amount of duty on the company.

The Tribunal set aside the findings of the adjudicating authority on the ground that the respondents were not guilty of clandestine removal of excisable goods and also that the goods of respondent-company were not excisable inasmuch as they were allegedly not packed in containers under a brand name and therefore not required to pay any excise duty. The instant appeals were filed challenging the order of the Tribunal.

Allowing the appeal, the Court

HELD: 1. The plea of the respondent that the statements of the Managing Director of the Company and other persons were retracted and cannot be relied upon was not tenable. The statements of Managing Director of the Company and other persons were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and, therefore, could not have been obtained through coercion or duress or through dictation. There was no reason why the said statements made in the circumstances of the case should not be considered, looked into and relied upon. It was established from the record that the said statements were given by the concerned persons out of their own volition and there was no allegation of threat, force, coercion, duress or pressure being used by the officers to extract the statements which corroborated each other. Besides, the Managing Director of the Company on his own volition

deposited the amount of Rs. 11 lakhs towards excise duty. This fact clearly proved the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress. The statement of Managing Director of the Company was on record where he had admitted the fact of clandestine clearance of excisable goods and, therefore, has voluntarily come forward to sort out the issue and to pay the Central Excise duty liability. Similar statement of the proprietor of RTC was also recorded under Section 14 of the Central Excise Act, 1944 along with the Production Supervisor of the respondent-company. [Paras 18-20] [914-G-H; 915-A-H]

2. The adjudicating authority came to the conclusion that the respondent-company with the connivance of respondent nos. 2 and 3 were clandestinely removing excisable goods as non-excisable goods with intent to evade payment of excise duty. However, the said order passed by the adjudicating authority was set aside by the Tribunal holding that neither the tempo nor the goods loaded therein could be legally seized and confiscated when the relevant documents were shown to the officers at the spot. It was also observed by the Tribunal that it could not be said that an attempt was being made to clear those goods in tempo in a clandestine manner, when the company representative produced the invoices and other relevant documents in respect thereof. These findings were arrived at by the Tribunal apparently ignoring the materials. There was no reference about the statement of the sole proprietor of M/s. RTC, in the order passed by the Tribunal, when she was examined under Section 14 of the Central Excise Act, she had clearly stated that her company bought large quantities of excisable goods from the respondent-company and in turn sold them to its distributors. She also confirmed the documents seized from her residence which included correspondence with

their customers regarding promotion of the "Kalvert brand" products. The Tribunal failed to consider and discuss the specific allegation of the appellant that respondent-company maintained two sets of computerized commercial invoices, one for excisable products like jams, sauce, syrup etc and the other for non-excisable goods such as salt, sugar and pepper which were marked as L series. It also came on evidence that L series sales for the period 1996-1999 was only made to M/s RTC in huge quantities and that in the guise of selling salt, sugar and pepper, the respondent-company was in fact selling excisable goods to M/s RTC. These facts were found and taken note of by the adjudicating authority but the same were totally ignored by the Tribunal. Due to the said reasons and on the basis of the materials available on record, the Company was guilty of clandestine removal of excisable goods as non-excisable goods in order to evade excise duty. It was proved from the fact that the Managing Director voluntarily came forward to sort out the issue and to pay the Excise duty and paid Excise duty to the extent of Rs. 11 lacs on different dates. The said act of the respondent-company was very material and relevant but the same was also ignored by the Tribunal while arriving at a wrong conclusion. Therefore, the issue with regard to the clandestine removal of excisable goods as non-excisable goods by the respondent from their premises and selling to its dealers and distributors was clearly proved from the materials on record. [Para 22-26] [916-E-H; 917-A-H; 918-A]

3. Since there was clandestine removal of excisable goods, the period of limitation in the instant case has to be computed from the date of knowledge, arrived at upon raids on the premises. Therefore, the extended period of limitation would be available as there was suppression of facts by the respondents with the intention to evade

the central excise duty inasmuch as they did not account for the manufactured goods in the prescribed record. The Tribunal also recorded a finding that the respondents never cleared the goods in question under any brand name and being unbranded they were chargeable to NIL rate of duty. The said finding was also unacceptable. The Managing Director of the respondent-company has himself stated that they have been selling their products under the brand name "Kalvert" and on the basis of the said statement and other record found on the articles sold by the respondent company the said finding of the Tribunal was wrong and perverse. The Tribunal also held that because the brand name "Kalvert" was not registered in their name therefore it could not be held that respondents were using 'brand name'. The Tribunal further held that the name on the goods manufactured and cleared by the respondent in the market could at best be termed as "House mark" and not brand name/trade name. The said findings were also totally wrong and recorded in violation of the law of Trade Marks. It is not necessary that "Brand name" should be compulsorily registered. A person can carry on his trade by using a "Brand name" which is not even registered. But in violation/infringement of trade mark, remedy available would be distinctly different to an unregistered brand name from that of remedy available to a registered brand name. Unfortunately, the Tribunal did not consider and properly appreciate the apparent distinction between the two distinct expressions i.e. "House mark" and "Brand name" and thereby proceeded to set aside the well-written Judgment passed by the adjudicating authority who had recorded his reasons giving cogent basis for his reasoning. It is clear that what was being used by the respondent under the expression "Kalvert" was a "Brand name" and not a "House mark" as sought to be alleged by the respondent and was wrongly accepted by the Tribunal. Therefore, the articles of assorted jams, pickles,

squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. manufactured and sold by the respondent company under a brand name "Kalvert" were liable to be charged for excise duty at the rate prescribed in the Excise Law. [Para 27-31, 34, 35, 37] [918-B-H; 919-C-E-H; 920-A-E-F]

Tarai Food Ltd. v. Commissioner of Central Excise, Meerut-II **2007(8) S.T.R. 442 (S.C.);** *Astra Pharmaceutical Pvt. Ltd*. *v.* Collector of Central Excise, Chandigarh **1995 (75) E.L.T. 214 (S.C.) – relied on.**

Narayanan's Book on Trade Marks and Passing-Off **; "*Trade Marks*"by *Sarkar*;** "*Law of Trade Marks*" **by** *K.C. Kailasam and Ramu Vedaraman* **– referred to.**

Case Law Reference:

2007 (8) S.T.R. 442 (SC)	**relied on**	**Para 31**
1995 (75) E.L.T. 214 (SC)	**relied on**	**Para 32, 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4500-4502 of 2003.

From the Judgment and Order dated 02.08.2002 of the Hon'ble Central Excise and Gold Control Appellate Tribunal in Appeal A. No. E/1595-1597/2002-NB(DB).

Harish Chandra, Sunita Rani Singh, B.K. Prasad, Mohd. Mannan, P. Parmeswaran for the Appellant.

Balbir Singh, Abhishek Singh Bagnel, Rajesh Kumar and Rupender Sinhmar for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. These appeals arise out of Judgment and Order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi Bench [for short "CEGAT"] on 02.08.2002 whereby the Tribunal had allowed the appeals filed by the respondents holding that the

respondents were not guilty of clandestine removal of excisable goods and also that the goods of the respondent no. 1 were not excisable inasmuch as they were not packed in containers under a brand name.

2. Before entering into rival contentions of the parties, it would be necessary although in a nutshell to look into the facts of the case leading to filing of the present appeals.

3. The respondent No. 1, M/s. Kalvert Foods India Pvt. Ltd. is a company (in short hereinafter referred to as 'the Company') engaged in the manufacture of P & P Food Products, such as, assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. The company is also trading in sugar, salt and pepper by packing into small packs. The respondent No. 2, Shri Yunus A. Kalvert is the Managing Director of the Company.

4. On 22.11.2000, on receiving information that respondents were indulging in clandestine removals of its finished P & P food products without payment of Central Excise Duty, the revenue authorities searched the factory premises of the respondent no. 1. Searches were also carried out at the premises of its distributors/wholesale dealers/traders of respondent no. 1 situated in and around Mumbai and other connected premises.

5. During the search conducted at the premises of the respondent no. 1 several incriminating documents, articles and records were found. A huge quantity of finished goods were also found lying in the factory premises. Further, it was also noticed that there was one tempo parked inside the factory premises loaded with cartons containing the excisable goods manufactured by the said company and was about to leave the factory premises. On inquiry from the driver of the said tempo it was found that the driver was not in possession of any documents relating to the goods loaded in the said tempo. On inspection of invoices at the premises of the respondent no. 1,

it was also found that there were two invoices with the same serial number, in respect of different products. The officers took stock of the goods in the factory and it was found that the finished goods lying in the factory were in excess of the stock shown and accounted for in the RGI Register.

6. Specific allegation against the respondent is that the goods found lying excess in the stock than what were entered into RGI register, valued at Rs. 7,33,668/- and the same was seized.

7. Thereafter, search was also carried out at the premises of the dealers/traders, to whom the company allegedly supplied the finished goods. The goods found lying in those premises to the value of Rs. 6,22,946/- were also seized on the ground that they were not duty paid.

8. Similarly, the search was carried out by the officers on 28-11-2000, at the premises of M/s. Relish Trading Company (in short 'RTC')/the selling agent of the respondent-company, M/s. Sai Krupa, a partnership firm of the Managing Director of the respondent No. 1; and at the premises of sole proprietor of RTC and records pertaining to the sale and purchase of the goods lying in the offices of these companies, were seized. It revealed to the searching officers that, in fact, the respondent-company had cleared jams, syrup, sauces, pickles, etc., from the factory premises to the above said selling agents without payment of duty, but had shown those clearances as that of the sugar, in the invoices and had also cleared the branded goods to the dealers/traders.

9. After completion of the entire process a show cause notice was issued to the Company and its Director. Such notices were also issued to the proprietor of M/s. RTC, its partner and M/s. Sai Krupa Corporation. Through notices issued, duty demand was raised from the company and penalty was also proposed to be imposed on the company. Reply was filed by the respondents to the aforesaid show cause notices.

10. The adjudicating authority, namely, the Commissioner of Central Excise, Mumbai, passed an order dated 27.02.2002, holding that the respondent no. 1 with the connivance of the respondents 2 and 3 have deliberately attempted to pass off excisable goods as non-excisable goods with an intent to evade payment of excise duty. Consequently, the Commissioner confirmed the duty demand and ordered confiscation of the seized goods and also imposed penalty equivalent to the amount of duty on the company and also directed to pay interest on the excise duty etc.

11. Being aggrieved by the aforesaid order, respondents filed appeals before the CEGAT. The said appeals were heard and Tribunal passed the judgment and order on 02.08.2002, which is impugned herein. The Tribunal by its order set aside the findings of the Commissioner of Central Excise, Mumbai holding that the respondents were not guilty of clandestine removal of excisable goods and also that the goods of respondent no. 1 were not excisable inasmuch as they were allegedly not packed in containers under a brand name and therefore not required to pay any excise duty.

12. The present appeals are directed and preferred against the said judgment and order on which we heard learned counsel appearing for the parties.

13. The learned counsel appearing for the parties have painstakingly and extensively taken us through the relevant documents on record to which reference shall be made during the course of our discussion hereinafter. However, before we record our findings and the conclusions on the issues raised, we must also deal with the tariff headings and some of the documents which are relevant for our purpose and material available on record.

14. Admittedly, the years with which we are concerned in these appeals are 1996-97, 1997-98 and 1998-99. So far the year of 1996-97 is concerned the relevant entry for our purpose

is 20.01 and sub-heading 2001.00 under Chapter 20 of the Central Excise Tariff of India 1996-97 (incorporating rates of Central Excise & Service Tax). Chapter 20 relates to preparations of vegetables, fruits, nuts or other parts of plants and it prescribes "Nil" rate of duty for the goods mentioned in this sub-heading 2001.00. Description of goods in the said sub-heading is as under:

> "preparations of vegetables, fruit, nuts or other parts of plants, including jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, fruit juices and vegetable juices, whether or not containing added sugar or other sweetening matter put up in unit containers and bearing a brand name"

15. Chapter 20 of the Central Excise Tariff of India 1998-99 (incorporating rates of Central Excise & Service Tax as in operation on 2nd June, 1998) prescribes 8% excise duty for the goods mentioned under sub heading 2001.10. Description of goods mentioned in sub-heading 2001.10 is as under:

> "preparations of vegetables, fruit, nuts or other parts of plants, including jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, fruit juices and vegetable juices, whether or not containing added sugar or other sweetening matter put up in unit containers and bearing a brand name".

What is brand name is also explained in the notes included in Chapter 20 to the following effect:

> ""brand name" means a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any

> indication of the identity of that person".

16. Chapter 21, of the Central Excise Tariff of India 1998-99 (incorporating rates of Central Excise & Service Tax as in operation on 2nd June, 1998) relates to "Miscellaneous Edible Preparations". It also prescribes 8% excise duty for the goods mentioned under sub heading 2103.10. Description of goods mentioned in sub-heading 2001.10 is as under:

> "Sauces, ketchup and the like and preparations therefore; fixed condiments and mixed seasonings; mustard flour and mead and prepared mustard put up in unit containers and bearing a brand name"

Sub-heading 2108.20 prescribes 18% excise duty for "Edible preparations, not elsewhere specified or including Sharbat" under Chapter 21. Sub-heading 2203.00 also prescribes 18% excise duty for "Vinegar and substitutes for vinegar obtained from acetic acid" under Chapter 22.

17. During the search operation carried out by the appellants several incriminating articles were found with brand name "Kalvert Anchor" or "Kalvert" in assorted forms which were manufactured by M/s. Kalvert Foods (I) P. Ltd. During the course of investigation statement of Shri Yunus A. Kalvert, Managing Director of respondent company was recorded under Section 14 of the Central Excise Act, 1944, who inter alia deposed that the respondent company was engaged in the manufacture of P & P food products like jams; pickles; syrups; vinegars etc. bearing their brand name "KALVERT ANCHOR" and the other Directors of the company viz. Shri Akbar Ali Kalvert, his father and Shri Irshad Y. Kalvert.

18. During the course of arguments learned counsel appearing for the respondent submitted before us that although the aforesaid statements of Managing Director of the Company and other persons were recorded during the course of judicial proceedings but the same were retracted statements, and

therefore, they cannot be relied upon. However, the statements were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon.

19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides, the Managing Director of the Company on his own volition deposited the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstance of the present case, the aforesaid statement of the counsel for the respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress.

20. During the course of arguments our attention was also drawn to the statement of Managing Director of the Company where he had admitted the fact of clandestine clearance of excisable goods and therefore has voluntarily come forward to sort out the issue and to pay the Central Excise duty liability and that he has paid Central Excise duty voluntarily under TR6 Challans totaling to Rs. 11,00,000/- on various dates. Similarly statement of Miss Vinita M. Khanolkar – proprietor of RTC was also recorded under Section 14 of the Central Excise Act, 1944 along with Shri Shekhar Mogaviera – Production Supervisor of M/s. Kalvert Foods India Pvt. Ltd. Statements of various other

persons were also recorded under Section 14 of the Central Excise Act.

21. Our attention was also drawn by the counsel appearing for the appellant to the findings recorded by the adjudicating authority to the fact that there have been recovery of unaccounted finished excisable goods from 8 different dealers in and around Mumbai and that there have been creation of firms dealing in similar products from the same premises by the same persons having no capital or machinery and also that there have been only one tempo invariably used for delivery of excisable goods from factory to the buyers though some invoices were issued by the firms other than M/s. Kalvert Foods India Pvt. Ltd. and that there have been use of parallel sets of invoices of the same serial numbers supported by recovery of a serially numbering machine and blank invoices without any printed serial numbers.

22. On the basis of the aforesaid material discussed hereinbefore the adjudicating authority came to the conclusion that the respondent no. 1 with the connivance of respondent nos. 2 and 3 have been deliberately clandestinely removing excisable goods as non-excisable goods with intent to evade payment of excise duty. However, the aforesaid judgment and order passed by the adjudicating authority, namely, the Commissioner of Central Excise, Mumbai, was set aside by the Tribunal holding that neither the tempo nor the goods loaded therein could be legally seized and confiscated when the relevant documents were shown to the officers at the spot. It was also observed by the Tribunal that it could not be said that an attempt was being made to clear those goods in tempo in a clandestine manner, when the company representative produced the invoices and other relevant documents in respect thereof. These findings were arrived at by the Tribunal apparently ignoring the materials which are considered hereinbefore and referred to.

23. There is no reference about the statement of Miss

Vinita M. Khanolkar - sole proprietor of M/s. RTC, in the judgment of order passed by the Tribunal, when she was examined under Section 14 of the Central Excise Act, she had clearly stated that her company bought large quantities of excisable goods from the respondent company and in turn sold them to its distributors. She also confirmed the documents seized from her residence which included correspondence with their customers regarding promotion of the "Kalvert brand" products.

24. The Tribunal also failed to consider and discuss the specific allegation of the appellant that respondent no. 1 maintained two sets of computerized commercial invoices, one for excisable products like jams, sauce, syrup etc and the other for non-excisable goods such as salt, sugar and pepper which were marked as L series. It has also come on evidence that L series sales for the period 1996-1999 was only made to RTC in huge quantities and that in the guise of selling salt, sugar and pepper, the respondent No. 1 was in fact selling excisable goods to RTC. These facts have been found and taken note of by the adjudicating authority but the same were totally ignored by the Tribunal.

25. Due to the aforesaid reasons and on the basis of the materials available on record it is clear that the Company was guilty of clandestine removal of excisable goods as non-excisable goods in order to evade excise duty. It is proved from the fact that the Managing Director voluntarily came forward to sort out the issue and to pay the Excise duty and paid Excise duty to the extent of Rs. 11,00,000/- on different dates. The aforesaid act of the respondent no. 1 was very material and relevant but the same was also ignored by the Tribunal while arriving at a wrong conclusion.

26. Therefore, according to us the issue with regard to the clandestine removal of excisable goods as non-excisable goods by the respondent from their premises and selling to its

dealers and distributors is clearly proved from the materials on record.

27. In view of the aforesaid position and since there was clandestine removal of excisable goods, the period of limitation in the present case would have to be computed from the date of their knowledge, arrived at upon raids on the premises. In the present case therefore the extended period of limitation would be available as there was suppression of facts by the respondents with the intention to evade the central excise duty inasmuch as they did not account for the manufactured goods in the prescribed record.

28. The Tribunal has also recorded a finding that the respondents never cleared the goods in question under any brand name and being unbranded they were chargeable to NIL rate of duty.

29. The aforesaid finding is also unacceptable. The Managing Director of the respondent company has himself stated that they have been selling their products under the brand name "Kalvert" and on the basis of the said statement and other record found on the articles sold by the respondent company the aforesaid finding of the Tribunal is wrong and perverse.

30. The Tribunal has also held that because the brand name "Kalvert" was not registered in their name therefore it cannot be held that respondents were using 'brand name'. The Tribunal further held that the name on the goods manufactured and cleared by the respondent in the market could at best be termed as "House mark" and not brand name/trade name.

31. In our considered opinion, the aforesaid findings are also totally wrong and recorded in violation of the law of Trade Marks. During the course of arguments, our attention was drawn to a Judgment of this Court in the case of T*ARAI FOOD LTD. V. COMMISSIONER OF CENTRAL EXCISE, MEERUT-II,* reported in 2007(8) S.T.R. 442 (S.C.). While

placing reliance on the said Judgment, the counsel appearing for the respondents submitted that what is a 'Brand name' is as stated in paragraph 4 of the said Judgment. He relied on the said definition of 'Brand name' and then submitted that the phrase "New Improved Quick Frozen French Fries" was not held to be a brand name, and therefore, according to him the brand name of the respondent company "Kalvert" being a "House Name" could not be termed as "Brand Name".

32. In our considered opinion, the aforesaid brand name "New Improved Quick Frozen French Fries" is a descriptive word and the same could not have been termed and coined either as a "house name" or a "brand name" under any circumstances. There can be no dispute therefore with regard to the proposition of law laid down by this Court in the aforesaid decision. We may also refer to another decision of this Court in *Astra Pharmaceutical Pvt. Ltd. V. Collector of Central Excise, Chandigarh,* reported in [1995 (75) E.L.T. 214 (S.C.)]. That was a case of Pharmaceutical product. In the said decision also the manner and scope of "Brand name" and distinction between 'House mark' and "Product mark/Brand name" has been brought out. It was stated therein by this Court that "House mark" which is usually a device in the form of an emblem, word or both is an identification of the manufacturer which is compulsory under the Drug Rules. On the other hand, product mark or brand name is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In paragraph 6 of the said Judgment, *Narayanan's Book on Trade Marks and Passing-Off* was also referred to and since the same may have a bearing to the facts of the present case, it is extracted herein below:

"677A. House mark and Product mark (or Brand name).

In the pharmaceutical business a distinction is made between a House mark and a Product mark. The former is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both. For each

product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In respect of all products both the Product mark and House mark will appear side by side on all the labels, cartons etc. Goods are ordered only by the product mark or Brand name. The House mark serves as an emblem of the manufacturer projecting the image of the manufacturer generally."

33. In the book of "Trade Marks" by Sarkar, the distinction between the expressions "House mark" and "Product mark" or "Brand name" has been clearly brought out by way of reference to the decision in *Astra Pharmaceutical Pvt. Ltd.* (supra). It is stated therein that "House mark" is used on all the products of the manufacturer and that it is usually a device or a form of emblem of words or both. It was also pointed out that for each product a separate mark known as a "Product mark" or "Brand name" is used which is invariably a word or combination of word and letter or numeral by which the product is identified and asked for. It was also stated that in respect of all products both the "Product mark" and "Brand name" would appear side by side on all the labels, cartons etc. and that the "House mark" is used generally as an emblem of the manufacturer projecting the image of the manufacturer, whereas "Brand name" is a name or trade mark either unregistered or registered under the Act.

34. Therefore, it is not necessary that "Brand name" should be compulsorily registered. A person can carry on his trade by using a "Brand name" which is not even registered. But in violation/infringement of trade mark, remedy available would be distinctly different to an unregistered brand name from that of remedy available to a registered brand name.

35. Unfortunately, the Tribunal did not consider and properly appreciate the apparent distinction between the two distinct expressions i.e. "House mark" and "Brand name" and thereby proceeded to set aside the well-written Judgment passed by

the Commissioner of Central Excise, Mumbai who has recorded his reasons giving cogent basis for his reasoning.

36. In the book of "Law of Trade Marks" by K.C. Kailasam and Ramu Vedaraman the distinction between 'Product mark' and 'House mark' has been beautifully delineated, which is as under:

> "It is possible that the proprietor may use several trade marks in respect of his goods (known as Product mark), besides using a common mark in all his products to indicate the origin of the goods from the enterprise (known as House mark). This practice is more predominant in the pharmaceutical trade. Though both are trade marks and are registrable as such, each has its own distinct function. While the House mark represents the image of the enterprise from which the goods emanate, the Product mark is the means by which goods are identified and purchased in the market place and it the focal point of presentation and advertisement."

37. In view of above discussion, it is clear that what was being used by the respondent under the expression "Kalvert" was a "Brand name" and not a "House mark" as sought to be alleged by the respondent and has been wrongly accepted by the Tribunal. Therefore, the articles of assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. manufactured and sold by the respondent company under a brand name "Kalvert" were liable to be charged for excise duty at the rate prescribed in the Excise Law.

38. The Tribunal committed manifest error in coming to its conclusion and therefore the order passed by the Tribunal is set aside and the order dated 27.02.2002 passed by the Commissioner of Central Excise, Mumbai is restored.

39. The appeals are allowed to the aforesaid extent but leaving the parties to bear their own costs.

D.G. Appeals allowed.

RAMACHANDRAPPA

v.

THE MANAGER, ROYAL SUNDARAM ALLIANCE INSURANCE COMPANY LIMITED

(Civil Appeal No 6481 of 2011)

AUGUST 9, 2011

[G. S. SINGHVI AND H.L. DATTU, JJ.]

MOTOR VEHICLES ACT, 1988:

s. 166 – Motor accident – Permanent disability – Suitable compensation – Expression 'disability' – Connotation of – Claimant, a coolie, aged about 35 years, suffered grievous injuries – Permanent physical disability of right upper limb – Tribunal awarded total compensation of Rs. 1,13,900/- – High Court enhanced the compensation to Rs. 1,33,900/- – Held: Compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury – Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper – In the instant case, the claim of claimant that his annual income was Rs.4500/- is honest and bona fide – The doctor assessed permanent physical disability at 41% and stated that the claimant cannot do any manual work as a coolie – Taking into consideration the future economic loss, the claimant would suffer because of permanent partial disability, the medical expenses incurred, pain and sufferings, loss of income during treatment, period of loss of future amenities and discomfort, interest of justice will be served if an additional amount of Rs.2,00,000/- is granted to the appellant by way of compensation –Insurance company directed to deposit before the Tribunal the enhanced compensation amount together with interest from the date of petition till the date of deposit.

The appellant, who was aged about 35 years and was working as a coolie, met with a motor accident and was grievously injured. He filed a petition stating that his right hand was completely disabled and he was unable to do the work of coolie; and claimed a compensation of Rs. 5,50,000/-. In support of his claim, he examined the doctor (PW 2), who deposed that the appellant could not work as a coolie by using his right hand and could not do any other manual work. The Tribunal awarded a total compensation of Rs. 1,13,900/-. On appeal, the High Court enhanced the compensation to Rs. 1,33,900/-.

Partly allowing the appeal filed by the claimant, the Court

HELD: 1.1 The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper. [para 8] [928-E-F]

1.2 The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if the claimant is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can

be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case. [para 9] [928-G-H; 929-A-B]

Ramesh Chandra Vs. Randhir Singh **1990 (3) SCR 1 = (1990) 3 SCC 723;** *K.G. Poovaiah (Dr) v. G.M./Managing Director, Karnataka KSRTC,* **(2001) 9 SCC 167;** *Kapil Kumar v. Kudrat Ali*, **(2002) 4 SCC 337,** *Raj Kumar v. Ajay Kumar*, **2010 (13) SCR 179 = (2011) 1 SCC 343 – relied on.**

1.3 In the instant case, it is not in dispute that the appellant was aged about 35 years and was working as a coolie and was earning Rs.4500/- per month at the time of accident. This claim is reduced by the Tribunal to a sum of Rs.3000/- only on the assumption that wages of the labourer during the relevant period viz. in the year 2004, were Rs.100/- per day. This assumption has no basis. Before the Tribunal, though Insurance Company was served, it did not choose to appear nor did it repudiate the claim. Therefore, there was no reason for the Tribunal to have reduced and determined the monthly earning a sum of Rs.3000/- per month. Further, the appellant was working as a coolie and, therefore, the court cannot expect him to produce any documentary evidence to substantiate his claim. In the absence of any other evidence contrary to the claim made by the claimant, in the facts of the case, the Tribunal should have accepted the same. However, in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In the instant case, the claim was honest and bonafide and, therefore, there was no reason for the Tribunal to have reduced the monthly earning of the appellant from Rs.4500/- to Rs.3000/- per month. This Court therefore, accepts his statement that his monthly earning was Rs.4500/-. [para 14] [933-A-G]

1.4 The appellant, in so far as disability caused due to accident is concerned, has stated in his evidence that he sustained severe bodily injuries which has resulted in permanent partial disability, which would affect his future earning capacity as a coolie. The Doctor (PW-2) has stated that the appellant has suffered permanent physical disability of 41% to right upper limb and in view of the disability, the claimant cannot work as a coolie and cannot do any other manual work as a coolie. This part of the evidence is not controverted by the insurance company by subjecting the claimant to cross-examination. Therefore, it can safely be concluded that the claimant has become permanently disabled and, therefore, has lost the future earning capacity permanently. The Tribunal, while assessing the loss of income has taken the disability to the whole body as 1/3rd of particular limb and has assessed the loss of income, at 1/3rd of 41% which comes to about 13.5% (so the loss of income taken at 13.5% of Rs.3000/-) and has quantified the loss of future income at Rs.72,900/-. This quantification arrived at by the Tribunal cannot be accepted since the assessment of compensation under the head of loss of earning capacity is calculated abysmally on the lower side. Besides, the claimant has also suffered prolonged medical treatment and hospitalization. [para 15] [933-H; 934-A-F]

1.5 Looking to the amount awarded by the Tribunal, this Court is of the view that the compensation awarded is too less. Taking into consideration the future economic loss, the claimant would suffer because of permanent partial disability, which would not permit him to work as a coolie or any other job, the medical expenses incurred, pain and sufferings, loss of income during treatment, period of loss of future amenities and discomfort, interest of justice will be served if an additional amount of Rs.2,00,000/- is granted to the appellant by way of

compensation. The respondent-Insurance company is directed to deposit before the Tribunal the enhanced compensation amount together with interest from the date of petition till the date of deposit. [para 15-16] [934-F-H; 935-A-B]

Case Law Reference:

1990 (3) SCR 1	**relied on**	**para 10**
(2001) 9 SCC 167	**relied on**	**para 11**
(2002) 4 SCC 337	**relied on**	**para 12**
2010 (13) SCR 179	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6481 of 2011.

From the Judgment and Order dated 09.12.2009 of the High Court of Karnataka at Bangalore in MFA No. 10869 of 2006.

V.N. Raghupathy for the Appellant.

G. Balaji and Mahalakshmi Pavani (for Mahalakshmi Balaji & Co.) for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. This appeal is directed against the Judgment and Decree passed by the High Court of Karnataka in MFA No. 10869 of 2006 dated 9th day of December, 2009, whereby the High Court has partly allowed the appeal and enhanced the compensation awarded by the Court of Small Causes, Bangalore ('Tribunal' for short) in MVC Case No. 5124 of 2004 dated 25.03.2006. The Tribunal has awarded a sum of Rs.1,13,900/- with interest at 6% p.a. from the date of the claim petition till the date of deposit as against the claim of the

appellant for Rs.5,50,000/-. The High Court, by its impugned Judgment and order, has marginally increased the compensation awarded by the Tribunal. The appellant, being aggrieved by the compensation awarded by the Tribunal and the High Court, has filed this appeal.

3. The facts of the present case are as follows :-

The appellant was working as a Coolie and earning Rs. 4500/- per month. He was riding as pillion on a motorcycle with one Hanumanthappa, when they met with an accident. Appellant sustained grievous injuries. He was treated in a private nursing home and his treatment continued for a long time. In the claim petition, it was his case and claim that even after treatment, his right hand is completely disabled and due to which, his work and livelihood completely suffered. Appellant filed an application under Section 166 of Motor Vehicles Act, 1988 for compensation of Rs.5,50,000/- by way of special and general damages on account of injuries, pain, mental agony, loss of earning, physical disabilities, shortening of expectation of life due to injuries sustained in the accident and medical expenses incurred thereon. Hanumanthappa, who was Respondent No. 1 in the Claim Petition, though served with the notice of petition, did not appear before the Court to oppose the relief sought in the claim petition. The Tribunal, after considering the evidence on record, has awarded a compensation of Rs.1,13,900/- with interest at 6% per annum from the date of petition till the date of deposit as against the claim of the appellant for Rs.5,50,000/-.

4. Aggrieved by the inadequate compensation awarded, the appellant preferred an appeal before the High Court of Karnataka. The court, by its order dated 9th of December, 2009, has awarded the compensation of Rs.1,33,900/-, as against Rs.1,13,900/- awarded by the Tribunal, with interest at 6% per annum on the enhanced compensation from the date of the petition till the date of realization. The appellant, being dissatisfied with the compensation awarded, is before us in this

appeal.

5. We have heard the learned counsel for the parties to the lis and perused the records.

6. Before the Tribunal, the appellant had examined himself (PW-1) and one Dr. P.K.Raju, Asst. Professor in Orthopaedics (PW-2) in support of his claim petition. The Doctor, in his evidence, has stated that the appellant cannot work as a coolie by using his right hand and cannot do any other manual work. Though, he was cross-examined, nothing adverse to the claim of the appellant is elicited.

7. The learned counsel for the appellant submits that due to the injuries sustained by the appellant in the accident, the appellant is permanently disabled, which would affect his future earning capacity as a Coolie. Per contra, learned counsel for the Insurance Company submits that since the appellant has suffered only 41% of disability, the High Court was justified in restricting the claim against the claim made by the appellant.

8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do

previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case.

10. In *Ramesh Chandra Vs. Randhir Singh* (1990) 3 SCC 723, this Court drawing distinction between the compensation for future loss and pain and enjoyment of life, has observed as under :

> "… The incapacity or disability to earn a livelihood would have to be viewed not only in presenti but in futuro on reasonable expectancies and taking into account deprival of earnings of a conceivable period. This head being totally different cannot in our view overlap the grant of compensation under the head of pain, suffering and loss of enjoyment of life. One head relates to the impairment of person's capacity to earn, the other relates to the pain and suffering and loss of enjoyment of life by the person himself."

11. In *K.G. Poovaiah (Dr) v. G.M./Managing Director, Karnataka KSRTC,* (2001) 9 SCC 167, the appellant was a Medical Practitioner and was aged about 36 years and had met with an accident in which his hand was crushed. This Court, while considering the nature of his profession and income, has enhanced the amount of compensation for loss of future earnings. This Court observed :

> "*There is no reason to doubt the testimony of the appellant so far as his monthly income is concerned. Being a medical man aged about 36 years on the date of the accident, the monthly salary received by him cannot be said to be exaggerated. He has candidly admitted that he was not assessed to tax. A salary of Rs*

> *3000 per month to a medical practitioner cannot be said to be on the higher side. We, therefore, accept his statement in this behalf. We also accept the assessment at Rs 40,000 for pain and suffering. However, the assessment of compensation under the head of loss of earning capacity is very much on the lower side. The injury to the right hand, which has left a permanent disability and which has affected the functioning of the limb and in particular the fingers, is a serious handicap to a medical practitioner. Patients would be reluctant to go to him for treatment and, therefore, the loss of earning capacity would be substantial. Even if we were to assume that it would reduce his earning capacity by 50% and even if we go by his earnings at the date of the accident, the monthly loss would come to Rs 1500 i.e. Rs 18,000 per annum. If this monthly loss of earning is multiplied by 10 years purchase factor the compensation would work out to Rs 1,80,000. To that must be added the compensation allowed under certain other heads, namely, pain and suffering, loss of amenities, medical expenses, etc. The total amount comes to Rs 2,38,000."*

12. In *Kapil Kumar v. Kudrat Ali*, (2002) 4 SCC 337, a student suffered injuries on his hand and the disability of 20% was assessed by the Doctors. This Court, while upholding the High Court's observation in relation to compensation for loss of future earnings, has held:

> "However, the disability sustained was assessed at 20 per cent. As rightly observed by the High Court, the loss of earning capacity on account of permanent partial disability suffered by the appellant cannot be calculated in terms of percentage only. It will have serious repercussions on his studies and prospects of earning. He will have to face other handicaps in life. Though the High Court did realise the need to enhance the compensation, we feel that the extent of enhancement is still inadequate. The increase of Rs

5000 is only marginal. Taking inter alia the table in the Second Schedule as the guiding factor, we are of the view that the compensation on account of disability incurred by the appellant should be enhanced by Rs 20,000 more; that means, he will get Rs 40,000 instead of Rs 20,000 awarded by the High Court under the first head."

13. In *Raj Kumar v. Ajay Kumar*, (2011) 1 SCC 343, this Court, while considering the award of compensation to the victim of motor accident for loss of future earning due to some permanent physical disability, has observed :

"Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of

earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in *Arvind Kumar Mishra v. New India Assurance Co. Ltd.*4 and *Yadava Kumar v. National Insurance Co. Ltd.*5)

Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity."

14. In the instant case, it is not in dispute that the appellant was aged about 35 years and was working as a Coolie and was earning Rs.4500/- per month at the time of accident. This claim is reduced by the Tribunal to a sum of Rs. 3000/- only on the assumption that wages of the labourer during the relevant period viz. in the year 2004, was Rs. 100/- per day. This assumption in our view has no basis. Before the Tribunal, though Insurance Company was served, it did not choose to appear before the Court nor did it repudiated the claim of the claimant. Therefore, there was no reason for the Tribunal to have reduced the claim of the claimant and determined the monthly earning a sum of Rs.3000/- per month. Secondly, the appellant was working as a Coolie and therefore, we cannot expect him to produce any documentary evidence to substantiate his claim. In the absence of any other evidence contrary to the claim made by the claimant, in our view, in the facts of the present case, the Tribunal should have accepted the claim of the claimant. We hasten to add that in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guess work, which may include the ground realities prevailing at the relevant point of time. In the present case, appellant was working as a Coolie and in and around the date of the accident, the wage of the labourer was between Rs.100/- to 150/- per day or Rs.4500/- per month. In our view, the claim was honest and bonafide and, therefore, there was no reason for the Tribunal to have reduced the monthly earning of the appellant from Rs.4500/- to Rs.3000/- per month. We, therefore, accept his statement that his monthly earning was Rs.4500/-.

15. The appellant, in so far as disability caused due to accident is concerned, had stated in his evidence that he had

sustained severe bodily injuries which has resulted in permanent partial disability, which would affect his future earning capacity as a Coolie. The Doctor, who was examined as claimant's witness, has stated that the appellant has sustained malunited fracture 2nd, 3rd, 4th, 5th MCB right and malunited fracture scapula right and in his opinion, the appellant has suffered permanent physical disability of 41% to right upper limb and in view of the disability, the claimant cannot work as a Coolie and cannot do any other manual work as a Coolie. The Tribunal, while assessing the loss of income has taken the disability to the whole body as 1/3rd of particular limb and has assessed the loss of income, at 1/3rd of 41% which comes to about 13.5%. So the loss of income taken at 13.5% of Rs.3000/- and has quantified the loss of future income at Rs.72,900/-. We cannot accept this quantification arrived at by the Tribunal, since the assessment of compensation under the head of loss of earning capacity is calculated abysmally on the lower side. On the question of disability caused due to the accident, the Doctor, who has been examined as claimant's witness, says that because of the injury sustained by the claimant, he cannot work as a Coolie and cannot do any other manual work. This part of the evidence is not controverted by the insurance company by subjecting the claimant to cross-examination. Therefore, we can safely conclude that claimant has become permanently disabled and, therefore, has lost the future earning capacity permanently. The claimant has also suffered prolonged medical treatment and hospitalization. Looking to the amount awarded by the Tribunal, we are of the view that the same is too less and, therefore, we are inclined to enhance the same. Taking into consideration the future economic loss, he would suffer because of permanent partial disability, which would not permit him to work as a Coolie or any other job, the medical expenses incurred, pain and sufferings, loss of income during treatment, period of loss of future amenities and discomfort, in our view, interest of justice will be served if an additional amount of Rs.2,00,000/- (Rupees

Two Lakhs) is granted to the appellant by way of compensation.

16. The respondent-Insurance company is directed to deposit the enhanced compensation amount together with interest from the date of petition till the date of deposit before the Tribunal within a period of eight weeks from today. The enhanced compensation amount with interest shall be paid to the claimant on such deposit.

17. The appeal is allowed to the extent indicated above. Costs are made easy.

R.P. Appeal partly allowed.

ETHIOPIAN AIRLINES

v.

GANESH NARAIN SABOO

(Civil Appeal No. 7037 of 2004)

AUGUST 09, 2011

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

Code of Civil Procedure, 1908 – s. 86 – Suit against foreign Rules, Ambassadors and Envoys – Complaint before the Consumer Fora against appellant-foreign airlines by respondent alleging deficiency in service – Applicability of s. 86 to proceedings before consumer fora – Case of appellant that being a foreign State or its instrumentality it could not be proceeded against under the Consumer Protection Act without obtaining proper permission of the Central Government – Held: Proceeding before the Consumer Forum comes within the sweep of term 'suit' – However, s. 86 is inapplicable – Consumer Protection Act, 1986 and the Carriage by Air Act, 1972, which came long after the CPC, are more focused and specific statutes, and thus, should be held to exclude s. 86 – In the fora created by the Consumer Act, the provisions of CPC are applicable to a limited extent and not all the provisions of CPC are made applicable to the proceedings of the National Forum – Rules created pursuant to the Consumer Act itself govern the procedure to be followed in the Consumer Fora – Thus, appellant-foreign airlines is not entitled to sovereign immunity with respect to a commercial transaction – Any other consent of the Central Government is not required to subject the appellant-foreign airlines, to a suit in an Indian Court – They must be held accountable for the contractual and commercial activities and obligations that it undertakes in India – Consumer Protection Act, 1986 – Carriage by Air Act, 1972.

Suit – Meaning of – Held: Term 'suit' is a generic term taking within its sweep all proceedings initiated by a party for realisation of the right vested in him in law – In common parlance, the term 'suit' is taken to include all proceedings of a judicial or quasi-judicial nature in which the disputes of aggrieved parties are adjudicated before an impartial forum – Thus, proceedings before the consumer fora fall squarely within the term suit.

Interpretation of statutes – Principle of statutory interpretation – Held: Specific statutes that come later in time trump prior general statutes – Consumer Protection Act, 1986 and the Carriage by Air Act, 1972, which came long after the Code of Civil Procedure, 1908, are more focused and specific statutes and therefore, should be held to supersede s. 86 – Code of Civil Procedure, 1908.

Consumer Protection Act, 1986 – Object of.

Carriage by Air Act, 1972 – Application of – Held: Its rules apply to carriage performed by the State or by legally constituted public bodies – Thus, on facts, according to the Indian Law, the appellant-foreign airlines can be subjected to suit under the Act – By signing onto the Warsaw Convention, the appellant-foreign airlines expressly waived its Airlines' right to immunity in cases such as that sub judice – Thus, the Central Governments of both India and Ethiopia have waived that right by passing the Carriage by Air Act, 1972 and by signing onto the Warsaw Convention.

Doctrines/Principles:

Principle of *expressio unius* – Explained.

Principle of restrictive immunity – Explained – International Law.

Respondent booked a consignment of reactive dyes with appellant-Foreign Airlines to be delivered in

Tanzania. It is alleged that there was delay in delivery of goods in Tanzania which resulted in deterioration of the goods. The respondent filed a complaint against the appellant-Foreign Airlines before the State Consumer Redressal Commission under the Consumer Protection Act, 1986 for the alleged deficiency in service. The State Commission held that the complaint was not maintainable. On appeal, the National Commission set aside the order of the State Commission and remitted the matter to the State Commission for deciding it afresh.

Aggrieved, the appellant filed the instant appeal before the Supreme Court on the ground that a foreign State or its instrumentality cannot be proceeded against under the Act without obtaining prior permission from the Central Government; that a foreign State or its instrumentality can legitimately claim sovereign immunity from being proceeded against under the Act in respect of a civil claim.

The questions arose for consideration before the two judge Bench of this Court that whether proceedings before the Consumer Forum are suits. There being two conflicting judgments on the said issue, **E.I.C.M. Exports Ltd. v. South Indian Corporation (Agencies) Ltd. and Another* **2009 (10) SCALE 22 and** ***Patel Roadways Limited v. Birla Yamaha Limited* **(2000) 4 SCC 91, the matter was referred to the present larger Bench.**

Disposing of the appeal, the Court

HELD: 1. The impugned order passed by the National Commission is untenable so far it held that the proceeding before the Consumer Forum does not come within the sweep of term "suit" because it is contrary to the judgment of the Constitution Bench of this Court in ***Economic Transport Organization's case that a proceeding before the Consumer forum comes within the

sweep of term suit. The finding of the National Commission is set aside to that extent. However, the findings of the National Commission so far as it has remitted the matter to the State Commission for adjudication is concurred with. [Para 75] [981-E-G]

***Economic Transport Organisation, Delhi v. Charan Spinning Mills Private Limited and Anr.* (2010) 4 SCC 114 - followed.**

***Patel Roadways Limited v. Birla Yamaha Limited* (2000) 4 SCC 91: 2000 (2) SCR 665 - relied on.**

E.I.C.M. Exports Ltd. v. South Indian Corporation (Agencies) Ltd. and Anr.* 2009 (10) SCALE 22 – overruled.

2.1 As per the Annexure to the Carriage by Air Act, 1972 under Section 3 sub Section 2, Part-I, vide entry 47, Ethiopia is a High Contracting Party to the Convention w.e.f. 12.11.1950. The provisions of Section 7 of the Air Act read with Rules in the first schedule leaves no room or doubt that a state carrier or legally constituted public body of the international carrier is deemed to have submitted to the jurisdiction of the courts in India, including for the purpose of the Code of Civil Procedure, 1908. There is a consent deemed to be granted by the Central Government contemplated under Section 86(1) of Code of Civil Procedure for a specified class of suits under the Air Act. [Paras 44, 45 and 47] [967-G-H; 968-A; 969-A-B]

1.2 The term 'suit' has not been defined in the Carriage by Air Act, 1972 nor is it provided in the Consumer Protection Act that the term 'suit' will have the same meaning as in the Code of Civil Procedure. Therefore, the term 'suit' has to be understood in its ordinary dictionary meaning. In that sense, the term 'suit' is a generic term taking within its sweep all proceedings

initiated by a party for realisation of the right vested in him in law. In common parlance, the term 'suit' is taken to include all proceedings of a judicial or quasi-judicial nature in which the disputes of aggrieved parties are adjudicated before an impartial forum. Proceedings before the Consumer fora fall squarely within that definition. [Para 53 and 55] [973-E-F; 974-A]

***Economic Transport Organisation, Delhi v. Charan Spinning Mills Private Limited and Anr.* (2010) 4 SCC 114 - followed.**

***Patel Roadways Limited v. Birla Yamaha Limited* (2000) 4 SCC 91: 2000 (2) SCR 665 - relied on.**

Upshur County v. Rich **135 US 467 (1890);** *Patterson v. Standard Accident Insurance Co.* **178 Mich. 288 – referred to.**

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

1.3 Notwithstanding the fact that proceedings of the National Commission are 'suits' under the Carriers Act, vide the *expressio unius* principle, the Consumer Protection Act, 1986 clearly enumerates those provisions of the CPC that are applicable to proceedings before the consumer fora. Such provisions include Section 13(4), in which the Consumer Protection Act, 1986 vests those powers vested in a civil court under the CPC to the District Forum. However, according to the principle of *expressio unius*, because the legislature expressly made the aforementioned provisions of the CPC applicable to the consumer proceedings, the legislature is, therefore, deemed to have intentionally excluded all other provisions of the CPC from applying to the said proceedings. This is particularly true since the Consumer Protection Act, 1986 sets forth an exhaustive list of procedures, distinguishable from those required under

the CPC, that the consumer redressal fora must follow. Therefore, since the Consumer Protection Act does not state that Section 86 applies to the consumer fora's proceedings, that Section of the CPC should be held to be not applicable. Likewise, the CPC itself does not claim to make Section 86 applicable to proceedings before the consumer fora. Instead, the CPC includes a saving clause, providing that "in the absence of any specific provision to the contrary, nothing in [the CPC] shall be deemed to limit or otherwise affect any special law or any special form of procedure prescribed, by or under any other law." In addition, Section 86 only applies to a "suit in any Court". This term should be understood differently than the term "court" because the CPC refers exclusively to Civil Courts. In particular, the CPC specifically refers to the District Courts, the High Courts, and the Supreme Court and makes little if any reference to other, quasi-judicial fora like the consumer redressal bodies. [Paras 58 and 59] [974-H; 975-A-H; 976-A]

H.H. The Maharana Sahib Shri Bhagwat Singh Bahadur of Udaipur v. State of Rajasthan and Ors. **AIR 1964 SC 444: 1964 SCR 1;** *Nawab Usmanali Khan v Sagarmal* **AIR 1965 SC 1798**

1.4 Section 86 of the Code of Civil Procedure is inapplicable to the instant case because the older and more general statute has been excluded by more recent special statute, namely, Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. The appellant-Foreign Airlines is not entitled to sovereign immunity in the suit at issue in the instant case. Therefore, any other consent of the Central Government is not required to subject the appellant, Foreign Airlines, to a suit in an Indian Court. [Paras 60 and 64] [976-B-C; 977-D-E]

Ratan Lal Adukia and Anr. v. Union of India **AIR 1990 SC 104: 1989 (3) SCR 440 – referred to.**

1.5 The Consumer and Carriage Acts, which came long after the CPC, are more focused and specific statutes, and therefore, should be held to exclude Section 86. The Supreme Court has previously found as such, holding that in the fora created by the Consumer Act, "the provisions of the Code of Civil Procedure are applicable to a limited extent and not all the provisions of the Code of Civil Procedure are made applicable to the proceedings of the National Forum." Rather, rules created pursuant to the Consumer Act itself govern the procedure to be followed in the consumer fora. Even though the consumer redressal fora utilized summary proceedings, that "does not mean that proceedings before the Consumer Forum [are] to be decided by ignoring the express statutory provisions of the Carriers Act in a proceeding in which a claim is made against a common carrier." [Para 62] [976-G-H; 977-A-B]

Economic Transport Organisation, Delhi v. Charan Spinning Mills Private Limited and Anr. **(2010) 4 SCC 114 - followed.**

E.I.C.M. Exports Ltd. v. South Indian Corporation (Agencies) Ltd. and Anr. **2009 (10) SCALE 22 – overruled.**

1.6 It is settled principle of statutory interpretation that specific statutes that come later in time trump prior general statutes. Both the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972, which came long after the Code of Civil Procedure, 1908, are more focused and specific statutes and therefore, should be held to supersede Section 86 of the Code. In fora created by the Consumer Act, the provisions of the Code of Civil Procedure are applicable only to a limited extent, therefore, the provisions of the Code of Civil Procedure have not been made applicable to the proceedings of the National Consumer Forum. [Para 65] [977-F-G]

Savita Garg v. Director, National Heart Institute **(2004) 8 SCC 56: 2004 (5) Suppl. SCR 359 - relied on.**

State of Karnataka v. Vishwabharathi House Building Co-operative Society and Ors. **(2003) 2 SCC 412: 2003 (1) SCR 397 - referred to.**

1.7 The Consumer Protection Act, 1986 is a comprehensive and self-contained piece of legislation, and its object is to decide consumers' complaints expeditiously, via summary procedure. The Consumer Protection Act, 1986 also permits authorized agents to appear on behalf of the complainants in order to ensure that they are not burdened with the heavy professional fees of lawyers. [Para 66] [978-A-B]

1.8 The Carriage by Air Act, 1972 explicitly provides that its rules apply to carriage performed by the State or by legally constituted public bodies under Chapter 1, Section 2, Sub-section 1. Thus, it is clear that according to the Indian Law, the appellant-Foreign Airlines can be subjected to suit under the Carriage Act, 1972. The Carriage by Air Act, 1972 (69 of 1972) is an Act to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of September, 1955 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to exceptions, adaptations and modification) to non-international carriage by air and for matters connected therewith. In effect, by signing onto the Warsaw Convention, the appellant foreign airlines had expressly waived its Airlines' right to immunity in cases such as that sub judice. Therefore, the Central Governments of both India and Ethiopia have waived that right by passing the Carriage by Air Act, 1972 and by signing onto the Warsaw

Convention. [Paras 67 and 68] [978-C-G]

The German Democratic Republic v. The Dynamic Industrial Undertaking Ltd. **AIR 1972 Bombay 27;** *Kenya Airways v. Jinibai B. Kheshwala* **AIR 1998 Bombay 287 – referred to.**

1.9 The appellant-Ethiopian Airlines is not entitled to sovereign immunity with respect to a commercial transaction is also consonant with the holdings of other countries' courts and with the growing International Law principle of restrictive immunity. The appellant Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India. It may be pertinent to mention that the Parliament has recognized this fact while passing the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Section 86 was itself, a modification and restriction of the principle of foreign sovereign immunity and thus, by limiting Section 86's applicability, the Parliament through these incorrect acts, further narrowed a party's ability to successfully plead foreign sovereign immunity. In the modern era, where there is close interconnection between different countries as far as trade, commerce and business are concerned, the principle of sovereign immunity can no longer be absolute in the way that it much earlier was. Countries who participate in trade, commerce and business with different countries ought to be subjected to normal rules of the market. State owned entities would be able to operate with impunity, the rule of law would be degraded and international trade, commerce and business will come to a grinding halt. Therefore, the appellant cannot claim sovereign immunity. The preliminary objection raised by the appellant before the court is devoid of any merit and must be rejected. [Paras 70, 72 and 73] [979-D; 980-E-H; 981-A-B]

Deepak Wadhwa v. Aeroflot **24 (1983) Delhi Law Times 1;** *Mirza Ali Akbar Kashani v.The United Arab Republic and Anr.* **AIR 1966 SC 230: 1966 SCR 319;** *Veb Deutfracht Seereederei Rostock (D.S.R. Lines) a Department of the German Democratic Republic v new Central jute Mills Co. Ltd. and Another* **(1994) 1 SCC 282;** *Ghaziabad Zila Sahkari Bank Ltd. v. Addl. Labour Commissioner and Ors.* **(2007) 11 SCC 756: 2007 (1) SCR 1007;** *Maruti Udyog Limited v. Ram Lal and Ors.* **(2005) 2 SCC 638: 2005 (1) SCR 790 – referred to.**

Rahimtoola v. H.E.H. The Nizam of Hyderabad and Ors. **(1957) 3 All E.R. 441;** *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* **(1977) 1 All E.R. 881 - referred to.**

Case Law Reference:

24 (1983) Delhi Law Times 1	**Referred to**	**Para 6**
1966 SCR 319	**Referred to**	**Para 10**
(1994) 1 SCC 282	**Referred to**	**Para 11**
2007 (1) SCR 1007	**Referred to**	**Para 34**
2005 (1) SCR 790	**Referred to**	**Para 34**
(2010) 4 SCC 114	**Followed**	**Para 56, 62, 63, 74, 75**
2009 (10) SCALE 22	**Overruled**	**Para 56, 63, 74**
135 US 467 (1890)	**Referred to**	**Para 57**
178 Mich. 288	**Referred to**	**Para 57**
1964 SCR 1	**Referred to**	**Para 59**
AIR 1965 SC 1798	**Referred to**	**Para 59**

1989 (3) SCR 440	**Referred to**	**Para 61**
2004 (5) Suppl. SCR 359	**Referred to**	**Para 65**
2003 (1) SCR 397	**Referred to**	**Para 66**
AIR 1972 Bombay 27	**Referred to**	**Para 69**
AIR 1998 Bombay 287	**Referred to**	**Para 69**
(1957) 3 All E.R. 441	**Referred to**	**Para 70**
(1977) 1 All E.R. 881	**Referred to**	**Para 71**
2000 (2) SCR 665	**Relied on**	**Para 74, 75**

CIVIL APPELLATE JURISDICTION : From the Judgment and Order dated 07.01.2004 of the National Consumer Disputes Redressal Commission in First Appeal No. 190 of 1996.

K.G. Presswala, Shiv Kumar Suri and Junaisa Rahman for the Appellant.

Rakesh Kr. Khanna, Dr. Rashmi Khanna and Seema Rao (for Surya Kant) for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal is directed against the judgment and order of the National Consumer Disputes Redressal Commission, New Delhi, dated 7.1.2004 passed in First Appeal No. 190 of 1996.

2. A two-Judge bench of this Court by its order dated 10.11.2009 referred this matter to a larger Bench. The said order reads as under:

"The questions in this case is whether proceedings before the Consumer Forum are suits. It appears that there are two conflicting judgments on this point – *E.I.C.M. Exports*

Ltd. v. South Indian Corporation (Agencies) Ltd. and Another 2009 (10) SCALE 22 and *Patel Roadways Limited v. Birla Yamaha Limited* (2000) 4 SCC 91. Hence we are referring the matter to a larger Bench to resolve this conflict, to be constituted by Hon'ble the Chief Justice of India."

BRIEF FACTS:

3. The respondent booked a consignment of Reactive Dyes with the appellant Ethiopian Airlines to be delivered at the Dar Es. Salaam, Tanzania on 30.9.1992. The airway bills were duly issued by the appellant from its office in Bombay at the Taj Mahal Hotel for the said consignment. According to the respondent there was gross delay in arrival of the consignment at the destination, which led to deterioration of the goods.

4. The respondent filed a complaint on 11.5.1993 before the Maharashtra State Consumer Dispute Redressal Commission (hereinafter referred to as 'the State Commission'). Pursuant to the notice issued by the State Commission, the appellant filed a written statement in which the appellant raised a preliminary objection regarding maintainability of the complaint.

5. On 17.1.1996, the State Commission held that the complaint filed by the respondent was not maintainable. The respondent aggrieved by the said order preferred an appeal before the National Consumer Disputes Redressal Commission (hereinafter referred to as 'the National Commission'). The National Commission categorically observed in the impugned judgment that Section 86 of the Code of Civil Procedure (for short 'C.P.C.') was not applicable since the case in dispute is covered under the provisions of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act').

6. The National Commission further held that Section 13(4)

of the Act makes the CPC applicable only for the limited purpose. As such, the National Commission took the view that the judgment of the High Court of Delhi delivered in the case of *Deepak Wadhwa v. Aeroflot* 24 (1983) Delhi Law Times 1 had no bearing and application in deciding the complaint filed by the respondent.

7. The National Commission set aside the order passed by the State Commission and remitted it to the State Commission so that the State Commission could decide it afresh in accordance with law.

8. The appellant, aggrieved by the said order, has preferred this appeal on the ground that a foreign State or its instrumentality cannot be proceeded against under the Act without obtaining prior permission from the Central Government. The appellant contends that a foreign State or its instrumentality can legitimately claim sovereign immunity from being proceeded against under the Act in respect of a civil claim.

9. It is submitted that, in India, it is clear that there is presumption that sovereign immunity is absolute, but that a foreign sovereign can still be sued in India under certain circumstances with the permission of the Government of India. The Central Government may give consent for such a suit if:

(a) the foreign State has instituted a suit in the Court against the person desiring to sue it;

(b) the foreign State trades within the legal limits of the jurisdiction of the Court or;

(c) the foreign State is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money charged thereon or;

(d) the foreign State has expressly or impliedly waived the privilege of immunity.

Relevant case law and submissions

10. Reliance was placed on a judgment of the Constitution Bench delivered in the case of *Mirza Ali Akbar Kashani v. The United Arab Republic and Another* AIR 1966 SC 230. This Court in para 30 of the said judgment observed as under:

> "The effect of the provisions of section 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal Courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal Courts. That being so, it would be legitimate to hold that the effect of section 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal Courts of India with the consent of the Central Government and when such consent is granted as required by section 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, section 86(1) is not merely procedural; it is in a sense a counter-part of section 84. Whereas section 84 confers a right on a foreign State to sue, section 86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. … … …"

11. Reliance was also placed on another judgment of this Court in the case of *Veb Deutfracht Seereederei Rostock (D.S.R. Lines) a Department of the German Democratic Republic v. New Central Jute Mills Co. Ltd. and Another* (1994) 1 SCC 282. In para 5 of the judgment this Court held that:

> "One of the principles of International Law is that sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines the relationship between sovereign States.
>
> The object of Section 86 of the Code is to give effect to the principles of International Law. But, in India it is only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued so can it provide rights and liabilities of foreign States to sue and be sued in its Courts. It can be said that effect of Section 86 thus is to modify the extent of doctrine of immunity recognised by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by Section 86, it shall not be open to any foreign State to rely on the doctrine of immunity. Sub-section (1) of Section 86 says in clear and unambiguous terms that no foreign State may be sued in any court, except with the consent of the Central Government certified in writing by the Secretary to that Government. Sub-section (2) prescribes that such consent shall not be given unless it appears to the Central Government that the case falls within any of the clauses (*a*) to (*d*) of sub-section (2) of Section 86. Sub-section (6) enjoins that where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall before refusing to accede to the request in whole or in part, give to the

person making the request a reasonable opportunity of being heard.

On a plain reading of different sub-sections of Section 86, it is apparent that no foreign State may be sued in any court in India, except with the consent of the Central Government which has to be certified in writing by the Secretary to that Government. In view of the provisions aforesaid, before any action is launched or a suit is filed against a foreign State, person concerned has to make a request to the Central Government for grant of the necessary consent as required by sub-section (1) of Section 86 and the Central Government has to accede to the said request or refuse the same after taking into consideration all the facts and circumstances of the case. … … …"

12. It was submitted by the learned counsel for the appellant, Mr. K.G. Presswala, that when interpreting Section 86 of the CPC, it should always be kept in view that the said Section gives effect to the principles of international law.

13. The learned counsel for the appellant placed reliance on the judgment of this court delivered in the case of *H.H. The Maharana Sahib Shri Bhagwat Singh Bahadur of Udaipur v. State of Rajasthan and Others* AIR 1964 SC 444, where an ex-ruler contended that under section 86 of the CPC, a reference made by the Government under the Industrial Disputes Act in respect of employees' wages was not maintainable without the prior consent of the Central Government. This Court in para 5 of the said judgment held:

"The appellant is recognised under Article 363(22) of the Constitution as a Ruler of an Indian State, but Section 86 in terms protects a Ruler from being "sued" and not against the institution of any other proceeding which is not in the nature of a suit. A proceeding which does not commence with a plaint or petition in the nature of plaint, or where the

claim is not in respect of a dispute ordinarily triable in a civil court, would prima facie not be regarded as falling within Section 86 Code of Civil Procedure. … … …"

14. The learned counsel for the appellant submitted that the Act specifically states in Section 3 that "the provisions of this Act shall be in addition to and not in derogation to any other law for the time being in force." The learned counsel for the appellant also submitted that this Court in the case of *State of Karnataka v. Vishwabharathi House Building Co-operative Society and Others* (2003) 2 SCC 412 in paragraphs 46 and 47 observed as under:

"46. By reason of the provisions of Section 3 of the Act, it is evident that remedies provided thereunder are not in derogation of those provided under other laws. The said Act supplements and not supplants the jurisdiction of the civil courts or other statutory authorities.

47. The said Act provides for a further safeguard to the effect that in the event a complaint involves complicated issues requiring recording of evidence of experts, the complainant would be at liberty to approach the civil court for appropriate relief. The right of the consumer to approach the civil court for necessary relief has, therefore, been provided under the Act itself."

15. The learned counsel for the appellant further submitted that a claim which is ordinarily triable in a Civil Court can also be tried in the Consumer Court if:

(i) an Unfair Trade Practice or a restrictive trade practice has been adopted by any trader or service provider;

(ii) the goods bought by a person or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or availed of or agreed to be

hired or availed of by him suffer from deficiency in any respect;

(iv) a Trader or a Service Provider as the case may be has charged for the goods or the services a price in excess of the price:

(a) fixed by or under any law for the time being in force;

(b) displayed on the goods or any package containing such goods;

(c) displayed on the price list exhibited by him or under any law for the time being in force;

(d) agreed between the parties

(v) goods which would be hazardous to life and safety when used are being offered for sale to the public

(e) in contravention of any standards relating to safety of such goods as required to be complied with by or under any law for the time being in force;

(f) if the trader could have known with due diligence that the goods so offered are unsafe to the public.

(vi) services which are hazardous or likely to be hazardous to the life and safety of the public when used are being offered by the Service Provider could have known with due diligence injurious to life and safety.

16. Mr. Presswala also submitted that a Complaint and a Plaint is one and the same thing and a proceeding in the Consumer Court, though not a suit under the Civil Procedure Code, is still a proceeding which is in the nature of a suit and

is commenced by a proceeding in the nature of a Plaint (i.e. a Complaint and is in respect of a claim which is ordinarily triable by a Civil Court). It is submitted by Mr. Presswala that Section 86 of the CPC would be squarely applicable to the proceedings under the Act.

17. The learned counsel for the appellant further submitted that the provisions of the CPC are not applicable to the proceedings under the Act. Mr. Presswala also submitted that the District Forums, the State Commission and the National Commission have all the trappings of a Civil Court. Consequently, the proceedings before these fora are legal proceedings.

18. According to the appellant, the interpretation given by the National Commission is totally untenable and cannot be sustained.

19. Mr. Rakesh Kumar Khanna, the learned senior counsel for the respondent submitted that this appeal not only involves the applicability of section 86 of the CPC and the Act, but also raises the following questions:

(a) Whether the Consumer Protection Act being a later and a Special Statute will have overriding effect over the provisions of general and previous Statute (i.e. the Civil Procedure Code, 1908?)

(b) Whether in view of the provisions of the Carriage by Air Act, 1972, specially, Section 7 read with Rules 1, 2, 18, 19 & 28 of First Schedule framed under Section 3 of the Act thereof, the Appellant Ethiopian Airlines will be deemed to have submitted to the jurisdiction of the Indian Courts for the purpose of Code of Civil Procedure, 1908?

(c) Whether the provisions of Carriage by Air Act, 1972 will be read into the provisions of the Consumer Protection Act, 1986?

20. Learned senior advocate for the respondent also submitted that the Act is a complete code in itself. It sets forth the procedure to be followed in dealing with complaints filed before the fora provided for in the Act as well as with the Appeals arising from the orders of those fora. Section 13 of this Act provides for the procedure to be followed by the fora on receipt of the complaint. Sub-sections 4, 5 and 6 of section 13, which are relevant for the purpose of the present case, read as under:

> "13. Procedure on admission of complaint: (1) The District Forum shall, on admission of a complaint, if it relates to any goods,
>
> xx xx xx
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> xx xx xx
>
> (4) For the purposes of this section, the District Forum shall have the same powers as are vested in a Civil Court under Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:
>
> (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
>
> (ii) the discovery and production of any document or other material object producible as evidence;
>
> (iii) the reception of evidence on affidavits;
>
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

> (v) issuing of any commission for the examination of any witness; and
>
> (vi) any other matter which may be prescribed.
>
> (5) Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and the District Forum shall be deemed to be a civil court for the purposes of Section 195 and chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).
>
> (6) Where the complainant is a consumer referred to in sub-clause (iv) of clause (b) of sub-section (1) of Section 2, the provisions of rule 8 of Order 1 of the first Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Forum thereon."

21. This Court in *Savita Garg v. Director, National Heart Institute* (2004) 8 SCC 56 para 7 has observed that:

> "... ... ...Therefore, as far as the Commission is concerned, the provisions of the Code of Civil Procedure are applicable to a limited extent and not all the provisions of the Code of Civil Procedure are made applicable to the proceedings of the National Forum.... ... ..."

22. In para 10 of the said judgment the Court further observed as under:

> "The Consumer Forum is primarily meant to provide better protection in the interest of the consumers and not to short-circuit the matter or to defeat the claim on technical grounds. ... ..."

23. The respondent contends that a bare perusal of Section 13(4), (5) and (6) clearly demonstrate that as far as the fora created under the Consumer Protection Act, 1986 for deciding consumer disputes are concerned, the provisions of the CPC are applicable to a limited extent only and not all provisions of CPC are made applicable thereto.

24. In exercise of powers conferred by Section 30A of the Consumer Protection Act, 1986, the Consumer Protection Regulations, 2005 have been framed. Regulation 26 of these Regulations specifically provides that in all the proceedings before the consumer forum endeavour shall be made by the parties and their counsel to avoid the use of provisions of CPC. Regulation 26 of these Regulations reads as under:

> "26. Miscellaneous: (1) In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908).
>
> Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made thereunder."

25. The aforesaid view of the specific provisions of Section 13(4) of the Consumer Protection Act read with Regulation 26, makes it clear that the provisions of the CPC in general are not applicable in the proceedings under the Consumer Protection Act, except to the extent provided for under Section 13 of the Act.

26. Mr. Khanna also submitted that the controversy involved in this case is no longer res integra, as evidenced by *Savita Garg (supra)*.

27. Mr. Khanna further submitted that the provisions of the CPC are not applicable to the proceedings under the Consumer Protection Act, 1986 and consequently, the bar

under Section 86 of the CPC likewise does not apply to the proceedings initiated under the Consumer Protection Act, 1986.

28. Mr. Khanna contended that the impugned order passed by the National Commission is in consonance with the legal position crystallized in a series of judgments of this Court and calls for no interference.

29. Mr. Khanna gave the historical background of the enactment of the Consumer Protection Act, 1986. He submitted that the interests of consumers around the world had drawn the attention of the United Nations for a long time and that after long deliberations and continued consultations, the United Nations in its General Assembly adopted guidelines for consumer protection. The relevant portion of the guidelines is given as under:

> "1. Taking into account the interests and needs of consumers in all countries, particularly in developing countries, recognize that consumers often face imbalances in economic terms, educational levels, and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development. These guidelines for consumer protection have the following objectives:
>
> (a) To assist countries in achieving or maintaining adequate protection for their population as consumers;
>
> (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;
>
> (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

(d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;

(e) To facilitate the development of independent consumer groups;

(f) To further international cooperation in the field of consumer protection;

(g) To encourage the development of market conditions which provide consumers with greater choices at lower prices.

5. All enterprises should obey the relevant laws and regulations of the countries in which they do business. They should also conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed. (hereinafter references to international standards in the guidelines should be viewed in the context of this paragraph).

28. Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low income consumers."

30. Mr. Khanna submitted that these guidelines were considered by this Court in the case of *Vishwabharti House Building Cooperative Society and others (supra)*.

31. Mr. Khanna also submitted that the framework for the Consumer Protection Act, 1986 was provided by a resolution dated 9.4.1985 of (the General Assembly of the United Nations Organisation) which is commonly known as "Consumer Protection Resolution No. 39/248". India is a signatory to the said resolution. The Act was enacted in view of the aforementioned resolution of General Assembly of the United Nations.

32. The learned counsel for the respondent contended that the Act was enacted to provide better protection for the consumers and their interests. By this Act, the legislature sought to constitute quasi judicial Tribunals/Commissions as an alternative system of adjudicating consumer disputes via summary proceedings. That is the whole purpose of providing for a separate three tiered system comprised of a District Forum, State Commission and the National Commission which would provide inexpensive and speedy remedies to consumers. In creating those fora, the legislature required the fora to arrive at conclusions based on reasons following the rules of natural justice. He also submitted that while enacting the Consumer Protection Act, Parliament was fully aware that the provisions of the CPC were available for the trial of a claim of a consumer dispute, yet, in its wisdom, Parliament decided not to apply the procedure provided in the CPC to the proceedings under the Act. Instead, Parliament chose to apply only limited provisions of the Code of Civil Procedure to the complaints to be entertained under the Act. Specifically, in Sections 13 (4), (5) and (6), the Act explicitly provided for limited applicability of the provisions of Code of Civil Procedure.

33. Mr. Khanna further submitted that the Act is a special statute enacted to provide remedies to a special class of litigants, namely the consumers, by a special procedure provided for under the statute, instead of the usual procedure set forth under the Code of Civil Procedure.

34. The learned counsel for the respondent also submitted

that the general legal principle of statutory interpretation of *generalia specialibus non-derogant and generalibus specialia derogant* applied. That is, if a special provision is made on a certain matter, that matter is excluded from the general provision. Mr. Khanna also stated that these principles have been applied by this Court in resolving the disputes between two Acts as well as in the construction of statutory rules and statutory orders. Mr. Khanna referred this Court's decision in the case of *Ghaziabad Zila Sahkari Bank Ltd. v. Addl. Labour Commissioner and Others* (2007) 11 SCC 756. In para 61 of that judgment, this Court held that the Uttar Pradesh Cooperative Societies Act, which is a complete code in itself regarding employment in cooperative societies, and its machinery and provisions will have overriding effect on the general Act, the Uttar Pradesh Industrial Disputes Act, 1947. Thus, the Industrial Disputes Act was held to have no applicability and to be excluded after enforcement of the Uttar Pradesh Cooperative Societies Act, which was a later and a special Act. Similarly, this Court in the case of *Maruti Udyog Limited v. Ram Lal and Others* (2005) 2 SCC 638 in para 42 observed as under:

> "42. In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and Others* [(2001) 3 SCC 71], it is stated:
>
> > 9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: *Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd., Sarwan Singh v. Kasturi Lal*; *Allahabad Bank v. Canara Bank and Ram Narain v. Simla Banking & Industrial Co. Ltd.*
> >
> > 10. We may notice that the Special Court had in another case dealt with a similar contention. In *Bhoruka Steel Ltd. v. Fairgrowth Financial*

> *Services Ltd.* it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:
>
> > Where there are two special statutes which contain non obstante clauses the later statute shall prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment would continue to apply."

35. Mr. Khanna also submitted that the Act is a special and a later Act which will prevail over the provisions of the CPC, which is a general and previous statute. He submitted that the Act is a complete Code in itself as regards the disputes covered under it. As such, the general statute i.e. CPC can have no applicability and stands excluded after the enactment of the Act.

36. Mr. Khanna further contended that the Carriage by Air Act, 1972 (hereinafter referred to as 'Air Act') again is a special Act regarding international carriage. The Air Act was enacted to give effect to the Convention for unification of Rules relating to international carriage by air signed at Warsaw on 12.10.1929, as amended by Hague Protocol dated 28.9.1955

and the Montreal Convention dated 28.9.1999. India enacted this Act as it is a signatory to the Warsaw Convention of 1929 governing the liabilities of air carrier in respect of international carriage of passengers, baggage and cargo by air. The preamble of the Air Act reads as under:

> "An Act to give effect to the convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of May, 1999 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to exceptions, adaptations and modifications) to non-international carriage by air and for matters connected therewith."

37. Section 2 (ii) of the Air Act defines "Convention" to mean Convention for unification of certain rules relating to international carriage by air signed at Warsaw on 12.10.1929. Section 2 (ii) reads as under:

> "2 (ii) Convention means the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929."

38. Section 3 of the Air Act provides that the Rules contained in the first schedule (the provisions of the Convention relating to the rights and liability of the carriers, passengers, consignors and other persons), shall have the force of law in India with respect to any carriage by air to which these rules apply, irrespective of the nationality of the air craft performing the carriage. Sub-Section 2 of section 3 provides that the high contracting parties to the Convention and date of enforcement of the said Convention shall be such as are included in Part-I of the Annexure. Section 3 reads as under:

> "3. Application of Convention to India:

> (1) The rules contained in the First Schedule, being the provisions of the Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons shall, subject to the provisions of this act, have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.
>
> (2) For the purpose of this Act, the High Contracting Parties to the Convention and the date of enforcement of the said Convention shall be such as are included in part-I of the Annexure-1.
>
> (3) Any reference in the first schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to all the territories in respect of which he is a party.
>
> (4) Any reference in the first schedule to agents of the carrier shall be construed as including a reference to servants of the carrier.
>
> (5) The Central Government may, having regard to the objects of this act, and if it considers necessary or expedient so to do, by notification in the official gazette, add to, or, as the case may be, omit from, Part I of the Annexure, any High Contracting Party and on such addition, or as the case may be, omission, such High Contracting Party shall be or shall cease to be, a High Contracting Party."

39. Section 7 of the Air Act provides that every high contracting party to the Convention, shall for the purpose of any suit brought in a court in India in accordance with the provisions of rule 28 of the first schedule or of the second schedule as the case may be to enforce a claim in respect of the carriage undertaken by him be deemed to have submitted to the

jurisdiction of that Court and to be a person for purpose of Code of Civil Procedure, 1908. Section 7 reads as under:

> "7. *Provisions regarding suits against High Contracting Parties who undertake carriage by Air*: (1) Every High Contracting Party to the Convention or the amended Convention, as the case may be, who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purpose of any suit brought in a Court in India in accordance with the provisions of rule 28 of the First Schedule, or of the Second Schedule, as the case may be, to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purpose of the Code of Civil Procedure, 1908.
>
> (2) The High Court may make rules of procedure providing for all matters which may be expedient to enable such suits to be instituted and carried on.
>
> (3) Nothing in this section shall authorize any Court to attach or sell any property of a High Contracting Party to the Convention or to the amended Convention."

40. The First Schedule to the Act vide Rule 1 provides that the Rules under this Schedule shall apply to all international carriage of persons, luggage or goods, performed by aircraft for reward. Sub Rule 2 defines the "High Contracting Party". Sub Rule 3 defines International Carriage. The provisions of Rule 1 read as under:

> "Rule1: (1) These rules apply to all international carriage of persons, luggage or goods, performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an Air Transport undertaking.
>
> (2) In these rules, "High Contracting Party" means a High Contracting Party to the Convention.

> (3) For the purposes of these rules the expression, "international carriage" means any carriage in which according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these Rules."

41. Rule 2 of these Rules, provides that these rules apply to carriage performed by the State or by legally constituted public bodies. Rule 2 reads as under:

> "2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in rule 1.
>
> (2) These rules do not apply to carriage performed under the terms of any International Postal Convention."

42. Rule 18 provides for liability of the carrier for damages and Rule 19 provides for liability of the carrier for damages occasioned by delay. Rule 18 and 19 read as under:

> "18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of sub-rule (1) comprises the period during which the luggage or goods are in charge of the carrier, whether in any aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contract, to have been the result of an event which took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods."

43. Rule 28 provides for Territorial Jurisdiction for suing for damages which reads as under:

"28. An action for damages must be brought at the option of the plaintiff either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination."

44. As per the Annexure to the Air Act under Section 3 sub Section 2, Part-I, vide entry 47, Ethiopia is a High Contracting Party to the Convention w.e.f. 12.11.1950.

45. A bare perusal of the aforesaid rules in the First Schedule, which has the force of law as per Section 3 of the Air Act, read with Section 7 leaves no room or doubt that a state

carrier or legally constituted public body of the international carrier is deemed to have submitted to the jurisdiction of the courts in India, including for the purpose of the Code of Civil Procedure, 1908.

46. Mr. Khanna also submitted that even otherwise Section 86(2) of the CPC provides that the consent of the Central Government can be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes. Section 86 of the CPC reads as under:

"86. *Suits against foreign Rules, Ambassadors and Envoys:* (1) No foreign state may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid (a foreign State) from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the court in which (the foreign state) may be sued, but it shall not be given, unless it appears to the Central Government that (the foreign State) -

(a) has instituted a suit in the Court against the person desiring to sue (it), or

(b) by (itself) or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situated within those limits and is to be sued with reference

to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to (it) by this section."

47. Thus, the provisions of Section 7 of the Air Act read with Rules in the first schedule makes it clear that there is a consent deemed to be granted by the central government contemplated under Section 86(1) of Code of Civil Procedure for a specified class of suits under the Air Act.

48. Mr. Khanna also referred to Section 3 of the Act and submitted that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other laws for the time being in force.

49. This Court in the case of *Patel Roadways Limited (supra)* has considered this question and has laid down that the Disputes Redressal Agency provided for in the Act will have jurisdiction to entertain complaints in which the claim for loss or damage of goods entrusted to a carrier for transportation is in dispute. This Court also noted that the term "suit" in Section 9 of the Carriage Act was applicable both the cases filed in the Civil Court and to proceedings before the National Commission that decides the complaints by consumers following summary procedure. Mr. Khanna further contended that the view taken by this Court in *Patel Roadways Limited* (supra) has been affirmed by the Constitution Bench of this Court in the case of *Economic Transport Organisation, Delhi v. Charan Spinning Mills Private Limited and Another* (2010) 4 SCC 114. In paras 53 to 57 of that case, this Court observed as under:

"53. Section 14(1)(*d*) of the Act provides that the Forum under the Act can direct payment of compensation awarded by it to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. This, according to the appellant,

makes it mandatory for the complainant to establish negligence on the part of the opposite party i.e. the carrier. It is further contended that presumption of negligence under Section 9 of the Carriers Act, 1865 (which provides that in any suit brought against a common carrier for the loss, damage or non-delivery of the goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery of goods was owing to the negligence or criminal act of the carrier, his servants and agents) is applicable only to a civil suit, and not to a complaint under the Act which specifically contemplates establishment of negligence by evidence. It is submitted that in this case the compensation has been awarded even though no evidence was led by the complainants about negligence of the driver of the appellant.

54. It is no doubt true that Section 14(1)(*d*) of the Act contemplates award of compensation to the consumer for any loss suffered by the consumer due to the negligence of the opposite party (the carrier). Section 9 of the Carriers Act does not lay down a proposition that a carrier will be liable even if there was no negligence on its part. On the other hand, it merely raises a presumption that when there is loss or damage or non-delivery of goods entrusted to a carrier, such loss, damage or non-delivery was due to the negligence of the carrier, its servant and agents. Thus where the consignor establishes loss or damage or non-delivery of goods, it is deemed that negligence on the part of the carrier is established. The carrier may avoid liability if it establishes that the loss, damage or non-delivery was due to an act of God or circumstances beyond its control. Section 14(1)(*d*)

of the Act does not operate to relieve the carrier against the presumption of negligence created under Section 9 of the Carriers Act.

55. The contention of the appellant that the presumption under Section 9 of the Carriers Act is available only in suits filed before civil courts and not in other civil proceedings under other Acts, is not tenable. This Court in *Patel Roadways Ltd.* (supra) has observed: (SCC pp. 106-07, paras 47, 48 & 49)

> The principle regarding the liability of a carrier contained in Section 9 of the Carriers Act, namely, that the liability of a carrier is that of an insurer and that in a case of loss or damage to goods entrusted to the carrier the plaintiff need not prove negligence, are applicable in a proceeding before the Consumer Forum. The term "suit" has not been defined in the Carriers Act nor is it provided in the said Act that the term "suit" will have the same meaning as in the Civil Procedure Code. Therefore, the term "suit" has to be understood in its ordinary dictionary meaning. In that sense, term "suit" is a generic term taking within its sweep all proceedings initiated by a party for realisation of a right vested in him under law. It is true that a proceeding before Consumer Forum is ordinarily a summary proceeding and in an appropriate case where the Commission feels that the issues raised are too contentious to be decided in summary proceedings it may refer parties to a civil court. That, however, does not mean that proceedings before the Consumer Forum is to be decided by ignoring the express statutory provisions of the Carriers Act in a proceeding in which a claim is made against a common carrier. A proceeding before the Consumer Forum comes within the sweep of term "suit".

56. Again, in *Economic Transport Organization v. Dharwad District Khadi Gramudyog Sangh* (2000) 5 SCC 78 this Court reiterated the principle stated in *Patel Roadways* and added the following: (*Economic Transport case* (supra) SCC p. 79, para 2)

> "*2*. … Even assuming that Section 9 of the Carriers Act, 1865 does not apply to the cases before the Consumer Fora under the Consumer Protection Act, the principle of common law abovementioned gets attracted to all these cases coming up before the Consumer Fora. Section 14(1)(*d*) of the Consumer Protection Act has to be understood in that light and the burden of proof gets shifted to the carriers by the application of the legal presumption under the common law. Section 14(1)(*d*) has to be understood in that manner. The complainant can discharge the initial onus, even if it is laid on him under Section 14(1)(*d*) of the Consumer Protection Act, by relying on Section 9 of the Carriers Act. It will, therefore, be for the carrier to prove absence of negligence."

57. We reiterate the said settled position and reject the contention of the appellant that the presumption under Section 9 of the Carriers Act is not available in a proceeding under the Consumer Protection Act and that therefore, in the absence of proof of negligence, it is not liable to compensate the respondents for the loss."

50. Mr. Khanna further submitted that in the case of *E.I.C.M. Exports Ltd. v. South Indian Corporation (Agencies) Ltd. and Another* 2009 (10) SCALE 22**,** this Court has held

firstly that the cases filed before the consumer forum are not suits within the meaning of Section 9 of CPC and secondly the limitation of two years for filing a case under the Act as provided vide Section 24 (A) of the Act will be applicable instead of Article III, Clause 6 of the schedule of the Indian Carriage of Goods by Sea Act, 1925, which provides for limitation of one year extendable by three months at the discretion of the Court. According to learned counsel for the respondent there is no conflict between the judgments of this Court in the cases of *E.I.C.M. Exports* (supra) and *Patel Roadways Limited* (supra). According to him the provisions of Carriage by Air Act, 1972 have to be read into the provisions of the Act.

51. We have heard learned counsel for the parties and carefully perused relevant cases cited at the Bar. The Central Question which requires adjudication is whether the appellant Ethiopian Airlines is entitled to sovereign immunity in this case?

52. The short question which falls for our adjudication is whether the proceedings before the Consumer Forum are suits.

53. The term "suit" has not been defined in the Carriage by Air Act, 1972 nor is it provided in the said Act that the term "suit" will have the same meaning as in the Civil Procedure Code. Therefore, the term "suit" has to be understood in its ordinary dictionary meaning. In that sense, the term "suit" is a generic term taking within its sweep all proceedings initiated by a party for realisation of the right vested in him in law. In this view of the matter, we have to look to the dictionary meaning of the word "suit".

54. According to Black's Law Dictionary, the word "suit" means "any proceeding by a party or parties against another in a court of law."

55. In common parlance, the term "suit" is taken to include all proceedings of a judicial or quasi-judicial nature in which the disputes of aggrieved parties are adjudicated before an

impartial forum. Proceedings before the Consumer fora fall squarely within that definition.

56. It has been held in *Patel Roadways Limited* (supra) that proceedings before the Consumer Forums come within the sweep of the term "suit". This judgment has been approved by a Constitution Bench of this Court in *Economic Transport Organization* (supra). Therefore, the controversy involved in this case is finally settled and we are bound by the decision of the Constitution Bench and this case has to be ruled in terms of what has been decided by the Constitution Bench in *Economic Transport Organisation* (supra).

57. In the same vein, the U.S. Supreme Court has read the term "suit" broadly, finding that a "suit" is "any proceeding in a court of justice by which a person pursues therein that remedy which the law affords him," *Upshur County v. Rich,* 135 US 467 (1890). Likewise, "the modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." *Id.* The Michigan Supreme Court similarly found that "the word ["suit"], as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by legislatures and courts, to designate almost any proceeding." *Patterson v. Standard Accident Insurance Co.,* 178 Mich. 288. The proceedings held before the consumer redressal fora easily fall within the aforementioned definitions : these are proceedings in which consumers may pursue the remedies afforded to them by the Consumer Protection Act and other laws and where the rights of the parties are fully litigated by an organ of justice.

58. However, notwithstanding the fact that proceedings of the National Commission are "suits" under the Carriers Act, vide the *expressio unius* principle, The Consumer Protection Act, 1986 clearly enumerates those provisions of the CPC that are applicable to proceedings before the consumer fora. Such

provisions include 13(4), in which the Consumer Protection Act, 1986 vests those powers vested in a civil court under the CPC to the District Forum. However, according to the principle of *expressio unius,* because the legislature expressly made the aforementioned provisions of the CPC applicable to the consumer proceedings, the legislature is, therefore, deemed to have intentionally excluded all other provisions of the CPC from applying to the said proceedings. This is particularly true since, as explained above, the Consumer Protection Act, 1986 sets forth an exhaustive list of procedures, distinguishable from those required under the CPC, that the consumer redressal fora must follow. Therefore, since the Consumer Protection Act does not state that Section 86 applies to the consumer fora's proceedings, that Section of the CPC should be held to be not applicable.

59. Likewise, the CPC itself does not claim to make Section 86 applicable to proceedings before the consumer fora. Instead, the CPC includes a saving clause, providing that "in the absence of any specific provision to the contrary, nothing in [the CPC] shall be deemed to limit or otherwise affect any *special....* law ... or any special form of procedure prescribed, by or under any other law..." In addition, Section 86 only applies to a "suit in any Court". This term should be understood differently than the term "court" discussed above because the CPC refers exclusively to Civil Courts. In particular, the CPC specifically refers to the District Courts, the High Courts, and the Supreme Court and makes little if any reference to other, quasi-judicial fora like the consumer redressal bodies at issue here. This interpretation has been approved by the Supreme Court, in *H.H. The Maharana Sahib Shri Bhagwat Singh Bahadur of Udaipur* (supra). In that case, the Apex Court found that the phrase "sued in any Court" must be strictly construed and confined to "suits proper" and thus held that Section 86 did not bar adjudication of an industrial dispute in an industrial Tribunal. Similarly, in *Nawab Usmanali Khan v. Sagarmal,* AIR 1965 SC 1798, this Court found that Section 87(B) does not

apply to proceedings under the Arbitration Act. Similarly, Section 86 and 87 should be found inapplicable to the consumer redressal fora's proceedings at issue here.

60. Moreover, Section 86 of the CPC is inapplicable because the legislative intent is deem to exclude older and more general statute by more recent and special statutes : the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. And, under these Acts, Ethiopian Airlines is not entitled to sovereign immunity in a suit like that at issue here. Thus, consent of the Central Government is not required to subject Ethiopian Airline to suit in an Indian court, let alone in a consumer redressal forum.

61. In *Ratan Lal Adukia and Another v. Union of India,* AIR 1990 SC 104, the Apex Court found that Section 80 of the Railways Act, 1890, substituted 1961, was a special provision and self-contained code and that it impliedly repealed in respect of suits covered by it the general provisions of the CPC. The Railways Act provides for a forum in which a suit for compensation for loss of life of, or personal injury to, a passenger for loss, destruction, damage, deterioration or non-delivery of animals or goods against a railway administration may be brought. This is very much akin to the fora created by the Consumer Protection Act. Thus, a similar finding should be made here : the Consumer Protection and Carriers Acts must be deemed special Acts bypassing Section 86 of the CPC, with respect to suits covered by those special Acts.

62. That is, the Consumer and Carriage Acts, which came long after the CPC, are more focused and specific statutes, and therefore should be held to exclude Section 86. The Supreme Court has previously found as such, holding that in the fora created by the Consumer Act, "the provisions of the Code of Civil Procedure are applicable to a limited extent and not all the provisions of the Code of Civil Procedure are made applicable to the proceedings of the National Forum." Rather, rules created pursuant to the Consumer Act itself govern the

procedure to be followed in the consumer fora. Similarly, a Constitutional Bench of this Court, in *Economic Transport Organisation* (supra) found that even though the consumer redressal fora utilized summary proceedings, that "does not mean that proceedings before the Consumer Forum [are] to be decided by ignoring the express statutory provisions of the Carriers Act in a proceeding in which a claim is made against a common carrier."

63. In view of the Constitution Bench judgment in *Economic Transport Organisation* (supra) the view which has been taken by the two-Judge Bench of this Court in *E.I.C.M. Exports* (supra) is wholly untenable and unsustainable in law.

64. Section 86 of the Code of Civil Procedure is inapplicable to the present case because the older and more general statute has been excluded by more recent special statute, namely, Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Ethiopian Airlines is not entitled to sovereign immunity in the suit at issue in the present case. Therefore, any other consent of the Central Government is not required to subject the appellant, Ethiopian Airlines, to a suit in an Indian Court.

65. It is settled principle of statutory interpretation that specific statutes that come later in time trump prior general statutes. Both the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972, which came long after the Code of Civil Procedure, 1908, are more focused and specific statutes and therefore should be held to supersede Section 86 of the Code. This Court in *Savita Garg* (supra) has clearly laid down that the principle that in fora created by the Consumer Act, the provisions of the Code of Civil Procedure are applicable only to a limited extent, therefore, the provisions of the Code of Civil Procedure have not been made applicable to the proceedings of the National Consumer Forum.

66. This court in *Vishwabharathi House Building Coop.*

Society and Others (supra) dealt with the object of the Consumer Protection Act, 1986 : to provide expeditious adjudication of consumers' complaints by adopting summary procedure. The Consumer Protection Act, 1986 is a comprehensive and self-contained piece of legislation, and its object is to decide consumers' complaints expeditiously, via summary procedure. The Consumer Protection Act, 1986 also permits authorized agents to appear on behalf of the complainants in order to ensure that they are not burdened with the heavy professional fees of lawyers.

67. Similarly, the Carriage by Air Act, 1972 explicitly provides that its rules apply to carriage performed by the State or by legally constituted public bodies under Chapter 1, Section 2, Sub-section 1. Thus, it is clear that according to the Indian Law, Ethiopian Airlines can be subjected to suit under the Carriage Act, 1972. It may be pertinent to mention that the Carriage by Air Act, 1972 (69 of 1972) is an Act to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of September, 1955 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to exceptions, adaptations and modification) to non-international carriage by air and for matters connected therewith.

68. In effect, by signing onto the Warsaw Convention, Ethiopia had expressly waived its Airlines' right to immunity in cases such as that *sub judice*. Therefore, the Central Governments of both India and Ethiopia have waived that right by passing the Carriage by Air Act, 1972 and by signing onto the Warsaw Convention.

69. In accordance with the interpretation set forth above, the Bombay High Court has noted that Section 86 is of only limited applicability and can be overcome in cases of even

implied waiver. For example, in *The German Democratic Republic v. The Dynamic Industrial Undertaking Ltd.*, AIR 1972 Bombay 27, the Bombay High Court found that Section 86 does not supplant the relevant doctrine under International Law. Rather, Section 86 "creates *another* exception" to immunity (emphasis added), in addition to those exceptions recognized under International Law. Likewise, in *Kenya Airways v. Jinibai B. Kheshwala,* AIR 1998 Bombay 287, the Bombay High Court found that, while Kenya Airways was a state entity prima facie entitled to immunity under Section 86, it had nevertheless waived that immunity by, in its written statements, failing to raise a plea of sovereign immunity under Section 86 of the CPC. Therefore, in that case, the Bombay High Court found that Kenya Airways was not entitled to sovereign immunity and could be subjected to suit in an Indian court.

70. Ethiopian Airlines is not entitled to sovereign immunity with respect to a commercial transaction is also consonant with the holdings of other countries' courts and with the growing International Law principle of restrictive immunity. For instance, in England, in *Rahimtoola v. H.E.H. The Nizam of Hyderabad and Others* (1957) 3 All E.R. 441, Lord Denning found that "there was no reason why [a country] should grant to the departments or agencies of foreign governments an immunity which [the country does] not grant [its] own, provided always that the matter in dispute arises within the jurisdiction of [the country's] courts and is properly cognizable by them." Lord Denning also held that "if the dispute concerns... the commercial transactions of a foreign government... and it arises properly within the territorial jurisdiction of [a country's] courts, there is no ground for granting immunity," finding implicitly that it would not "offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country."

71. Likewise, in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977) 1 All E.R. 881, the Court held

that the Central Bank of Nigeria was not entitled to plead sovereign immunity because, according to International Law Principle of restrictive immunity, a state-owned entity is not entitled to immunity for acts of a commercial nature, *jure gestionis*. The Court noted that "if a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place." The Court also noted an "important practical consideration." stating that foreign sovereign immunity, "in protecting sovereign bodies from the indignities and disadvantages of that process, operates to deprive other persons of the benefits and advantages of [the judicial] process in relation to rights which they posses and which would otherwise be susceptible to enforcement." As the court stated, the principle of restrictive immunity is "manifestly better in accord with practical good sense and with justice."

72. On careful analysis of the American, English and Indian cases, it is abundantly clear that the appellant Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India.

73. It may be pertinent to mention that the Parliament has recognized this fact while passing the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Section 86 was itself, a modification and restriction of the principle of foreign sovereign immunity and thus, by limiting Section 86's applicability, the Parliament through these Acts, further narrowed a party's ability to successfully plead foreign sovereign immunity. In the modern era, where there is close interconnection between different countries as far as trade, commerce and business are concerned, the principle of sovereign immunity can no longer be absolute in the way that it much earlier was. Countries who participate in trade, commerce and business with different countries ought to be subjected to normal rules of the market. if State owned entities

would be able to operate with impunity, the rule of law would be degraded and international trade, commerce and business will come to a grinding halt. Therefore, we have no hesitation in coming to the conclusion that the appellant cannot claim sovereign immunity. The preliminary objection raised by the appellant before the court is devoid of any merit and must be rejected.

74. The controversy involved in this case is no longer *res*-integra. This Court in *Patel Roadways Limited* (supra) clearly observed that a proceeding before the Consumer Forum comes within the sweep of term "suit". Again this Court in *Economic Transport Organization* (supra) reiterated the principle stated in *Patel Roadways Limited* (supra). Both these judgments have been specifically approved by the Constitution Bench of this Court in *Economic Transport Organization* (supra). The view which has been taken in *E.I.C.M. Exports* (supra) is clearly contrary to the view taken by the Constitution Bench judgment in *Economic Transport Organization (supra)* and the same cannot be sustained.

75. We are of the considered view that the impugned order passed by the National Commission is untenable so far it held that the proceeding before the Consumer Forum does not come within the sweep of term "suit" because it is contrary to the judgment of the Constitution Bench of this court in *Economic Transport Organization* (supra). The finding of the National Commission is accordingly set aside to that extent. However, we agree with the findings of the National Commission so far as it has remitted the matter to the State Commission for adjudication. In the facts and circumstance of this case, we direct the State Commission to dispose of the case as expeditiously as possible.

76. This appeal is accordingly disposed of, leaving the parties to bear their own costs.

N.J. Appeal disposed of.

COMMISSIONER OF CENTRAL EXCISE, BELAPUR, MUMBAI

v.

RDC CONCRETE (INDIA) P. LTD.

(Civil Appeal No. 4409 of 201)

AUGUST 9, 2011

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

Central Excise Act, 1944 – s. 35C(2) – Application under – For rectification of mistake – Power of appellate tribunal – Held: Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record – Mistake apparent on record must be an obvious and patent mistake – It cannot be something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions – Decision on a debatable point of law cannot be a mistake apparent from the record – On facts, the appellate Tribunal exceeded the powers given to it u/s. 35C(2) of the Act, and tried to re-appreciate the evidence and reconsider its legal view taken earlier in pursuance of a rectification application, which it could not have done so – Thus, the order passed in pursuance of the rectification application is bad in law and, is quashed and set aside.

Respondent-Company is engaged in the manufacturing of pavers. According to appellant-Revenue Department, the respondent sold its excisable goods to a related person or an inter-connected undertaking at a particular price and immediately thereafter, the inter-connected company had sold the very same goods at much higher price to another company, for the purpose of evasion of excise duty. A Cost Accountant was appointed to ascertain value of the

goods manufactured by the respondent. Thereafter, the Department raised demand for excise duty together with interest and equivalent amount of penalty. The respondent challenged the same. In the appeal filed by the respondent, the CESTAT upheld the demand of duty with interest and penalty. However, certain amount of penalty was set aside. The respondent filed an application for rectification of the said order under Section 35C(2) of the Central Excise Act, 1944. CESTAT modified the original final order to such an extent that the entire demand of duty was quashed and set aside as also the penalty imposed upon the respondent-Company and the Directors of the Company was set aside. CESTAT also accepted the submission raised by the respondent that an employee of the Department who was not in practice as a Cost Accountant, could not have been appointed to ascertain the value of the goods manufactured by the respondent (which was raised in the appeal but was not accepted by the CESTAT earlier) and did not accept the valuation arrived at by the Cost Accountant and the order was modified. Therefore, the appellant-Revenue Department filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 A mistake apparent on record must be an obvious and patent mistake. A "mistake apparent from the record" cannot be something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. A decision on a debatable point of law cannot be a mistake apparent from the record. [Paras 16 and 21] [992-D-E; 999-G-H; 995-A-B]

T.S. Balram v. M/s.Volkart Brothers **82 ITR 50;** *ITO v. Ashok Textiles* **41 ITR 732 – referred to.**

1.2 If one looks at the subsequent order passed by

the CESTAT in pursuance of the rectification application, it is very clear that the CESTAT re-appreciated the evidence and came to a different conclusion than the earlier one. At an earlier point of time, the CESTAT came to a conclusion that the company to which the respondent-assessee sold its goods was an inter-connected company. In the circumstances, according to the CESTAT, the decision of the department to appoint a Cost Accountant to ascertain value of the goods manufactured by the asessee was considered to be just and proper. However, after considering the submissions made in pursuance of the rectification application, the CESTAT came to a different conclusion to the effect that the asessee company and the buyer of the goods were not inter-connected companies. Different conclusions were arrived at by the CESTAT because it re-appreciated the evidence in relation to common directors among the companies and *inter se* holding of shares by the companies. Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. [Para 16] [992-D-H; 993-A]

1.3 In pursuance of the rectifying application, the CESTAT came to the conclusion that an officer of the department, who was working as Assistant Director (Cost) and was also a Member of an Institute of Cost and Works Accountants was not competent as a Cost Accountant to ascertain value of the goods. It is strange as to why the CESTAT came to the conclusion that it was necessary that the person appointed as a Cost Accountant should be in practice. There is no reason as to how the CESTAT came to the conclusion that the Cost Accountant, whose services were availed by the department should not have been engaged because he was an employee of the department and he was not in practice. The said facts clearly show that the CESTAT

took a different view in pursuance of the rectification application. The submissions which were made before the CESTAT by the respondent while arguing the rectification application were also advanced before the CESTAT when the appeal was heard at an earlier stage. The arguments not accepted at an earlier point of time were accepted by the CESTAT after hearing the rectification application. It is strange as to how a particular decision taken by the CESTAT after considering all the relevant facts and submissions made on behalf of the parties was changed by the CESTAT. There was no mistake apparent on record when the CESTAT did not accept a submission of the respondent to the effect that the officer appointed to value the goods manufactured by asessee should not have been engaged as a Cost Accountant. [Para 17] [993-B-G]

Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut **2005(183) E.L.T 225 (S.C.);** *Commissioner of Central Excise,Mumbai v. Bharat Bijlee Limited* **2006 (198) ELT 489;** *Honda Siel Power Products Ltd. v. Commissioner of Income Tax, Delhi* **2008(221) E.L.T 11 (S.C.) – referred to.**

1.4 Upon perusal of both the orders viz. earlier order dated 4th November, 2008 and order dated 23rd November, 2009 passed in pursuance of the rectification application, the CESTAT exceeded its powers given to it under the provisions of Section 35C(2) of the Central Excise Act, 1944 and it tried to re-appreciate the evidence and it reconsidered its legal view taken earlier in pursuance of a rectification application. The CESTAT could not have done so while exercising its powers under Section 35C(2) of the Act, and, therefore, the impugned order passed in pursuance of the rectification application is bad in law and, therefore, the said order is quashed and set aside. [Paras 16, 22] [992-C; 995-C]

Commissioner of Central Excise, Calcutta v. Ascu Ltd.

Calcutta **2003 (9) SCC 230;** *Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd.* **2003(12) SCC 731;** *Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, **U.P.*** **2008 (221) E.L.T 16;** *Mepco Industries Limited, Madurai v. Commissioner of Income Tax and Anr.* **2010 (1) SCC 434: 2009 (15) SCR 1026 – cited.**

Case Law Reference:

2003 (9) SCC 230	**Cited**	**Para 13**
2003(12) SCC 731	**Cited**	**Para 13**
2008 (221) E.L.T 16	**Cited**	**Para 13**
2009 (15) SCR 1026	**Cited**	**Para 13**
82 ITR 50	**Referred to**	**Para 16, 21**
2005(183) E.L.T 225 (S.C.)	**Referred to**	**Para 18**
2006 (198) ELT 489	**Referred to**	**Para 19**
2008(221) E.L.T 11 (S.C.)	**Referred to**	**Para 20**
41 ITR 732	**Referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4409 of 2010.

From the Judgment and Order dated 23.11.2009 of the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. E/2032/06.

B. Bhattacharya, ASG, Harish Chandra, B. Tamta, Ajay Singh, Judy James, Nimisha Swarup and B. Krishna Prasad for the Appellant.

Arshad Hidayatullah, Shailaja Kher, P.K. Ram, P.N. Srivastava and Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Being aggrieved by the Order dated 23rd November, 2009, passed in Appeal No.E/2032/06-Mum. by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), West Zonal Bench at Mumbai, this appeal has been filed by the Revenue – Commissioner of Central Excise, Belapur, Mumbai.

2. By virtue of the impugned order, the CESTAT has rectified its Order dated 4th November, 2008 passed in Appeal No.E-2032-2033/06 in pursuance of an application for rectification filed by the present respondent-assessee under Section 35C(2) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act').

It is the case of the appellant that the aforestated final order dated 4th November, 2008 passed by the CESTAT has been rectified in pursuance of the application filed by the respondent herein. The case of the appellant, in this appeal, is that under the garb of rectification, the CESTAT has modified its order dated 4th November, 2008 in such a way as if the respondent asessee had filed an appeal against the said order and the CESTAT has virtually allowed the appeal against its own order.

3. Mr. B. Bhattacharya, learned Additional Solicitor General, appearing for the Revenue submitted that the CESTAT has limited power to rectify its mistake under the provision of Section 35C(2) of the Act. The relevant portion of the said section reads as under:

> "35C(2) - The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal……"

The learned counsel submitted that as per the language of the

aforestated sub-section, it is clear that the Appellate Tribunal, i.e. the CESTAT has power to rectify any mistake which is apparent from the record of any order passed by it under Section 35C(1) of the Act. The learned counsel submitted that the CESTAT had passed final order dated 4th November, 2008 in an appeal filed before it by the respondent. By virtue of the final order passed in the said appeal filed by the respondent, the CESTAT had upheld the demand of duty of Rs.90,89,480.56 together with interest and equivalent penalty of Rs.90,89,480.56 but the order imposing penalty of Rs.25,00,000/- had been set aside. Moreover, the penalty imposed upon Shri Sanjay Bahadur had been reduced to Rs.1,00,000/-.

4. In pursuance of the application submitted by the respondent for rectification, the CESTAT modified the original final order to such an extent that the entire demand of duty has been quashed and set aside and as a consequence thereof the penalty imposed upon the respondent company and upon the Directors of the company has also been set aside.

5. The learned counsel appearing for the Revenue submitted that in pursuance of the rectification application, the CESTAT has not only substantially changed its order but has also changed its legal view on the subject. According to him, while rectifying any order, the CESTAT can rectify any mistake which is apparent from the record. Under the guise of rectification, the CESTAT cannot altogether take a different view in law and it cannot reappreciate evidence which had been led before it.

6. He further submitted that the CESTAT has practically reviewed its order though it has no power to review its order and, therefore, it was not open to the CESTAT to review the decision rendered by it on 4th November, 2008. He further submitted that no judicial or quasi judicial authority has power to review its order unless the statute gives such a power.

7. Coming to details, as to how the CESTAT exceeded its jurisdiction, the learned counsel narrated the facts in a nutshell. He submitted that the respondent-company is a manufacturer of 'Unipaved Interlocking Concrete Blocks' (pavers), being excisable goods falling under chapter 68 of the First Schedule to the Central Excise Tariff Act, 1985. In pursuance of specific information received by the Department of Central Excise with regard to evasion of duty by the respondent, officers of the Head Quarters (Preventive) Wing had given a surprise visit to the factory premises of the respondent on 13th February, 2002 and had checked the company's record and recorded statements of its officers. In pursuance of investigation, it was found that the pavers manufactured by the respondent were valued by the respondent at Rs.250/- per sq. mtr. and accordingly excise duty was paid thereon. The said pavers were sold by the respondent to a related person or its inter-connected company – M/s. Unitech Ltd. (UTL) for Rs.531/- per sq. mtr. and thereafter UTL was selling the same for Rs.826.50 per sq. mtr. to Senorita Builders Pvt. Ltd. Thus, according to the learned counsel, the goods manufactured by the respondent were shown at a substantially low value only for the purpose of evasion of excise duty.

8. In the aforestated circumstances, a Cost Accountant was appointed to ascertain value of the goods manufactured by the respondent. The Assistant Director (Cost) of the Excise Department, who was a Cost Accountant, was appointed, though he was in service of the Department. An objection was raised by the respondent before the CESTAT at the time of hearing of the appeal referred to hereinabove that an employee of the Department, who was not in practice as a Cost Accountant, could not have been appointed to ascertain value of the goods manufactured by the respondent.

9. The aforestated objection raised by the respondent was duly considered by the CESTAT and was rejected for the reason that the Act or Rules made thereunder nowhere provides

that only a Cost Accountant, who is in practice should be appointed to ascertain value of the goods, when the Revenue feels that the value of the goods shown by the concerned manufacturer is required to be ascertained. In pursuance of the rectification application, the CESTAT had heard the matter again and a similar objection was raised by the respondent in the rectification application. Once again it was submitted before the CESTAT that an officer of the department, though a Member of the Institute of Cost and Works Accountants of India, could not have been entrusted with the work of ascertaining the value of the goods because the person so appointed was in service of the department and was not in practice. The learned counsel submitted that after hearing the rectification application, the CESTAT accepted the aforesaid submission (which had not been accepted by the CESTAT earlier) and the valuation arrived at by the Cost Accountant was not accepted by the CESTAT and accordingly the order was modified.

10. The learned counsel for the Revenue submitted that the CESTAT could not have changed its view as stated above because what was permissible to the CESTAT was only rectification of a mistake, if found apparent from the record. The interpretation with regard to the provision relating to the appointment of the Cost Accountant, which the CESTAT had accepted at an earlier point of time could not have been changed by the CESTAT while deciding the rectification application because by changing the legal view, the CESTAT was not rectifying any mistake apparent from the record but the CESTAT was changing its view altogether, which is not permissible under the provision of Section 35C (2) of the Act.

11. Similarly, the learned counsel further submitted that the CESTAT had earlier arrived at a finding that the respondent company had sold its excisable goods to a related person or an inter-connected undertaking at a particular price and immediately thereafter the inter-connected company had sold the very same goods at much higher price to another company.

The CESTAT had earlier come to a conclusion that it was nothing but an attempt to evade duty and subsequently, in pursuance of the rectification application, the CESTAT took altogether a different view whereby it came to the conclusion that the company with which the respondent-assessee had dealings, was in no way inter-connected. Thus, the facts which had been ascertained at an earlier point of time were found to be incorrect or the CESTAT had reappreciated evidence while deciding the rectifying application.

12. According to the learned counsel, the CESTAT should not have re-appreciated the evidence so as to come to a different conclusion while exercising its power under Section 35C(2) of the Act.

13. The learned counsel relied upon judgments of this Court in *Commissioner of Central Excise, Calcutta v. Ascu Ltd., Calcutta* 2003(9) SCC 230, *Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd.* 2003(12) SCC 731, *Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, U.P.* 2008(221) E.L.T 16 and *Mepco Industries Limited, Madurai v. Commissioner of Income Tax and Another* 2010(1) SCC 434.

14. On the other hand, the learned counsel for the respondent-assessee submitted that it was open to the CESTAT to change its view because it apparently noted its mistakes which had been committed while passing its earlier order dated 4th November, 2008. The counsel further submitted that the view expressed by this Court in the judgments referred to by the learned counsel appearing for the appellant had been subsequently changed in the judgments delivered in cases of *Commissioner of Central Excise, Mumbai v. Bharat Bijlee Limited,* 2006 (198) ELT 489, *Honda Siel Power Products Ltd. vs. Commissioner of Income Tax,* Delhi , 2008(221) ELT 11 and of *Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut,* 2005 (183) ELT 225. Thus, the learned counsel submitted that the CESTAT did not exceed its power and rightly

rectified the mistakes which were apparent on the record while deciding the rectification application.

15. We heard the learned counsel at length and also considered the judgments cited by them and the orders passed by the CESTAT.

16. Upon perusal of both the orders viz. earlier order dated 4th November, 2008 and order dated 23rd November, 2009 passed in pursuance of the rectification application, we are of the view that the CESTAT exceeded its powers given to it under the provisions of Section 35C(2) of the Act. This Court has already laid down law in the case of T.S. Balram v. M/s.Volkart Brothers, 82 ITR 50 to the effect that a "mistake apparent from the record" cannot be something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. It has been also held that a decision on a debatable point of law cannot be a mistake apparent from the record. If one looks at the subsequent order passed by the CESTAT in pursuance of the rectification application, it is very clear that the CESTAT re-appreciated the evidence and came to a different conclusion than the earlier one.

At an earlier point of time, the CESTAT came to a conclusion that the company to which the respondent-assessee sold its goods was an inter-connected company. In the circumstances, according to the CESTAT, the decision of the department to appoint a Cost Accountant to ascertain value of the goods manufactured by the asessee was considered to be just and proper. However, after considering the submissions made in pursuance of the rectification application, the CESTAT came to a different conclusion to the effect that the asessee company and the buyer of the goods were not inter-connected companies. Different conclusions were arrived at by the CESTAT because it reappreciated the evidence in relation to common directors among the companies and inter se

holding of shares by the companies. Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record.

17. Similarly, in pursuance of the rectifying application, the CESTAT came to the conclusion that an officer of the department, who was working as Assistant Director (Cost) and who was also a Member of an Institute of Cost and Works Accountants was not competent as a Cost Accountant to ascertain value of the goods. It is strange as to why the CESTAT came to the conclusion that it was necessary that the person appointed as a Cost Accountant should be in practice. We do not see any reason as to how the CESTAT came to the conclusion that the Cost Accountant, whose services were availed by the department should not have been engaged because he was an employee of the department and he was not in practice. The aforestated facts clearly show that the CESTAT took a different view in pursuance of the rectification application. The submissions which were made before the CESTAT by the respondent-assessee while arguing the rectification application were also advanced before the CESTAT when the appeal was heard at an earlier stage. The arguments not accepted at an earlier point of time were accepted by the CESTAT after hearing the rectification application. It is strange as to how a particular decision taken by the CESTAT after considering all the relevant facts and submissions made on behalf of the parties was changed by the CESTAT. There was no mistake apparent on record when the CESTAT did not accept a submission of the respondent-assessee to the effect that the officer appointed to value the goods manufactured by asessee should not have been engaged as a cost accountant.

18. We are not impressed by the judgments cited by the learned counsel for the respondent. So far as the judgment delivered in the matter of *Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut,* 2005(183) E.L.T 225 (S.C.)

is concerned, it pertains to sale of goods by an asessee to an independent and unrelated dealers and its effect on valuation. The said judgment pertains to a transaction with a related person in the State of U.P., at lower price and as such deals with the facts of that particular case. In our opinion, the said judgment would not help the respondent so far as the matter pertaining to rectification is concerned.

19. So far as the judgment delivered in *Commissioner of Central Excise, Mumbai v. Bharat Bijlee Limited,* (supra) is concerned, this Court held therein that when the Tribunal had totally failed to take into consideration something which was on record, the Tribunal had committed a mistake apparent on the face of the record. In the instant case, the evidence which was on record was duly appreciated by the Tribunal at the first instance but the Tribunal made an effort to re-appreciate the evidence and re-appreciation can never be considered as rectification of a mistake. We are, therefore, of the view that the aforementioned judgment would not help the respondent-assessee.

20. So far as judgment delivered in the case of *Honda Siel Power Products Ltd. v. Commissioner of Income Tax, Delhi,* 2008(221) E.L.T 11 (S.C.), is concerned, there also the Tribunal had not considered certain material which was very much on record and thereby it committed a mistake which was subsequently rectified by considering and appreciating the evidence which had not been considered earlier. As stated hereinabove, in the instant case, the position is absolutely different.

21. This Court has decided in several cases that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning. In the case of *T.S. Balram v. M/s. Volkart Brothers* (supra), this Court has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated

hereinabove, the mistake cannot be such which can be ascertained by a long drawn process of reasoning. Similarly, this Court has decided in *ITO v. Ashok Textiles,* 41 ITR 732 that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected.

22. For the aforestated reasons, we are of the view that the CESTAT exceeded its powers and it tried to re-appreciate the evidence and it reconsidered its legal view taken earlier in pursuance of a rectification application. In our opinion, the CESTAT could not have done so while exercising its powers under Section 35C(2) of the Act, and, therefore, the impugned order passed in pursuance of the rectification application is bad in law and, therefore, the said order is hereby quashed and set aside. The appeal is allowed with no order as to costs.

N.J. Appeal allowed.

PYLA MUTYALAMMA @ SATYAVATHI
v.
PYLA SURI DEMUDU & ANR.
(Criminal Appeal No. 219 of 2007)

AUGUST 9, 2011

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

Code of Criminal Procedure, 1973:

s.125 – Maintenance – Claim for, entitlement – Held: There is no quarrel with the legal position that during the subsistence of the first marriage and existence of a living wife (first wife), the claim of maintenance by the second wife cannot be entertained – But proof and evidence of subsistence of an earlier marriage at the time of solemnizing the second marriage, has to be adduced by the husband taking the plea of subsistence of an earlier marriage and when a plea of subsisting marriage is raised by the respondent-husband, it has to be satisfactorily proved by tendering evidence – In the instant case, respondent-husband failed to establish his plea that his earlier marriage was at all in subsistence which he claims to have been performed in the year 1970 as he has not led even an iota of evidence in support of his earlier marriage – This strong circumstance was heavily against the respondent-husband.

s.125 – Essential requirements of – Held: When the husband denies that the applicant is not his wife, all that the Magistrate has to find, in a proceeding u/s.125 is whether there was some marriage ceremony between the parties, whether they lived as husband and wife in the eyes of their neighbours, whether children were borne out of the union – If the evidence led in a proceeding u/s.125 raises a presumption that the applicant was the wife of the respondent, it would be sufficient for the Magistrate to pass an order granting maintenance

under the proceeding – In a case u/s.125, the Magistrate has to take prima facie view of the matter and it is not necessary for the Magistrate to go into matrimonial disparity between the parties in detail in order to deny maintenance to the claimant wife – s.125 proceeds on de facto marriage and not marriage de jure – Thus, validity of the marriage will not be a ground for refusal of maintenance if other requirements of s.125 are fulfilled – In the instant case, appellant had succeeded in proving that she was the legally married wife of the respondent with three children out of which one had expired while the other two were major and well-settled – It was further proved that the respondent-husband started deserting the appellant-wife after almost 25 years of marriage and in order to avert the claim of maintenance, a story of previous marriage was set up for which he failed to furnish any proof much less clear proof – Thus, it was not open for the High Court under its revisional jurisdiction to set aside the finding of the trial court and absolve the respondent from paying the maintenance of Rs.500/- per month to the appellant-wife.

Revisional jurisdiction: Scope of – Maintenance application filed u/s.125 Cr.P.C. by the appellant against the respondent on the ground that the appellant married the respondent in the year 1974 as per Hindu rites and customs after which they lived as a normal couple and out of the wedlock 3 children were born – Trial court awarded Rs.500 p.m. in favour of the appellant – On revision, High Court set aside the award on the ground that there was no valid marriage between the respondent and the appellant, as an earlier marriage between the respondent with his previous wife was subsisting and since the marriage with the appellant was performed without repudiation of the earlier marriage, the subsequent marriage with the appellant was not a valid one and, therefore, no maintenance was payable to her – On appeal, held: High Court in its revisional jurisdiction ought not to have entered into a scrutiny of the finding recorded by the trial court that the appellant was a married wife of the

respondent as it is well-settled that the revisional court can interfere only if there is any illegality in the order or there is any material irregularity in the procedure or there is an error of jurisdiction – High Court under its revisional jurisdiction is not required to enter into re-appreciation of evidence recorded in the order granting maintenance – In a case where the trial court has granted maintenance holding that the wife had been neglected and she was entitled to maintenance, the scope of interference by the revisional court is very limited – The questions whether the applicant is a married wife and whether the children are legitimate/illegitimate, being pre-eminently questions of fact, cannot be reopened and the revisional court cannot substitute its own views – High Court, therefore, is not required in revision to interfere with the positive finding in favour of the marriage and patronage of a child – The order of High Court is set aside and order passed by trial court is restored.

The appellant filed maintenance application under Section 125 Cr.P.C. claiming Rs.500 per month from the respondent on the ground that she married him in the year 1974 as per Hindu rites and customs after which they lived as a normal couple and out of the wedlock they were blessed with two daughters and one son, out of which one daughter died. The trial court passed an award of Rs.500 per month in favour of the appellant. On revision, the High Court set aside the award on the ground that there was no valid marriage between the respondent and the appellant, as an earlier marriage between the respondent with his previous wife was subsisting and as the marriage with the appellant was performed without repudiation of the earlier marriage, the subsequent marriage with the appellant was not a valid one and, therefore, no maintenance was payable to the appellant. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The High Court in its revisional jurisdiction ought not to have entered into a scrutiny of the finding recorded by the Magistrate that the appellant was a married wife of the respondent, before allowing an application determining maintenance as it is well-settled that the revisional court can interfere only if there is any illegality in the order or there is any material irregularity in the procedure or there is an error of jurisdiction. The High Court under its revisional jurisdiction is not required to enter into re-appreciation of evidence recorded in the order granting maintenance; at the most it could correct a patent error of jurisdiction. In a case where the Magistrate has granted maintenance holding that the wife had been neglected and the wife was entitled to maintenance, the scope of interference by the revisional court is very limited. The revisional court would not substitute its own finding and upset the maintenance order recorded by the Magistrate. Under revisional jurisdiction, the questions whether the applicant is a married wife and whether the children are legitimate/ illegitimate, being pre-eminently questions of fact, cannot be reopened and the revisional court cannot substitute its own views. The High Court, therefore, is not required in revision to interfere with the positive finding in favour of the marriage and patronage of a child. But where finding is a negative one, the High Court would entertain the revision, re-evaluate the evidence and come to a conclusion whether the findings or conclusions reached by the Magistrate are legally sustainable or not as negative finding has evil consequences on the life of both child and the woman. [Paras 9, 10] [1007-F-H; 1008-A-E]

Santosh (Smt.) v. Naresh Pal **(1998) 8 SCC 447;** *Parvathy Rani Sahu v. Bishnu Sahu* **(2002) 10 SCC 510 – relied on.**

Mohabbat Ali Khan v. Muhammad Ibrahim Khan & Ors. **AIR 1929 P.C. 135;** *Vimala (K) v. Veeraswamy (K)* **(1991) 2 SCC 375: 1991 (1) SCR 904;** *Suresh Mondal v. State of Jharkhand* **2006 (1) AIR Jhar. R. 153 – referred to**

2. There is no quarrel with the legal position that during the subsistence of the first marriage and existence of a living wife (first wife), the claim of maintenance by the second wife cannot be entertained. But proof and evidence of subsistence of an earlier marriage at the time of solemnizing the second marriage, has to be adduced by the husband taking the plea of subsistence of an earlier marriage and when a plea of subsisting marriage is raised by the respondent-husband, it has to be satisfactorily proved by tendering evidence. The respondent-husband failed to establish his plea that his earlier marriage was at all in subsistence which he claims to have performed in the year 1970 as he has not led even an iota of evidence in support of his earlier marriage including the fact that he has not produced a single witness except the so-called first wife as a witness of proof of his earlier marriage. This strong circumstance goes heavily against the respondent-husband. [Para 12] [1009-D-H; 1010-A]

Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. **(2005) 3 SCC 636: 2005 (2) SCR 638 – distinguished.**

3.1. The nature of the proof of marriage required for a proceeding under Section 125, Cr.P.C. need not be so strong or conclusive as in a criminal proceeding for an offence under Section 494 IPC since, the jurisdiction of the Magistrate under Section 125 Cr.P.C. being preventive in nature, the Magistrate cannot usurp the jurisdiction in matrimonial dispute possessed by the civil court. The object of the section being to afford a swift remedy, and the determination by the Magistrate as to the status of the parties being subject to a final determination of the civil

court, when the husband denies that the applicant is not his wife, all that the Magistrate has to find, in a proceeding under Section 125 Cr.P.C., is whether there was some marriage ceremony between the parties, whether they have lived as husband and wife in the eyes of their neighbours, whether children were borne out of the union. If the evidence led in a proceeding under Section 125 Cr.P.C. raises a presumption that the applicant was the wife of the respondent, it would be sufficient for the Magistrate to pass an order granting maintenance under the proceeding. But if the husband wishes to impeach the validity of the marriage, he will have to bring a declaratory suit in the civil court where the whole questions may be gone into wherein he can contend that the marriage was not a valid marriage or was a fraud or coercion practiced upon him. In a case under Section 125 Cr.P.C., the Magistrate has to take prima facie view of the matter and it is not necessary for the Magistrate to go into matrimonial disparity between the parties in detail in order to deny maintenance to the claimant wife. Section 125, Cr.P.C. proceeds on de facto marriage and not marriage de jure. Thus, validity of the marriage will not be a ground for refusal of maintenance if other requirements of Section 125 Cr.P.C. are fulfilled. [Paras 13, 14] [1010-B-G; 1011-A-B]

Jamuna Bai v. Anant Rai **AIR 1988 SC 793 ;** *Sethu Rathinam vs. Barbad* **(1970) 1 SCWR 589;** *Rajathi v. C. Ganesan* **AIR 1999 SC 2374: 1999 (3) SCR 1047– relied on.**

3.2. When the appellant's case is tested on the anvil of the said legal position, it is sufficiently clear that the appellant has succeeded in proving that she was the legally married wife of the respondent with three children out of which one had expired while the other two who are major are well-settled. It was further proved that the respondent-husband started deserting the appellant-wife

after almost 25 years of marriage and in order to avert the claim of maintenance, a story of previous marriage was set up for which he failed to furnish any proof much less clear proof. Thus, it was not open for the High Court under its revisional jurisdiction to set aside the finding of the trial court and absolve the respondent from paying the maintenance of Rs.500/- per month to the appellant-wife. The High Court wrongly exercised its jurisdiction while entertaining the revision petition against an order granting maintenance to the appellant-wife under Section 125 Cr.P.C. The judgment and order of the High Court is set aside and the order passed by the Magistrate in favour of the appellant granting her maintenance is restored. [Paras 15 and 16] [1011-C-G]

Case Law Reference:

AIR 1929 P.C. 135	**Referred to**	**Para 1**
1991 (1) SCR 904	**Referred to**	**Para 7**
2006 (1) AIR Jhar. R. 153	**Referred to**	**Para 9**
(1998) 8 SCC 447	**Relied on**	**Para 10**
(2002) 10 SCC 510	**Relied on**	**Para 10**
2005 (2) SCR 638	**Distinguished**	**Para 11**
AIR 1988 SC 793	**Relied on**	**Para 13**
(1970) 1 SCWR 589	**Relied on**	**Para 14**
1999 (3) SCR 1047	**Relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 219 of 2007.

From the Judgment & Order dated 09.09.2005 of the High Court of Andhra Pradesh at Hyderabad in Criminal Revision Case No. 234 of 2004.

Y. Raja Gopalan Rao, Vismai Rath, Hitendra Nath Raja, V.N. Raghupathy, D. Mahesh Babu, Ramesh Allanki, Savita Dhanda for the appearing parties.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Under the law, a second wife whose marriage is void on account of survival of the previous marriage of her husband with a living wife is not a legally wedded wife and she is, therefore, not entitled to maintenance under Section 125 Cr.P.C. for the sole reason that "law leans in favour of legitimacy and frowns upon bastardy[1]". But, the law also presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a long number of years and when the man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. Several judicial pronouncements right from the Privy Council up to this stage, have considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. But, when an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage and this is intended to protect women and children from living as destitutes and this is also clearly the object of incorporation of Section 125 of the Code of Criminal Procedure providing for grant of maintenance.

2. This appeal at the instance of an estranged wife, once again has beseeched this Court to delve and decide the question regarding grant of maintenance under Section 125 Cr. P.C. which arises after grant of special leave under Article 136 of the Constitution and is directed against the judgment and order dated 19.09.2005 passed by a learned single Judge of

1. AIR 1929 P.C. 135.

the High Court of Andhra Pradesh at Hyderabad in Criminal Revision No. 234/2004 whereby the learned single Judge had been pleased to set aside the order of the Family Court, Visakhapatnam awarding a sum of Rs.500/- per month to the appellant-wife by way of maintenance to her under Section 125 Cr.P.C. The respondent-husband assailed this order by way of a criminal revision before the High Court of Andhra Pradesh which was allowed and the order granting maintenance to the appellant-wife was set aside.

3. The appellant-Pyla Mutyalamma @ Satyavathi initially filed an application bearing M.C.No.145/2002 under Section 125, Cr.P.C. claiming Rs.500/- per month from her husband Pyla Suri Demudu-the respondent herein, on the ground that she married him in the year 1974 at Jagannadha Swamy Temple at Visakahapatnam as per the Hindu rites and customs after which they lived as a normal couple and out of the wedlock they were blessed with two daughters and a son of whom one daughter died. The surviving daughter is married and the son aged 22 years is also employed in the Dock Labour Board who was engaged as such by his father the respondent-husband himself. However, the relationship of the appellant-wife and the respondent-husband subsequently got strained when the respondent got addicted to vices and started ignoring and neglecting the appellant-wife as he failed to provide her even the basic amenities like food and clothing and indulged in beating her frequently under the influence of liquor. He thus deserted her and also started living with another woman due to which the appellant was compelled to claim maintenance from the husband-the respondent herein.

4. The respondent-husband herein, however, flatly denied the allegations and went to the extent of stating that the appellant is not his wife as he was already married to one Kolupuru Mutyalamma in a native of Lankivanipalem in the year 1970 and had children through her first marriage and that he never married the present appellant. He also alleged that the appellant is married to another man and as she owns a sum of Rs.2.50

lac to the respondent which he had given to her by way of a loan at the time of construction of her house in the year 1991-1992, she started the litigation in order to evade making the repayment of loan amount.

5. The learned trial Magistrate on an appreciation and scrutiny of evidence held that the appellant in fact is the wife of respondent No.1 who was deserted by the respondent and, therefore, fixed a maintenance of Rs.500/- per month to the appellant and the respondent-husband was directed to pay this amount to the appellant-wife. As already stated, this was resisted by the respondent-husband who assailed the order of the trial court by filing a revision petition before the High Court. The learned single Judge of the High Court was pleased to hold that there was no valid marriage between the respondent-husband and the appellant-wife, as an earlier marriage between the appellant and one another lady-Kolupuru Mutyalamma was subsisting and as the marriage with the appellant was performed without repudiation of the earlier marriage of 1970, the subsequent marriage was not a valid one and hence no maintenance could be paid to the appellant-wife. Feeling aggrieved with this view of the High Court, expressed in the impugned order, the appellant-wife has preferred this appeal.

6. Learned counsel for the appellant-wife in substance has contended that the learned single Judge of the High Court erred in reversing the finding of fact rendered by the trail court and interfered with a pure question of fact in spite of clinching evidence available on record to show that the appellant was the legally married wife of the respondent-husband who had been living together ever since their marriage in 1974 as any other usual couple and it is only in the year 2001, the respondent started deserting the appellant due to his vices which he picked up much after his marriage with the appellant. The High Court also ignored the evidence of the son and the daughter of the appellant but relied upon the evidence of Respondent-husband.

The High Court further relied on the defence case of the respondent -husband that he was already married to another lady in the year 1970, although no other witness except the so-called first wife was produced as a witness before the courts below.

7. The counsel for the appellant further laid much emphasis on the fact that the order granting maintenance to the appellant by the trial court should not have been interfered with by the High Court as it was merely raised to circumvent the order granting maintenance by setting up a false story regarding the existence of previous marriage of the appellant in the year 1970 ignoring the clinching evidence led by the appellant regarding her marriage which was creditworthy. In support of his submission, the counsel also relied upon a decision delivered in the matter of *Vimala (K) vs. Veeraswamy (K)*[2], wherein a Bench of three learned Judges of this Court had been pleased to hold that when a husband takes a plea that the marriage was void due to subsistence of an earlier marriage, the same requires clear and strict proof and the burden of strict proof of earlier marriage is on the husband to discharge. It may be relevant and worthwhile at this stage to quote the observations of their Lordships in the aforesaid matter which was to the following effect:

> "Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. Under the Hindu Law, a second marriage is void on account of the survival of the first marriage and is not a legally wedded wife. She is, therefore, not entitled to

2. (1991) 2 SCC 375.

maintenance under Section 125. Such a provision in law which disentitles a second wife from receiving maintenance from her husband under Section 125, Cr.P.C., for the sole reason that the marriage ceremony though performed in the customary form lacks legal sanctity can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage particularly when Section 125 is a measure of social justice intended to protect women and children."

8. In the case under consideration herein, the respondent-husband has sought to repudiate the marriage of the appellant as void on account of subsistence of an earlier marriage. But while doing so he has also set up another cooked up story that the appellant is already married to another woman and as she is owing an amount of Rs.2.50 lakhs to the appellant which he had advanced to her by way of a loan, the appellant has raised a false plea of claim of maintenance. Thus, the respondent-husband in one breath states that the second marriage with the appellant is void in view of the subsistence of his earlier marriage and in the next one he states that the appellant-wife has set up a false plea as she wants to get away from the liability of repayment of the amount which she was owing to the respondent.

9. In fact, we also find sufficient substance in the plea that the High Court in its revisional jurisdiction ought not to have entered into a scrutiny of the finding recorded by the Magistrate that the appellant was a married wife of the respondent, before allowing an application determining maintenance as it is well-settled that the revisional court can interfere only if there is any illegality in the order or there is any material irregularity in the procedure or there is an error of jurisdiction. The High Court under its revisional jurisdiction is not required to enter into re-appreciation of evidence recorded in the order granting maintenance; at the most it could correct a patent error of jurisdiction. It has been laid down in a series of decisions

including *Suresh Mondal vs. State of Jharkhand*[3] that in a case where the learned Magistrate has granted maintenance holding that the wife had been neglected and the wife was entitled to maintenance, the scope of interference by the revisional court is very limited. The revisional court would not substitute its own finding and upset the maintenance order recorded by the Magistrate.

10. In revision against the maintenance order passed in proceedings under Section 125, Cr.P.C., the revisional court has no power to re-assess evidence and substitute its own findings. Under revisional jurisdiction, the questions whether the applicant is a married wife, the children are legitimate/ illegitimate, being pre-eminently questions of fact, cannot be reopened and the revisional court cannot substitute its own views. The High Court, therefore, is not required in revision to interfere with the positive finding in favour of the marriage and patronage of a child. But where finding is a negative one, the High Court would entertain the revision, re-evaluate the evidence and come to a conclusion whether the findings or conclusions reached by the Magistrate are legally sustainable or not as negative finding has evil consequences on the life of both child and the woman. This was the view expressed by the Supreme Court in the matter of *Santosh (Smt.) vs. Naresh Pal*[4], as also in the case of *Parvathy Rani Sahu vs. Bishnu Sahu*[5]. Thus, the ratio decidendi which emerges out of a catena of authorities on the efficacy and value of the order passed by the Magistrate while determining maintenance under Section 125, Cr.P.C. is that it should not be disturbed while exercising revisional jurisdiction.

11. However, learned counsel for the respondent-husband on his part has also cited the case of *Savitaben Somabhai Bhatiya vs. State of Gujarat & Ors.*[6], in support of his plea that

3. 2006 (1) AIR Jhar. R. 153.
4. (1998) 8 SCC 447.
5. (2002) 10 SCC 510.
6. (2005) 3 SCC 636.

claim of maintenance by the second wife cannot be sustained unless the previous marriage of the husband performed in accordance with the Hindu rites having a living spouse is proved to be a nullity and the second wife, therefore, is not entitled to the benefit of Section of 125 Cr.P.C. or the Hindu Marriage Act, 1955.

12. It is no doubt true that the learned Judges in this cited case had been pleased to hold that scope of Section 125 cannot be enlarged by introducing any artificial definition to include a second woman not legally married, in the expression 'wife'. But it has also been held therein that evidence showing that the respondent-husband was having a living spouse at the time of alleged marriage with the second wife, will have to be discharged by the husband. Hence, this authority is of no assistance to the counsel for the respondent-husband herein as it is nobody's case that the appellant-wife should be held entitled to maintenance even though the first marriage of her husband was subsisting and the respondent-husband was having a living wife as there is no quarrel with the legal position that during the subsistence of the first marriage and existence of a living wife (first wife), the claim of maintenance by the second wife cannot be entertained. But proof and evidence of subsistence of an earlier marriage at the time of solemnizing the second marriage, has to be adduced by the husband taking the plea of subsistence of an earlier marriage and when a plea of subsisting marriage is raised by the respondent-husband, it has to be satisfactorily proved by tendering evidence. This was the view taken by the learned Judges in Savitaben's case (supra) also which has been relied upon by the respondent-husband. Hence, even if the ratio of this case relied upon by the respondent-husband is applied, the respondent-husband herein has failed to establish his plea that his earlier marriage was at all in subsistence which he claims to have performed in the year 1970 as he has not led even an iota of evidence in support of his earlier marriage including the fact that he has not produced a single witness except the so-called first wife as a witness of proof of his earlier marriage. This strong

circumstance apart from the facts recorded herein above, goes heavily against the respondent-husband.

13. We may further take note of an important legal aspect as laid down by the Supreme Court in the matter of *Jamuna Bai vs. Anant Rai*[7], that the nature of the proof of marriage required for a proceeding under Section 125, Cr.P.C. need not be so strong or conclusive as in a criminal proceeding for an offence under Section 494 IPC since, the jurisdiction of the Magistrate under Section 125 Cr.P.C. being preventive in nature, the Magistrate cannot usurp the jurisdiction in matrimonial dispute possessed by the civil court. The object of the section being to afford a swift remedy, and the determination by the Magistrate as to the status of the parties being subject to a final determination of the civil court, when the husband denies that the applicant is not his wife, all that the Magistrate has to find, in a proceeding under Section 125 Cr.P.C., is whether there was some marriage ceremony between the parties, whether they have lived as husband and wife in the eyes of their neighbours, whether children were borne out of the union.

14. It was still further laid down in the case of *Sethu Rathinam vs. Barbara*[8] that if there was affirmative evidence on the aforesaid points, the Magistrate would not enter into complicated questions of law as to the validity of the marriage according to the sacrament element or personal law and the like, which are questions for determination by the civil court. If the evidence led in a proceeding under Section 125 Cr.P.C. raises a presumption that the applicant was the wife of the respondent, it would be sufficient for the Magistrate to pass an order granting maintenance under the proceeding. But if the husband wishes to impeach the validity of the marriage, he will have to bring a declaratory suit in the civil court where the whole questions may be gone into wherein he can contend that the marriage was not a valid marriage or was a fraud or coercion

7. AIR 1988 SC 793 (para 4, 5 and 8)

8. (1970) 1 SCWR 589.

practiced upon him. Fortifying this view, it was further laid down by the Supreme Court in the matter of *Rajathi vs. C. Ganesan*[9] also, that in a case under Section 125 Cr.P.C., the Magistrate has to take prima facie view of the matter and it is not necessary for the Magistrate to go into matrimonial disparity between the parties in detail in order to deny maintenance to the claimant wife. Section 125, Cr.P.C. proceeds on de facto marriage and not marriage de jure. Thus, validity of the marriage will not be a ground for refusal of maintenance if other requirements of Section 125 Cr.P.C. are fulfilled.

15. When the appellant's case is tested on the anvil of the aforesaid legal position, it is sufficiently clear that the appellant has succeeded in proving that she was the legally married wife of the respondent with three children out of which one had expired while the other two who are major and well-settled. It has further been proved that the respondent-husband started deserting the appellant-wife after almost 25 years of marriage and in order to avert the claim of maintenance, a story of previous marriage was set up for which he failed to furnish any proof much less clear proof. Thus, it was not open for the High Court under its revisional jurisdiction to set aside the finding of the trial court and absolve the respondent from paying the maintenance of Rs.500/- per month to the appellant-wife.

16. Having thus considered the contradictory versions of the contesting parties and deliberating over the arguments advanced by them in the light of the evidence and circumstances, we are clearly led to the irresistible conclusion that the High Court wrongly exercised its jurisdiction while entertaining the revision petition against an order granting maintenance to the appellant-wife under Section 125 Cr.P.C. We, therefore, set aside the judgment and order of the High Court and restore the order passed by the Magistrate in favour of the appellant granting her maintenance. The appeal accordingly is allowed.

D.G. Appeal allowed.

9. AIR 1999 SC 2374.

RAJIV SARIN & ANR.

v.

STATE OF UTTARAKHAND & ORS.

(Civil Appeal No. 4772 of 1998)

AUGUST 9, 2011.

[S.H. KAPADIA, CJI, DR. MUKUNDAKAM SHARMA, K. S. RADHAKRISHNAN, SWATANTER KUMAR AND ANIL R. DAVE, JJ.]

KUMAUN AND UTTARAKHAND ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1960:

Sections 4, 4-A(as amended by U.P. Act 15 of 1978), 8, 18(1) and 19(1)(b) – Forest land– Vesting of, in the State – Held: By virtue of s. 4-A of the Act, the rights, title and interest of every hissedar in respect of forest land situated in the specified areas ceased with effect from 1.1.1978 and the same were vested in the State Government – Rule 41 of KUZALR Rules provides that forests belonging to State shall be managed by "Gaon Sabha or any other local authority, established" upon a notification issued by the State – So, where the land acquired by the State is to be transferred to a Gaon Sabha/Village Panchayat for its management and use of land leading to betterment of village economy, the legislation is in the nature of agrarian reforms – It is settled law that agrarian reforms fall within Entry 18 of List-II read with Entry 42 of List III of the Seventh Schedule to the Constitution – Validity of KUZALR Act and, particularly, ss. 4-A, 18(1) and 19(1)(b)thereof is upheld – Constitution of India, 1950 – Article 254, Seventh Schedule, List II, Entry 18 read with Entry 42 of List III – Kumaun and Uttarakhand Zamindari Abolition and Land Reform Rules, 1965 - r.41.

CONSTITUTION OF INDIA, 1950:

Article 254 (2), Seventh Schedule, List II Entry 18 read

with List III Entry 42 – KUZALR Act providing for vesting of forest land in State Government – Held: KUZALR Act is an enactment for agrarian reforms and principally relatable to Entry 18 (land) of List II read with Entry 42 in List III and only incidentally trenches upon "forest" i.e. Entry 17-A of list III – Indian Forest Act, 1927 is relatable to Entry 17-A read with Entry 42, both of List III and is in pith and substance relatable to Entry 17-A, as it deals with 'forests' and not with land and only incidentally spills over in the field of Entry 42 as it deals with "control over forest land and not property of the Government"—Indian Forest Act, 1927 does not deal with agrarian reforms, but deals with forest policy and management and, therefore, is in a different field – Consequently, in the instant matter, no case of repugnancy is made out and Article 254 (2) has no application – Accordingly, both the Acts are legally valid and constitutional – Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960- Rule of repugnancy – Doctrine of pith and substance – Doctrine of occupied field.

Article 300-A, Seventh Schedule, List II, Entry 18 and List III, Entry 42 --Acquisition and requisitioning of property – Compensation – Private forests – Vesting of forest land in State by virtue of s. 4-A of KUZALR Act – Held: When State exercises the power of acquisition of a private property, provision is generally made in the statute to pay compensation to be determined according to the criteria laid down in the statute itself – In the instant case, acquisition of property by State in furtherance of the Directive Principles of State Policy was to distribute the material resources of the community – It does not require payment of market value or indemnification to the owner of the property expropriated – The acquisition and payment of amount are part of the same scheme and they cannot be separated – Though adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory.

Article 300-A read with Article 226 – Private forests – Vesting of forest land in State – Compensation – Revenue authorities denying compensation stating that the KUZALR Act did not provide for a method to compute compensation in cases where no income was derived from the forests – Held: Awarding no compensation attracts the vice of illegal deprivation of property even in the light of the provisions of the Act and, therefore, amenable to writ jurisdiction – The intention of the legislature to pay compensation is abundantly clear from the fact that s. 19 itself prescribes that compensation payable to a hissedar u/s 12 shall, in the case of private forest, be eight times the amount of average annual income from such forest – In the instant case, income also includes possible income in case of persons who have not exploited the forest and have rather preserved it – In fact, the persons who are maintaining the forest and preserving it for future and posterity cannot be penalised by giving nil compensation – The Assistant Collector is directed to determine and award compensation to the owners of the property by following a reasonable and intelligible criterion evolved on the guidelines provided and in the light of the law enunciated in the judgment – The owners will also be entitled to interest @ 6% per annum on the compensation amount from the date of handover/physical possession of the State till the date of payment – Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 – ss. 18 and 19 – Judicial review.

INTERPRETATION OF CONSTITUTION:

Entries in the three lists of Seventh Schedule to the Constitution of India – HELD: The entries being the filed of legislation must receive liberal construction inspired by a broad and generous spirit.

The appellants were served with a notice under Rule 2 of the Kumaun and Uttarakhand Zamindari Abolition and Land Reform Rules, 1965 intimating them that

effective from 1.1.1978, the rights, title and interest of hissedar in respect of 1600 acres of their forest land (property in question) had vested in the State Government free from all encumbrances. The objections filed by the appellants challenging the vires of the Kumaun and Uttarakhand Zamindari Abolition and Land Reform Act, 1960 (KUZALR Act) and stating that no profit was being made from the property in question, were rejected by the Assistant Collector holding that he had no jurisdiction to consider the validity of the Act and that since the Act did not provide for a method to compute compensation in cases where no income was derived form the forests, the appellants were not entitled to any compensation. The landowners filed a writ petition before the High Court questioning the legality and validity of the order of the Assistant Collector and also challenging the constitutional validity of ss.4-A, 18(1)(cc) and 19(1)(b) of KUZALR Act. The High Court dismissed the writ petition.

The land owners filed the instant appeal contending that the provisions of s. 18(1)(cc) and s.19(1)(b) of KUZALR Act as amended by the UP Amendment Act, 1978 were repugnant to ss.37 and 84 of the Indian Forest Act 1927, in so far as no compensation was provided under the U.P. Amendment Act, 1978 for private forests which were preserved and protected through prudent management, while a private forest to which s. 36 of the Indian Forest Act, 1927 applied and which was neglected or mismanaged, could be acquired under the *Land Acquisition* Act, 1894 by paying market value and solatium.

The question for consideration before the Court was: whether the High Court was justified in holding that the appellants were not entitled to any compensation even when their forest land was acquired by the government, merely because the appellants had not derived any income from the said forest.

Partly allowing the appeal, the Court

HELD: 1.1 By a Gazette Notification dated 21.12.1977 u/s 4-A of the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 as amended by the U.P. Act No. 15 of 1978, the rights, title and interest of every *hissedar* in respect of forest land situated in the specified areas ceased with effect from 1.1.1978 and the same were vested in the State Government. [para 2] [1027-C-D]

1.2 It is settled law that agrarian reforms fall within Entry 18 of List-II read with Entry 42 of List-III of the Seventh Schedule to the Constitution. Rule 41 of the KUZALR Rules, 1965 declares that the forests belonging to the State shall be managed by "Goan Sabha or any other local authority established" upon a notification issued by the State Government. This being so, it clearly brings out that the vesting of forest land under the KUZALR Act is directly linked with the agrarian reforms, as the land as also the forest are managed by the Goan Sabha or any local authority dealing with the rights of villagers for betterment of village economy. So, where the land acquired by the State is to be transferred to a Goan Sabha / Village Panchayat for its management and use of land leading to betterment of village economy, the legislation is in the nature of agrarian reforms. [paras 17, 20 and 21] [1032-G; 1033-E-F; 1034-F-G]

Ranjit Singh and Others Vs. State of Punjab and Others **[1965] 1 SCR 82 – relied on.**

1.3 It is true that s.4A of KUZALR Act, 1960, as amended by the UP Amendment Act 1978, provides that Chapter II and Chapter V of the KUZALR Act would apply *mutatis mutandis* and Rule 41 of the KUZALR Rules is relatable to Chapter IV of the KUZALR Act. However, the necessary consequence of s.4A of the KUZALR Act is

that the forest land vests in the State and all that Rule 41 of the KUZALR Rules does is to provide how the lands vested in the State including forest and non-forest land is to be dealt with. Thus, Rule 41 of the KUZALR Rules clearly applies to forest lands as well, which are vested in the State u/s 4A of the KUZALR Act and, therefore, have become the land/property of the State, which would be managed by the Goan Sabha. [para 23] [1035-E-H]

Repugnancy and Article 254 of the Constitution

2.1 It is trite law that the plea of repugnancy would be attracted only if both the legislations i.e. one made by Parliament and the other by the State Legislature, fall under the Concurrent List of the Seventh Schedule to the Constitution. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by Parliament and the law made by the State Legislature occupy the same field. Therefore, whenever the issue of repugnancy between the law passed by Parliament and of State legislature are raised, it becomes quite necessary to examine as to whether the two legislations cover or relate to the same subject matter or different. [Para 28] [1037-C-G]

2.2 It is by now a well-established rule of interpretation that the entries in the three lists of the Seventh Schedule being fields of legislation, must receive liberal construction inspired by a broad and generous spirit and not a narrow or pedantic approach. [para 29] [1037-G-H; 1038-A]

Navinchandra Mafatlal v. CIT **1955 SCR 829 =AIR 1955 SC 58 and** *State of Maharashtra v. Bharat Shanti Lal Shah* **2008 (12) SCR 1083 = (2008) 13 SCC 5 – relied on.**

2.3 For repugnancy under Article 254 of the Constitution, there is a twin requirement, which is to be

fulfilled: firstly, there has to be a "repugnancy" between the Central and the State Acts; and secondly, the Presidential assent has to be held as being non-existent. The test for determining such repugnancy is indeed to find out the dominant intention of the both legislations and whether such dominant intentions of both the legislations are alike or different. [para 38] [1041-D-F]

2.4 A provision in one legislation in order to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but such partial or incidental coverage of the same area in a different context and to achieve a different purpose does not attract the doctrine of repugnancy. Thus, in order to attract the doctrine of repugnancy, both the legislations must be substantially on the same subject. While considering the issue of repugnancy what is required to be considered is the legislation in question as a whole and its main object and purpose, and while doing so incidental encroachment is to be ignored and disregarded. [para 35 and 38] [1040-G; 1041-E-F]

2.5 Repugnancy in the context of Article 254 of the Constitution is understood as requiring the fulfillment of a "Triple test", reiterated by the Constitution Bench in Karunanidhi's case, namely, (i) that there is a clear and direct inconsistency between the Central Act and the State Act; (ii) that such an inconsistency is absolutely irreconcilable; and (iii) that the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other. The two legislations must cover the same field. This has to be examined by a reference to the doctrine of pith and substance. [Paras 39-40] [1041-G; 1042-A-D]

M. Karunanidhi v. Union of India, **1979 (3) SCR 254 = (1979) 3 SCC 431 – relied on**

2.6 As and when there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it would also be necessary for the courts to examine the true nature and character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. Thus, whether on account of the exhaustive code doctrine or whether on account of irreconcilable conflict concept, the real test is that would there be a room or possibility for both the Acts to apply. Repugnancy would follow only if there is no such room or possibility. [para 30 and 50] [1035-C-E; 1048-B]

Kartar Singh v. State of Punjab, **(1994) 3 SCC 589;** *Hoechst harmaceuticals Ltd. v. State of Bihar,* **1983 (3) SCR 130 = (1983) 4 SCC 45;** *State of Maharashtra v. Bharat Shanti Lal Shah,* **2008 (12) SCR 1083 = (2008) 13 SCC 5; and** *Govt. of A.P. v. J.B. Educational Society,* **2005 (2) SCR 302 = (2005) 3 SCC 212 – referred to.**

2.7 KUZALR Act is a law principally relatable to Entry 18 (land) of List II read with Entry 42 in List III of the Seventh Schedule and only incidentally trenches upon "forest" i.e. Entry 17A/List-III of the Seventh Schedule. This is so because it is an enactment for agrarian reforms and so the basic subject matter is "land". Since the land happens to be forest land, it spills over and incidentally encroaches on Entry 17A i.e. "forest" as well. On the other hand, the Central Act i.e. the Indian Forests Act 1927 is relatable to Entry 17A read with entry 42, both of List III of the Seventh Schedule. It is in pith and substance relatable to Entry 17A, as it deals with "forests" and not

with "land" or any other subject. It only incidentally spills over in the field of Entry 42, as it deals with "control over forest land and not property of the Government" and in that context s.37, as an alternative to management of forests u/s. 36 of the Indian Forest Act 1927, deals with the grant of power to acquire land under the Land Acquisition Act 1894. [para 32] [1039-B-E]

Glanrock Estate Private Limited v. State of Tamil Nadu **2010 (12) SCR 597 = (2010) 10 SCC 96 – referred to.**

2.8 It is quite clear that the KUZALR Act relates to agrarian reforms and, therefore, it deals with the "land"; however, the Indian Forests Act 1927 deal with "forests" and its management, preservation and levy of royalty/ fees on forest produce. KUZALR Act further provides for statutory vesting, i.e., statutory taking over of property of hissedar, which happens to be 1st January 1978, i.e. the statutorily fixed date. Therefore, this forest land becomes the property of the State Government and is dealt with like land, which is acquired u/s 4A of KUZALR Act. This emerges from a reading of r. 41 of the KUZALR Rules itself. Further, the acquisition under the KUZALR Act is a case of "taking" upon payment of an amount, which is not intended to be the market price of the rights acquired. On the other hand, the power of acquisition u/s 37 of the Indian Forests Act 1927 Act is an acquisition based on the principles of public purpose and compensation. Thus, not only do the two Acts relate to different subject matters, but the acquisitions mentioned therein are conceptually different. [paras 34 and 35] [1040-B-E]

2.9 In fact, it is the UP Private Forest Act, 1948, which is an enactment relatable to Entry 17A of List III, i.e., 'forests', read with Entry 42 of List III of the Seventh Schedule of the Constitution, i.e., acquisition to the extent of "vested" forests. It is this Act which covers a field similar to that of the Central Act and, therefore, sought

and obtained the permission of the President u/s. 76 of the Government of India Act. Thus, in the State, there are two Acts, which are applicable viz. the UP Private Forests Act, 1948, which is in the same field as the Indian Forest Act 1927 and the KUZALR Act, which is in respect of a different subject matter. [para 36-37] [1040-H; 1041-A-C]

2.10 KUZALR Act deals with agrarian reforms and in the context deals with the private forests and vests the same with the State and such private forests would, therefore, be managed by the Goan Sabha. The Indian Forest Act, 1927 has nothing to do with agrarian reforms but deals with forest policy and management, and, therefore, is in a different field. Further, there is no direct conflict or collision, as the Indian Forest Act, 1927 only gives an enabling power to the government to acquire forests in accordance with the provisions of the Land Acquisition Act 1894, whereas KUZALR Act results in vesting of forests from the dates specified in s. 4A of the KUZALR Act. Consequently, it could be deduced that none of the three conditions is attracted to the facts of the instant case. [para 40] [1042-D-G]

2.11 It is, thus, crystal clear that in the instant matter, no case of repugnancy is made out, as both the Indian Forest Act, 1927 and the KUZALR Act operate in two different and distinct fields. Accordingly, both the Acts are legally valid and constitutional. That being so, there was no requirement of obtaining any Presidential assent. Consequently, Article 254(2) of the Constitution has also no application in the instant case. [para 51] [1048-C-D]

Gram Panchayat Jamalpur v. Malwinder Singh **1985 (2) Suppl. SCR 28 = (1985) 3 SCC 661;** *P.N. Krishna Pal v. State of Kerala,* **1994 (5) Suppl. SCR 526 = (1995) Suppl. 2 SCC 187; and** *Kaiser-I-Hind (P) Ltd. v. National Textile Corporation (Maharashtra North),* **(2002) 8 SCC 182 – referred to.**

Article 300-A of the Constitution and Compensation:

3.1 The incident of deprivation of property within the meaning of Article 300A of the Constitution normally occurred mostly in the context of public purpose. Any law which deprives a person of his private property for private interest, will be amenable to judicial review. With regard to claiming compensation, all modern constitutions which are invariably of democratic character provide for payment of compensation as the condition to exercise the right of expropriation. Under Indian Constitution, the field of legislation covering claim for compensation on deprivation of one's property can be traced to Entry 42 List III of the Seventh Schedule. The Constitution (7th Amendment) Act, 1956 deleted Entry 33 List I, Entry 36 List II and reworded Entry 42 List III relating to "acquisition and requisitioning of property". The right to property being no more a fundamental right, a legislation enacted under the authority of law as provided in Article 300A of the Constitution is not amenable to judicial review merely for alleged violation of Part III of the Constitution. [paras 61-63] [1055-B-G]

I. R. Coelho v. State of Tamil Nadu **2007 (1) SCR 706 = (2007) 2 SCC 1 – referred to.**

3.2 The Government is empowered to acquire land by exercising its various statutory powers. Acquisition of land and thereby deprivation of property is possible and permissible in accordance with the statutory framework enacted. Article 31(2) of the Constitution has since been repealed by the Constitution (44th Amendment) Act 1978. It is to be noted that Article 300A was inserted by the Constitution (44th Amendment) Act, 1978 by practically reinserting Article 31(1) of the Constitution. Therefore, right to property is no longer a fundamental right but a right envisaged and conferred by the Constitution. [paras 67-68] [1057-E-H; 1058-A-B]

3.3 When the State exercises the power of acquisition of a private property thereby depriving the private person of the property, provision is generally made in the statute to pay compensation to be fixed or determined according to the criteria laid down in the statute itself. It must be understood in this context that the acquisition of the property by the State in furtherance of the Directive Principles of State Policy was to distribute the material resources of the community including acquisition and taking possession of private property for public purpose. It does not require payment of market value or indemnification to the owner of the property expropriated. Payment of market value in lieu of acquired property is not a condition precedent or sine qua non for acquisition. It must be clearly understood that the acquisition and payment of amount are part of the same scheme and they cannot be separated. It is true that the adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory. [para 68] [1058-C-G]

3.4 Section 12 of the KUZALR Act, 1960 states that every hissedar whose rights, title or interest are acquired u/s. 4, shall be entitled to receive and be paid compensation. Further, s. 4A of the KUZALR Act makes it clear that the provisions of Chapter II (Acquisition and Modifications of existing rights in Land), including s.12, shall apply *mutatis mutandis* to a forest land as they apply to a *khaikhari* land. Further, the intention of the legislature to pay compensation is abundantly clear from the fact that s. 19 itself prescribes that the compensation payable to a *hissedar* u/s. 12 shall, in the case of private forest, be eight times the amount of average annual income from such forest. In the instant case, income also includes possible income in case of persons who have not exploited the forest and have rather preserved it. Otherwise, it would amount to giving a licence to owners/

persons to exploit forests and get huge return of income and not to maintain and preserve it. The same cannot be said to be the intention of the legislature in enacting the KUZALR Act. In fact, the persons who are maintaining the forest and preserving it for future and posterity cannot be penalised by giving nil compensation only because of the reason that they in fact chose to maintain the forest instead of exploiting it. [para 69] [1058-H; 1059-A-E]

Ganga Devi v. State of U.P. **1972 (3) SCR 431 = (1972) 3 SCC 126 – held inapplicable.**

3.5 As mandated by Article 300A, a person can be deprived of his property but in a just, fair and reasonable manner. In an appropriate case the court may find 'nil compensation' also justified and fair if it is found that the State has undertaken to take over the liability and also has assured to compensate in a just and fair manner. But the situation would be totally different if it is a case of 'no compensation' at all. [para 70] [1059-H; 1060-A-B]

3.6 A law seeking to acquire private property for public purpose cannot say that 'no compensation' would be paid. The instant case is a case of payment of 'no compensation' at all. In the case at hand, the forest land which was vested on the State by operation of law cannot be said to be non-productive or unproductive by any stretch of imagination. The property in question was definitely a productive asset. That being so, the criteria to determine possible income on the date of vesting would be to ascertain such compensation paid to similarly situated owners of neighbouring forests on the date of vesting. Even otherwise, revenue authority can always make an estimation of possible income on the date of vesting, if the property in question had been exploited by the appellants and then calculate compensation on the basis thereof in terms of ss. 18(1) (cc) and 19(1) (b) of KUZALR Act. [para 70] [1060-B-E]

3.7 Awarding no compensation attracts the vice of illegal deprivation of property even in the light of the provisions of the Act and, therefore, amenable to writ jurisdiction. [para 70] [1060-E]

4.1 The validity of the KUZALR Act and particularly of ss. 4A, 18(1) (cc) and 19 (1) (b) thereof is upheld. The Assistant Collector is directed to determine and award compensation to the appellants by following a reasonable and intelligible criterion evolved on the guidelines provided and in light of the law enunciated by this Court in the instant judgment. The appellants will also be entitled to interest @ 6% per annum on the compensation amount from the date of dispossession till the date of payment provided the possession of the forest was handed and taken over formally by the respondent physically and provided the appellant was totally deprived of physical possession of the forest. However, it is clarified that in case the physical/actual possession has not been handed over by the appellants to the State government or has been handed over at some subsequent date i.e. after the date of vesting, the interest on the compensation amount would be payable only from the date of actual handover/physical possession of the property in question and not from the date of vesting. [para 72] [1060-G-H; 1061-A-D]

Case Law Reference:

[1965] 1 SCR 82	**relied on**	**para 22**
1955 SCR 829	**relied on**	**para 29**
2008 (12) SCR 1083	**relied on**	**para 29**
2010 (12) SCR 597	**relied on**	**para 33**
1979 (3) SCR 254	**relied on**	**para 39**
1983 (3) SCR 130	**referred to**	**para 42**

(1994) 3 SCC 589	**referred to**	**para 43**
2005 (2) SCR 302	**referred to**	**para 44**
1985 (2) Suppl. SCR 28	**referred to**	**para 52**
1994 (5) Suppl. SCR 526	**referred to**	**para 52**
(2002) 8 SCC 182	**referred to**	**para 55**
2007 (1) SCR 706	**referred to**	**para 63**
1972 (3) SCR 431	**held inapplicable**	**para 66**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4772 of 1998.

From the Judgment and Order dated 12.08.1997 of the High Court of Judicature at Allahabad in Writ Petition No. 8927 of 1988.

K.K. Venugopal, E.C. Agrawala, Rishi Agrawala, Mahesh Agarwal, Shyam Mohan, Neha Agarwal, Sunil Murarka, Radhika Gautam for the Appellants.

Parag P. Tripathi, ASG, S.R. Singh, Rachna Srivastava, Kunal Bahri, Avneesh Arputham, Mahima Gupta, Manoj K. Dwivedi and Gunnam Venkateswara Rao for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The present Civil Appeal emanates from the judgment and order dated 12th August 1997 passed by the High Court of Judicature at Allahabad in Writ Petition No. 8927 of 1988, whereby the Division Bench of the High Court dismissed the writ petition filed by the appellants. Whether the High Court was justified in holding that the appellants were not entitled to any compensation even when their forest land is acquired by the government, merely because the appellants had not derived any income from the said forest, is one of the several important

questions of law which has arisen for consideration in the present appeal.

2. The appellant's father Shri P. N. Sarin had in the year 1945 acquired proprietary right in an Estate known as Beni Tal Fee Simple Estate situated in Pargana Chandpur, Tehsil Karan Prayag, District Chamoli, Uttarakhand (hereinafter referred to as "the property in question") which comprised of large tracts of forest spanning in and around 1600 acres. On the death of Shri P.N. Sarin in the year 1976 appellants succeeded to the property in question. By a Gazette Notification dated 21st December, 1977 under Section 4-A of the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (hereinafter referred to as "KUZALR Act") as amended by the U.P. Act No. 15 of 1978, the rights, title and interest of every hissedar in respect of forest land situated in the specified areas ceased with effect from 01st January, 1978 and the same were vested in the State Government. A notice issued by the Assistant Collector, Karan Prayag, District Chamoli, under Rule 2 of the Kumaun and Uttrakhand Zamindari Abolition and Land Reform Rules, 1965 (hereinafter referred to as "the KUZALR Rules") framed under the KUZALR Act was served upon the appellants intimating them that effective from 1st January, 1978, the rights, title and interest of hissedar in respect of the property in question had vested in the State Government free from all encumbrances and it invited objections and statement, if any, relating to the compensation qua the property in question.

3. Assailing the aforesaid notice issued by the Assistant Collector, the appellants preferred a writ petition under Article 32 of the Constitution before this Court. On 13th December 1978 while disposing the aforesaid writ petition, this Court passed the following order

> "We are of the opinion that it will be better if the Petitioner files a petition under Article 226 of the Constitution in the High Court. This Petition is therefore allowed to be withdrawn."

4. Subsequently, on 02nd April 1979 the appellants filed objections to the notice issued by the Assistant Collector challenging the vires of the KUZALR Act and also stating that no profit was being made from the property in question. By an order dated 11th April 1988, the Assistant Collector dismissed the objections of the appellants by observing that that he had no jurisdiction to consider the legal validity of the KUZALR Act. With regard to the issue of compensation, the Assistant Collector held that since the KUZALR Act does not provide for a method to compute compensation in cases where no income has been derived from the forests, the appellants were not entitled to any compensation.

5. Feeling aggrieved, the appellants preferred a writ petition in the High Court of Judicature at Allahabad questioning the legality and validity of the order of the Assistant Collector and also challenging the constitutional validity of Sections 4A, 18(1)(cc) and 19(1)(b) of the KUZALR Act. By impugned judgment dated 12th August 1997, the High Court dismissed the writ petition.

6. Not satisfied with the judgment rendered by the High Court, the appellants preferred a Special Leave Petition in which leave was granted by this Court by order dated 11th September 1998. By an order passed on 11th August, 2010, this appeal was directed to be listed before the Constitution Bench. This matter was thereafter listed before the Constitution Bench alongwith other connected matters wherein also the issue of scope and extent of right under Article 300A of the Constitution of India was one of the issues to be considered.

7. We heard the learned senior counsel appearing for the parties in respect of all the contentions raised before us. Before addressing the rival contentions advanced by the parties, it will be useful to throw some light on the relevant legal position which is intrinsically complex and requires closer examination.

8. The *Uttar Pradesh Zamindari Abolition and Land*

Reforms Act, 1950 (hereinafter to be referred as "UPZALR Act") was enacted in the year 1950 and the UPZALR Act was made applicable to the whole of the State of U.P. except inter-alia the areas of Kumaon, Uttarakhand. The object of the UPZALR Act as quite evident from its statements and objects are to provide for the abolition of the Zamindari System which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith.

9. Subsequently, on 02nd August 1960 *Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act,* 1960 was enacted. The object of the KUZALR Act is to provide for the acquisition of the rights, title and interests of persons between the State and the tiller of the soil in certain areas of the Kumaun and Garhwal Divisions and for the introduction of land reforms therein. It is important to notice that the original KUZALR Act did not provide for vesting of private forests, and the definition of the word "land" in Section 3(10) thereof excluded forest. Section 3(10) of the KUZALR Act reads as follows:-

> "3(10). "land" means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming but shall not include a forest;"

10. However, after the commencement of the Constitution (*42nd Amendment*) Act, 1976 which came into effect from 03rd January 1977 wherein inter-alia the subject "forests" was included in the Concurrent List of the Seventh Schedule of the Constitution as Entry 17A; the *U.P. Zamindari Abolition (Amendment) Act,* 1978 (U.P. Act 15 of 1978) was passed on 30th November 1977 whereby KUZALR Act was amended. In the preamble and Statement of Objects and Reasons necessitating the amendment, it is stated that the amendment

act amends Kumaun and Uttarakhand Zamindari abolition and Land Reforms Act, 1960 also. It goes on to state that in the areas governed by the Principal Act namely the Uttar Pradesh Zamindari Abolition and Land Reforms Act, the rights, title and interest of ex-intermediaries in respect of their private forests were abolished and vested in State. It also states that in the areas to which the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 apply, the hissedars (Intermediaries) continued to enjoy their rights in respect of their private forests and therefore it was necessary to remove the disparity as well by introducing an amendment in the nature of Section 4A. Under the aforesaid amendment to the KUZALR Act, Section 4A was added to the KUZALR Act and private forests were brought within its purview. It will be useful to reproduce Section 4A, 18(1)(cc) and 19(1)(b) of the KUZALR Act which reads as follows:

> "4-A. Vesting of interest of hissedar in the forest land – With effect from January 1, 1978 the rights, title and interest of every hissedar in respect of forest land shall cease and shall vest in the State Government free from all encumbrances, and the provisions of this Chapter and Chapter V shall mutatis mutandis apply to a forest land as they apply to a khaikari land."
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> "18 (1) (cc) in the case of a private forest, the average annual income from such forest for a period of twenty agricultural years immediately preceding the date of vesting;"
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> "19(1) (b) – in the case of a private forest, eight times of the amount of average annual income from such forest."

11. *Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960,* which is a State legislation received

the assent of the President of India on 10th September, 1960. The amendment brought in 1978 through UP Act 15 of 1978 to the said Act also received the assent of the President on 26th April, 1978.

12. At the outset we would like to mention that there is no specific whisper of defence raised under Articles 31A, 31B and 31C of the Constitution in the Counter-Affidavit/Reply filed by the State of Uttarakhand to the writ petition filed by the appellants in the High Court nor even before this Court but an attempt was made to argue the case on those grounds on behalf of the respondents. As there is no mention of any of the aforesaid Articles of the Constitution in the arguments or specific pleadings by the respondents in the writ petition, the question of deciding the applicability of those provisions of the Constitution and consequent protection of the Act, therefore, does not arise.

13. It was contended by Shri K.K. Venugopal, learned senior counsel appearing for the appellants that the original KUZALR Act, 1960 excluded private forests [Section 6(1) (4)], since the vesting of private forests in the State would not be by way of agrarian reform. It was further contended that the provision for agrarian reforms, therefore, should be a part of the Act, but, in the present case, the private forests so acquired under Section 4A of the KUZALR Act becomes the property of the State which is untenable.

14. It was further argued that in any event, under Section 4A of the KUZALR Act, it is only the provisions of Chapter-II and Chapter-V which shall apply to forests land while Rule 41 occurs in Chapter IV and has no application to the forests covered by Section 4A, and hence Rule 41 will not apply to forests acquired under Section 4A of the KUZALR Act. Further, if Article 31A of the Constitution has no application, then the law has to be tested against the Constitution as it stood on the date of its enactment, i.e. the U.P. Amendment Act, 1978 bringing forth amendment to KUZALR Act has to stand the test

of Articles 14, 19 and 21 of the Constitution. It was further contended that the said Amendment Act would be invalid since the mere transfer of the private forests to the State would by itself not be a public purpose and, furthermore, non-grant /total absence of compensation to the appellants, while granting full compensation to other owners of private forests who have mismanaged the forests or clear-felled the forests, would be violative of Article 14 of the Constitution.

15. Per contra Shri Parag P. Tripathi, Ld. Additional Solicitor General strenuously argued that that the entry "Acquisition and Requisitioning of property" which was earlier in the form of Entry 36/List-II of the Seventh Schedule of the Constitution [which was subject to Entry 42/List-III of the Seventh Schedule of the Constitution] and Entry 33/List-I of the Seventh Schedule of the Constitution provided only the field of legislative power and did not extend to providing or requiring compensation. The requirement of compensation in the event of "taking" flows only from Article 31(2) of the Constitution, which was repealed by the Constitution (44th Amendment) Act, with effect from 26th September, 1979.

16. As far as the question of alleged discrimination i.e. giving compensation to other owners and nil compensation to the appellants herein is concerned, it was contended by Learned Additional Solicitor General that merely because there may be two compensation laws, which may be applicable, one of which provides for a higher compensation than the other, would not by itself make the provisions discriminatory or violative of Article 14 of the Constitution.

17. It is settled law that Agrarian Reforms fall within Entry 18/List-II read with Entry 42/List-III of the Seventh Schedule of the Constitution.

18. In the instant case, it cannot be denied that KUZALR Act, 1960 is a statutory enactment, dealing with the agrarian reforms. Section 4 of the KUZALR Act provides that in respect

of non-forest land, State Government may by notification take over the rights, title and interests of hissedar. The land so released is then dealt with by giving *bhumidhari rights/asami* rights to the tillers and thereby effectuating the purpose of agrarian reforms.

19. It is important to notice that Section 4A introduced in KUZALR Act by the UP Amendment Act 1978 does not require any notification but it specifies the date i.e. 01st January 1978 and provides that the right, title and interest of a hissedar in respect of forest land shall cease and vest by the application of the statute itself in the State Government. Section 8 of the KUZALR Act mandates that such "hissedar" becomes by operation of the statute a "bhumidhar". The aforesaid amendment was introduced by way of amendment so as to bring the said act in parity with the Principal Act, namely UP Zamindari Abolition and Land Reforms Act wherein the rights, title and interest of an intermediary (hissedar) was abolished and vested with the State from the very inception of the said Act as such provision was part of the principal Act itself.

20. Further, Rule 41 of the KUZALR Rules, 1965 framed under the KUZALR Act declares that the forests belonging to the State shall be managed by "Goan Sabha or any other local authority established" upon a notification issued by the State Government. The Rule 41 of the KUZALR Rules, 1965 reads as follows:-

> **"41. Section 41 : Management of land and things belonging to State -** At any time after the appointed date, the State Government, may, by notification published in the Gazette, declare that as from the date to be specified, all or any of the following things, namely, -
>
> (i) lands, whether cultivable or otherwise, except land for the time being comprised in any holding or grove,
>
> (ii) forests,

> (iii) trees, other than trees in a holding or in a grove or in abadi,
>
> (iv) fisheries,
>
> (v) Hats, bazars and melas, except hats, bazars and melas held on land referred to in Section 7 or which is for the time being comprised in the holding of a bhumidar, and
>
> (vi) Tanks, ponds, ferries, water-channels, pathways and abadi sites;
>
> Belonging to the State, shall be managed by the Goan Sabha or any other local authority established for the whole or part of the village in which the things specified in clauses (i) to (vi) are situate, subject to and in accordance with the provisions of Chapter VII of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, and the rules made thereunder, as applicable to Kumaun and Uttarakhand Divisions:
>
> Provided that it shall be lawful for the State Government to make the declaration aforesaid subject to such exceptions or conditions as may be specified in the notification."

21. This being so, it clearly brings out that the vesting of forest land under the KUZALR Act are directly linked with the agrarian reforms, as the land as also the forest are managed by the Goan Sabha or any local authority dealing with the rights of villagers for betterment of village economy. So, where the land acquired by the State is to be transferred to a Goan Sabha/Village Panchayat for its management and use of land leading to betterment of village economy, the legislation is in the nature of agrarian reforms.

22. The aforesaid conclusions arrived at by us find support from the Constitution Bench decision of this Court in *Ranjit*

Singh and Others Vs. State of Punjab and Others reported in [1965] 1 SCR 82. In the said decision, the Constitution Bench has stated thus:-

> ".....The scheme of rural development today envisages not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few on the other, but envisages also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to village Panchayat for the use of the general community, or for hospitals, schools, manure pits, tanning grounds etc. ensure for the benefit of rural population must be considered to be an essential part of the redistribution of holdings and open lands to which no objection is apparently taken. If agrarian reforms are to succeed, mere distribution of land to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the village Panchayat is best designed to promote rural welfare than individual owners of small portions of lands...."

23. It is true that Section 4A of KUZALR Act, 1960, as amended by the UP Amendment Act 1978, provides that Chapter II and Chapter V of the KUZALR Act would apply *mutatis mutandis* and Rule 41 of the KUZALR Rules is relatable to Chapter IV of the KUZALR Act. However, the necessary consequence of Section 4A of the KUZALR Act is that the forest land vests in the State and all that Rule 41 of the KUZALR Rules does is to provide how the lands vested in the State including forest and non-forest land is to be dealt with. Thus, Rule 41 of the KUZALR Rules clearly applies to forest lands as it has been specifically so mentioned in the said Rules as well which are vested in the State under Section 4A of the KUZALR Act and therefore have become the land/property of the State, which would be managed by the Goan Sabha.

Repugnancy and Article 254 of the Constitution

24. Learned senior counsel appearing for the appellants raised two contentions in the context of the inter-relation of the Indian Forest Act 1927 and the KUZALR Act; firstly, the case of alleged discrimination in as much as the Central Act i.e. the Indian Forests Act provides for compensation under the *Land Acquisition Act 1894*, which is higher; and secondly, the case of alleged repugnancy.

25. It was submitted that the provisions of Section 18(1)(cc) read with Section 19(1)(b) of KUZALR Act as amended by the UP Amendment Act 1978 are repugnant to Section 37 and Section 84 of the *Indian Forests Act 1927*, in so far as no compensation is provided for under the U.P. Amendment Act, 1978 for private forests which are preserved and protected through prudent management, while a private forest which is neglected or mismanaged to which Section 36 of the Indian Forest Act, 1927 applies, can be acquired under the *Land Acquisition Act, 1894* by paying market value and solatium.

26. However, per contra the Learned Additional Solicitor General appearing for the respondents contended that the issue of repugnancy does not arise at all in the instant case as there is in fact no repugnancy between the Central Act i.e. the *Indian Forest Act, 1927* and KUZALR Act in as much as the Central Act and KUZALR Act in pith and substance operates in different subject matters.

27. It was submitted by Learned Additional Solicitor General that once the pith and substance of the aforesaid two legislations viz. KUZALR Act and the *Indian Forest Act, 1927* is examined, the following picture would emerge: firstly, the KUZALR Act is an enactment under Entry 18/List-II, i.e. "land" read with Entry 42/List-III of the Seventh Schedule of the Constitution. It was further submitted that at the highest, it can be said that KUZALR Act is relatable to Entry 18 of List II and 42 of List-III of the Seventh Schedule of the Constitution and if

at all, only incidentally trenches in the legislative field of Entry 17A/List-III of the Seventh Schedule of the Constitution; and secondly, the *Indian Forest Act, 1927* on the other hand, is in pith and substance a legislation under Entry 17-A/List-III i.e. "Forests" read with Entry 42/List-III of the Seventh Schedule of the Constitution.

28. It is trite law that the plea of repugnancy would be attracted only if both the legislations fall under the Concurrent List of the Seventh Schedule of the Constitution. Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III i.e. the Concurrent List of the Seventh Schedule of the Constitution would be invalid if its provisions are repugnant to a law passed on the same subject by the Parliament and that too only in a situation if both the laws i.e. one made by the State legislature and another made by the Parliament cannot exist together. In other words, the question of repugnancy under Article 254 of the Constitution arises when the provisions of both laws are completely inconsistent with each other or when the provisions of both laws are absolutely irreconcilable with each other and it is impossible without disturbing the other provision, or conflicting interpretations resulted into, when both the statutes covering the same field are applied to a given set of facts. That is to say, in simple words, repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same field. Hence, whenever the issue of repugnancy between the law passed by the Parliament and of State legislature are raised, it becomes quite necessary to examine as to whether the two legislations cover or relate to the same subject matter or different.

29. It is by now a well-established rule of interpretation that the entries in the list being fields of legislation must receive liberal construction inspired by a broad and generous spirit and

not a narrow or pedantic approach. This Court in the cases of *Navinchandra Mafatlal v. CIT,* reported in AIR 1955 SC 58 and *State of Maharashtra v. Bharat Shanti Lal Shah,* reported in (2008) 13 SCC 5 held that each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. In those decisions it was also reiterated that there shall always be a presumption of constitutionality in favour of a statute and while construing such statute every legally permissible effort should be made to keep the statute within the competence of the State Legislature.

30. As and when there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it would also be necessary for the courts to examine the true nature and character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. In the aforesaid context we now proceed to examine the nature and character of the KUZALR Act and examine and scrutinize the same in the context of the Central Act, namely, the Indian Forests Act, 1927.

31. As noted hereinbefore, Section 4A was introduced in KUZALR Act by an amendment in the year 1978 as a part of agrarian reforms and not by a separate enactment, as was done in the case of the *UP Private Forests Act, 1948*. Significantly, the agrarian reforms introduced by the UPZALR Act were not brought about by amending the *UP Private Forests Act, 1948*. It is to be noticed that the *Indian Forest Act, 1927* and the *UP Private Forests Act, 1948* that deal broadly with the same field of, inter-alia conservation, regulation, etc., of forests. It is to be further noticed that the UPZALR Act and after the 1978 amendment, KUZALR Act do not deal with conservation or regulation of forests but with agrarian reforms. In order to find out the subject matter of an enactment, even in

the context of enactments relatable to List III of the Seventh Schedule of the Constitution, passed by different legislatures, the doctrine of pith and substance can be relied upon and would apply.

32. As discussed hereinbefore KUZALR Act is a law principally relatable to Entry 18 (land) of List II read with Entry 42 in List III of the Seventh Schedule of the Constitution and only incidentally trenches upon "forest" i.e. Entry 17A/List-III of the Seventh Schedule of the Constitution. This is so because it is an enactment for agrarian reforms and so the basic subject matter is "land". Since the land happens to be forest land, it spills over and incidentally encroaches on Entry 17A i.e. "forest" as well. On the other hand, the Central Act i.e. the *Indian Forests Act 1927* is relatable to Entry 17A read with entry 42, both of List III of the Seventh Schedule of the Constitution. It is in pith and substance relatable to Entry 17A, as it deals with "forests" and not with "land" or any other subject. It only incidentally spills over in the field of Entry 42, as it deals with "control over forest land and not property of the Government" and in that context Section 37, as an alternative to management of forests under Section 36 of the *Indian Forests Act 1927*, deals with the grant of power to acquire land under the *Land Acquisition Act 1894*.

33. This Court in the case of *Glanrock Estate Private Limited v. State of Tamil Nadu,* reported in (2010) 10 SCC 96 observed in paragraph 45 of the Judgment as follows:

> ".....we are of the view that the requirement of public purpose and compensation are not legislative requirements of the competence of legislature to make laws under Entry 18 List II or Entry 42 List III, but are conditions or restrictions under Article 31(2) of the Constitution as the said article stood in 1969. ..... Lastly, in pith and substance, we are of the view that the Janmam Act (24 of 1969) was in respect of "land" and

"land tenure" under Entry 18 List II of the Constitution.

34. It is quite clear that the KUZALR Act relates to agrarian reforms and therefore it deals with the "land"; however, the Central Act i.e. the *Indian Forests Act 1927* deal with "forests" and its management, preservation and levy of royalty/fees on forest produce. KUZALR Act further provides for statutory vesting, i.e., statutory taking over of property of *hissedar*, which happens to be 1st January 1978, i.e. the statutorily fixed date. Therefore, this forest land becomes the property of the State Government and is dealt with like land, which is acquired under Section 4A of KUZALR Act. This emerges from a reading of Rule 41 of the KUZALR Rules itself. Further, the acquisition under the KUZALR Act is a case of "taking" upon payment of an amount, which is not intended to be the market price of the rights acquired. On the other hand, the power of acquisition under Section 37 of the *Indian Forests Act 1927* i.e. the Central Act is an acquisition based on the principles of public purpose and compensation.

35. Thus, not only do the aforesaid Acts relate to different subject matters, but the acquisitions mentioned therein are conceptually different. The Central Act i.e. the Indian Forests Act 1927 mainly deals with the management, preservation and levy of royalty on transmit of forest produce. The *Indian Forests Act 1927* also incidentally provides for and empowers the State Government to acquire any land which might be required to give effect to any of the purposes of the Act, in which case such land could be acquired by issuing a notification under Section 4 of the *Indian Forests Act 1927*. This however is to be understood as an incidental power vested on the State Government which could be exercised for giving effect to the purposes of the Indian Forests Act 1927. While considering the issue of repugnancy what is required to be considered is the legislation in question as a whole and to its main object and purpose and while doing so incidental encroachment is to be ignored and disregarded.

36. In fact, it is the UP Private Forest Act, 1948, which is

an enactment relatable to Entry 17A of List III, i.e., Forests, read with Entry 42 of List III of the Seventh Schedule of the Constitution, i.e., acquisition to the extent of "vested" forests. It is this Act which covers a field similar to that of the Central Act and therefore, sought and obtained the permission of the President under Section 76 of the Government of India Act.

37. Thus, in the State, there are two Acts, which are applicable viz. the *UP Private Forests Act, 1948*, which is in the same field as the Central Act i.e. the *Indian Forest Act 1927* and the KUZALR Act, which is in respect of a different subject matter.

38. For repugnancy under Article 254 of the Constitution, there is a twin requirement, which is to be fulfilled: firstly, there has to be a "repugnancy" between a Central and State Act; and secondly, the Presidential assent has to be held as being non-existent. The test for determining such repugnancy is indeed to find out the dominant intention of the both legislations and whether such dominant intentions of both the legislations are alike or different. To put it simply, a provision in one legislation in order to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but such partial or incidental coverage of the same area in a different context and to achieve a different purpose does not attract the doctrine of repugnancy. In nutshell, in order to attract the doctrine of repugnancy, both the legislations must be substantially on the same subject.

39. Repugnancy in the context of Article 254 of the Constitution is understood as requiring the fulfillment of a "Triple test" reiterated by the Constitutional Bench in *M. Karunanidhi v. Union of India,* (1979) 3 SCC 431 @ page 443-444, which reads as follows:-

> "24. It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is

> unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:
>
> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.
>
> 2. That such an inconsistency is absolutely irreconcilable.
>
> 3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

40. In other words, the two legislations must cover the same field. This has to be examined by a reference to the doctrine of pith and substance. In the instant case, the KUZALR Act deals with agrarian reforms and in the context deals with the private forests, this vests with the State and would therefore be managed by the Goan Sabha. The *Indian Forest Act, 1927* which is the existing Central law, has nothing to do with agrarian reforms but deals with forest policy and management, and therefore is in a different field. Further, there is no direct conflict or collision, as the *Indian Forest Act, 1927* only gives an enabling power to the government to acquire forests in accordance with the provisions of the *Land Acquisition Act 1894*, whereas KUZALR Act results in vesting of forests from the dates specified in Section 4A of the KUZALR Act. Consequently, it could be deduced that none of the aforesaid three conditions as mentioned in the decision of *M. Karunanidhi* case (supra) is attracted to the facts of the present case.

41. The only other area where repugnancy can arise is where the superior legislature namely the Parliament has evinced an intention to create a complete code. This obviously

is not the case here, as admittedly even earlier, assent was given under Section 107(2) of the Government of India Act by the *Governor General to the U P Private Forests Act, 1948*.

42. This Court succinctly observed as follows in *Hoechst Pharmaceuticals Ltd. v. State of Bihar,* (1983) 4 SCC 45, at page 87:

> "67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a

> law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together: See *Zaverbhai Amaidas v. State of Bombay; M. Karunanidhi v. Union of India* and *T. Barai v. Henry Ah Hoe*."

43. Again a five-Judge Bench of this Court while discussing the said doctrine in *Kartar Singh v. State of Punjab,* (1994) 3 SCC 589 @ page 630 observed as under:

> "60. This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

44. Further in *Govt. of A.P. v. J.B. Educational Society,* (2005) 3 SCC 212, this Court while explaining the scope of Articles 246 and 254 of the Constitution and considering the proposition laid down by this Court in *M. Karunanidhi* case (supra) with respect to the situations in which repugnancy would arise, held as follows at page 219:

"9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

10. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non obstante clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

11. With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict."

Thereafter, this Court, in para 12, held that the question of repugnancy between the parliamentary legislation and the State legislation could arise in the following two ways: (SCC p. 220)

"12. … First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and

conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1). Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation."

45. The aforesaid position makes it quite clear that even if both the legislations are relatable to List-III of the Seventh Schedule of the Constitution, the test for repugnancy is whether the two legislations "exercise their power over the same subject matter…" and secondly whether the law of Parliament was intended "to be exhaustive to cover the entire field". The answer to both these questions in the instant case is in the negative, as the Indian Forest Act 1927 deals with the law relating to forest transit, forest levy and forest produce, whereas the KUZALR Act deals with the land and agrarian reforms.

46. In respect of the Concurrent List under Seventh Schedule to the Constitution, by definition both the legislatures viz. the Parliament and the State legislatures are competent to enact a law. Thus, the only way in which the doctrine of pith and substance can and is utilised in determining the question of repugnancy is to find out whether in pith and substance the two laws operate and relate to the same matter or not. This can be either in the context of the same Entry in List III or different Entries in List III of the Seventh Schedule of the Constitution. In other words, what has to be examined is whether the two Acts deal with the same field in the sense of the same subject matter or deal with different matters.

47. The concept of repugnancy does not arise as far as

the American and Canadian Constitutions are concerned, as there is no Concurrent List there, nor is there any provision akin to Article 254 of the Constitution of India. Repugnancy arises in the Australian Constitution, which has a Concurrent List and a provision i.e. Section 107, akin to Article 254 of the Constitution of India.

48. In the Australian cases, the concept of Repugnancy has really been applied in the context of Criminal Law where for the same offence, there are two inconsistent and different punishments, which are provided and so the two laws cannot co-exist together. To put it differently, an area where the two Acts may be repugnant is when the Central Act evinces a clear interest to be exhaustive and unqualified and therefore, occupies the entire field.

49. In a Full Bench decision of this Court in the case of *State of Maharashtra v. Bharat Shanti Lal Shah,* (2008) 13 SCC 5, this Court observed as follows at page 23 :

> "48. Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by the State Legislature occupies the same field with respect to one of the matters enumerated in the Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in the Concurrent List. In such situation the provisions enacted by Parliament and the State Legislature cannot unitedly stand and the State law will have to make way for the Union law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid,

> for repugnancy has to exist in fact and it must be shown clearly and sufficiently that the State law is repugnant to the Union law."

50. In a nutshell, whether on account of the exhaustive code doctrine or whether on account of irreconcilable conflict concept, the real test is that would there be a room or possibility for both the Acts to apply. Repugnancy would follow only if there is no such room or possibility.

51. Having discussed the law, as applicable in the aforesaid manner and upon scrutiny of subject matters of both the concurrent Acts, it is crystal clear that no case of repugnancy is made out in the present case as both the *Indian Forest Act, 1927* and the KUZALR Act operate in two different and distinct fields as pointed out hereinbefore. Accordingly, both the Acts are legally valid and constitutional. That being so, there was no requirement of obtaining any Presidential assent. Consequently, Article 254(2) of the Constitution has also no application in the instant case. However, it would be appropriate to discuss the issue as elaborate argument was made on this issue as well.

Presidential Assent and Article 254(2) of the Constitution

52. The issue argued was whether "General Assent" can always be sought and obtained by the State Government. Reference was made to a Constitutional Bench decision of this Court in *Gram Panchayat Jamalpur v. Malwinder Singh,* (1985) 3 SCC 661; which was subsequently further interpreted and followed in the case of *P.N. Krishna Pal v. State of Kerala,* (1995) Suppl. 2 SCC 187.

53. In the *Gram Panchayat Jamalpur* case (supra), the Constitution Bench observed as follows at page 669:

> "13. This situation creates a conundrum. The Central Act of 1950 prevails over the Punjab Act of 1953 by virtue of Article 254(1) of the Constitution read with Entry 41 of the Concurrent List; and, Article 254(2) cannot afford

assistance to reverse that position since the President's assent, which was obtained for a specific purpose, cannot be utilised for according priority to the Punjab Act. Though the law made by the Parliament prevails over the law made by the State Legislature, the interest of the evacuees in the Shamlat-deh lands cannot be dealt with effectively by the Custodian under the Central Act, because of the peculiar incidents and characteristics of such lands. The unfortunate result is that the vesting in the Custodian of the evacuee interest in the Shamlat-deh lands is, more or less, an empty formality. It does not help the Custodian to implement the provisions of the Central law but, it excludes the benign operation of the State law.

14. The line of reasoning of our learned Brother, Chinnappa Reddy, affords a satisfactory solution to this constitutional impasse, which we adopt without reservation of any kind. The pith and substance of the Punjab Act of 1953 is "Land" which falls under Entry 18 of List II (State List) of the Seventh Schedule to the Constitution. That Entry reads thus:

"18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonisation."

Our learned Brother has extracted a passage from a decision of a Constitution Bench of this Court in *Ranjit Singh v. State of Punjab*[3] which took the view that since, the Punjab Act of 1953 is a measure of agrarian reform, it would receive the protection of Article 31-A. It may be recalled that the Act had received the assent of the President as required by the first proviso to that article. The power of the State Legislature to pass laws on matters enumerated in the State List is exclusive by reason of the provision contained in Article 246(3). In a nutshell, the

position is that the Parliament has passed a law on a matter which falls under Entry 41 of the Concurrent List, while the State Legislature has passed a law which falls under Entry 18 of the State List. The law passed by the State Legislature, being a measure of agrarian reform, is conducive to the welfare of the community and there is no reason why that law should not have effect in its full amplitude. By this process, the Village Panchayats will be able to meet the needs of the village community and secure its welfare. Accordingly, the Punjab Act of 1953 would prevail in the State of Punjab over the Central Act of 1950, even insofar as Shamlat-deh lands are concerned."

54. Following the ratio of *Gram Panchayat Jamalpur* case (supra) this Court in the case of *P.N. Krishna Pal v. State of Kerala,* (1995) Suppl. 2 SCC 187 observed as follows at page 200.

"14. In *Jamalpur Gram Panchayat case*[3] the facts were that specific assent of the President was sought, namely, Article 31 and Article 31-A of the Constitution vis-à-vis Entry 18 of List II of the Seventh Schedule of the Constitution. The President had given specific assent. The Shamlat-deh lands in Punjab were owned by the proprietors of the village, in proportion to their share in the property of the lands held by them. After the partition, the proprietary interests in the lands of the migrants and proportionate to share of their lands vest in the Union of India. The question arose whether the Punjab Village Common Lands (Regulation) Act, 1953 prevails over Evacuee Property Act, 1950. It was contended that in view of the assent given by the President, the State Act prevails over the Central Act. This Court in that context considered the scope of the limited assent. Chandrachud, C.J. speaking for majority, held that the Central Act, 1950 prevails over the Punjab Act, 1953 and the assent of the

President which was obtained for a specific purpose cannot be utilised for according precedence to the Punjab Act. At page 42, placitum 'B' to 'E', this Court held that

"the assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise."

Thus it is clear that this Court did not intend to hold that it is necessary that in every case the assent of the President in specific terms had to be sought and given for special reasons in respect of each enactment or provision or provisions. On the other hand, the observation clearly indicates that if the assent is sought and given in general terms it would be effective for all purposes. In other words, this Court observed that the assent sought for and given by the President in general terms could be effective for all purposes unless specific assent is sought and given in which event it would be operative only to that limited extent."

55. Further, in the case *Kaiser-I-Hind (P) Ltd. v. National Textile Corporation (Maharashtra North),* (2002) 8 SCC 182, this Court made it clear that it was not considering; whether the assent of the President was rightly or wrongly given?; and whether the assent given without considering the extent and the nature of the repugnancy should be taken as no assent at all? It observed as follows at page 203:

"27. In this case, we have made it clear that we are not considering the question that the assent of the President was rightly or wrongly given. We are also not considering the question that — whether "assent" given without considering the extent and the nature of the repugnancy should be taken as no assent at all. Further,

in the aforesaid case, before the Madras High Court also the relevant proposal made by the State was produced. The Court had specifically arrived at a conclusion that Ext. P-12 shows that Section 10 of the Act has been referred to as the provision which can be said to be repugnant to the provisions of the Code of Civil Procedure and the Transfer of Property Act, which are existing laws on the concurrent subject. After observing that, the Court has raised the presumption. We do not think that it was necessary to do so. In any case as discussed above, the essential ingredients of Article 254(2) are: (1) mentioning of the entry/entries with respect to one of the matters enumerated in the Concurrent List; (2) stating repugnancy to the provisions of an earlier law made by Parliament and the State law and reasons for having such law; (3) thereafter it is required to be reserved for consideration of the President; and (4) receipt of the assent of the President."

56. It is in this context, that the finding of this Court in *Kaiser-I-Hind (P) Ltd.* (supra) at para 65 becomes important to the effect that "pointed attention" of the President is required to be drawn to the repugnancy and the reasons for having such a law, despite the enactment by Parliament, has to be understood. It summarizes the point as follows at page 215 as follows:

"65. The result of the foregoing discussion is:

1. It cannot be held that summary speedier procedure prescribed under the PP Eviction Act for evicting the tenants, sub-tenants or unauthorised occupants, if it is reasonable and in conformity with the principles of natural justice, would abridge the rights conferred under the Constitution.

2. (a) Article 254(2) contemplates "reservation for consideration of the President" and also "assent".

Reservation for consideration is not an empty formality. Pointed attention of the President is required to be drawn to the repugnancy between the earlier law made by Parliament and the contemplated State legislation and the reasons for having such law despite the enactment by Parliament.

(b) The word "assent" used in clause (2) of Article 254 would in context mean express agreement of mind to what is proposed by the State.

(c) In case where it is not indicated that "assent" is qua a particular law made by Parliament, then it is open to the Court to call for the proposals made by the State for the consideration of the President before obtaining assent.

3. Extending the duration of a temporary enactment does not amount to enactment of a new law. However such extension may require assent of the President in case of repugnancy."

57. If it is to be contended that Kaiser lays down the proposition that there can be no general Presidential assent, then such an interpretation would be clearly contrary to the observation of the Bench in Para 27 itself where it states that it is not examining the issue whether such an assent can be taken as an assent.

58. Such an interpretation would also open the judgment to a charge of being, with respect, per in curium as even though while noting the *Jamalpur* case – (1985) 3 SCC 661, it overlooks the extracts in the *Jamalpur* case dealing with the aspect of general assent:

"The assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for doing so. If the

assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the Law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it."

Article 300A of the Constitution and Compensation

59. After passing of the Constitution (Forty Forth) Amendment Act 1978 which deleted Article 19(1)(f) and Article 31 from the Constitution and introduced Article 300A in the Constitution, the Constitution (44th Amendment) Act inserted in Part XII, a new chapter: "Chapter IV – Right to Property" and inserted a new Article 300A, which reads as follows:-

"No person shall be deprived of property save by authority of law"

60. It would be useful to reiterate paragraphs 3, 4 and 5 of the Statement of Objects and Reasons of the Constitution (44th Amendment) Act which reads as follows:-

"3. In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one Amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice.

4. Similarly, the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected.

5. Property, while ceasing to be a fundamental right, would,

however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law."

61. The incident of deprivation of property within the meaning of Article 300A of the Constitution normally occurred mostly in the context of public purpose. Clearly, any law, which deprives a person of his private property for private interest, will be amenable to judicial review. In last sixty years, though the concept of public purpose has been given quite wide interpretation, nevertheless, the "public purpose" remains the most important condition in order to invoke Article 300A of the Constitution.

62. With regard to claiming compensation, all modern constitutions which are invariably of democratic character provide for payment of compensation as the condition to exercise the right of expropriation. Commonwealth of Australia Act, a French Civil Code (Article 545), the 5th Amendment of the Constitution of U.S.A. and the Italian Constitution provided principles of "just terms", "just indemnity", "just compensation" as reimbursement for the property taken, have been provided for.

63. Under Indian Constitution, the field of legislation covering claim for compensation on deprivation of one's property can be traced to Entry 42 List III of the Seventh Schedule of the Constitution. The Constitution (*7th Amendment*) Act, 1956 deleted Entry 33 List I, Entry 36 List II and reworded Entry 42 List III relating to "acquisition and requisitioning of property". The right to property being no more a fundamental right, a legislation enacted under the authority of law as provided in Article 300A of the Constitution is not amenable to judicial review merely for alleged violation of Part III of the Constitution. Article 31A was inserted by the *Constitutional (1st Amendment) Act, 1951* to protect the zamindari abolition laws. The right to challenge laws enacted in respect of subject matter enumerated under Article 31A (1) (a) to (g) of the Constitution

on the ground of violation of Article 14 was also constitutionally excluded. Further, Article 31B read with Ninth Schedule of the Constitution protects all laws even if they are violative of the Part III of the Constitution. However, it is to be noted that in the Constitutional Bench decision in *I. R. Coelho v. State of Tamil Nadu* (2007) 2 SCC 1, this Court has held that the laws added to the Ninth Schedule of the Constitution, by violating the constitutional amendments after 24.12.1973, would be amenable to judicial review on the ground like basic structure doctrine.

64. It has been contended by ld. senior counsel appearing for the appellants that the action taken by the respondents must satisfy the twin principles viz. public purpose and adequate compensation. It has been contended that whenever there is arbitrariness by the State in its action, the provisions of Article 14, 19 and 21 would get attracted and such action is liable to be struck down. It was submitted that the KUZALR Act does not provide for any principle or guidelines for the fixation of the compensation amount in a situation when no actual income is being derived from the property in question. It was further submitted that the inherent powers of public purpose and eminent domain are embodied in Article 300A, and Entry 42 List III, "Acquisition and Requisitioning of Property" which necessarily connotes that the acquisition and requisitioning of property will be for a public use and for compensation and whenever a person is deprived of his property, the limitations as implied in Article 300A as well as Entry 42 List III will come into the picture and the Court can always examine the legality and validity of the legislation in question. It was further submitted that awarding nil compensation is squarely amenable to judicial review under Articles 32 and 226 of the Constitution of India.

65. It is the case of the State that the statutory scheme under the UPZALR Act, 1950 is provided in Section 39(1) (e) in respect of forests. The said section provides for two methods for computation of compensation, namely, the average annual

income of last 20 to 40 years as provided in Section 29(1) (e) (i) and the estimate of annual yield on the date of vesting as provided in Section 39(1) (e) (ii). It was further argued that in respect of KUZALR Act, the same U.P. Legislature which had the example of Section 39(1)(e) deliberately dropped the second sub-clause and limited the compensation only to the average annual income of the last 20 years. From this it was argued that where there is no annual income, there would be no compensation.

66. It had been further argued that since the expression "average annual income" under Section 39(1) (e) (i) has already been judicially interpreted in the case of *Ganga Devi v. State of U.P.* (1972) 3 SCC 126 to mean "actual" annual income and not an estimate, therefore, if the forest land is not earning any income, then in the statutory formula set out in KUZALR Act, it would not be entitled to any compensation.

67. The Government is empowered to acquire land by exercising its various statutory powers. Acquisition of land and thereby deprivation of property is possible and permissible in accordance with the statutory framework enacted. Acquisition is also permissible upon exercise of police power of the State. It is also possible and permissible to acquire such land by exercising the power vested under the Land Acquisition Act. This Act mandates acquisition of land for public purpose or public use, which expression is defined in the Act itself. This Act also empowers acquisition of land for use of companies also in the manner and mode clearly stipulated in the Act and the purpose of such acquisition is envisaged in the Act as not public purpose but for the purpose specifically enumerated in Section 40 of the Land Acquisition Act. But, in case of both the aforesaid manner of acquisition of land, the Act envisages payment of compensation for such acquisition of land and deprivation of property, which is reasonable and just.

68. Article 31(2) of the Constitution has since been repealed by the Constitution (44th Amendment) Act 1978. It is

to be noted that Article 300A was inserted by the Constitution (44th Amendment) Act, 1978 by practically reinserting Article 31(1) of the Constitution. Therefore, right to property is no longer a fundamental right but a right envisaged and conferred by the Constitution and that also by retaining only Article 31(1) of the Constitution and specifically deleting Article 31(2), as it stood. In view of the aforesaid position the entire concept to right to property has to be viewed with a different mindset than the mindset which was prevalent during the period when the concept of eminent domain was the embodied provision of fundamental rights. But even now as provided under Article 300A of the Constitution the State can proceed to acquire land for specified use but by enacting a law through State legislature or by Parliament and in the manner having force of law. When the State exercises the power of acquisition of a private property thereby depriving the private person of the property, provision is generally made in the statute to pay compensation to be fixed or determined according to the criteria laid down in the statute itself. It must be understood in this context that the acquisition of the property by the State in furtherance of the Directive Principles of State Policy was to distribute the material resources of the community including acquisition and taking possession of private property for public purpose. It does not require payment of market value or indemnification to the owner of the property expropriated. Payment of market value in lieu of acquired property is not a condition precedent or sine qua non for acquisition. It must be clearly understood that the acquisition and payment of amount are part of the same scheme and they cannot be separated. It is true that the adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory.

69. Further, it is to be clearly understood that the stand taken by the State that the right, title or interests of a hissedar could be acquired without payment of any compensation, as in the present case, is contrary to the express provisions of KUZALR Act itself. Section 12 of the KUZALR Act, 1960 states

that every *hissedar* whose rights, title or interest are acquired under Section 4, shall be entitled to receive and be paid compensation. Further, Section 4A of the KUZALR Act makes it clear that the provisions of Chapter II (Acquisition and Modifications of existing rights in Land), including Section 12, shall apply *mutatis mutandis* to a forest land as they apply to a khaikhari land. Further, the intention of the legislature to pay compensation is abundantly clear from the fact that Section 19 itself prescribes that the compensation payable to a hissedar under Section 12 shall, in the case of private forest, be eight times the amount of average annual income from such forest. In the instant case, income also includes possible income in case of persons who have not exploited the forest and have rather preserved it. Otherwise, it would amount to giving a licence to owners/persons to exploit forests and get huge return of income and not to maintain and preserve it. The same cannot be said to be the intention of the legislature in enacting the aforesaid KUZALR Act. In fact, the persons who are maintaining the forest and preserving it for future and posterity cannot be penalised by giving nil compensation only because of the reason that they were in fact chose to maintain the forest instead of exploiting it.

70. We are of the considered view that the decision of this Court in *Ganga Devi* (supra) is not applicable in the present case in as much as this Court in *Ganga Devi* (supra) never dealt with a situation of unexploited forest and the interpretation of actual income was done in the peculiar facts and circumstances of the said case. The said case does not deal with a situation where there could be such income possible to be derived because it was unexploited but there could be no income derived immediately even if it is used or exploited. Therefore, the said case is clearly distinguishable on facts. A distinction and difference has been drawn between the concept of 'no compensation' and the concept of 'nil compensation'. As mandated by Article 300A, a person can be deprived of his property but in a just, fair and reasonable manner. In an

appropriate case the Court may find 'nil compensation' also justified and fair if it is found that the State has undertaken to take over the liability and also has assured to compensate in a just and fair manner. But the situation would be totally different if it is a case of 'no compensation' at all. As already held 'a law seeking to acquire private property for public purpose cannot say that 'no compensation' would be paid. The present case is a case of payment of 'no compensation' at all. In the case at hand, the forest land which was vested on the State by operation of law cannot be said to be non-productive or unproductive by any stretch of imagination. The property in question was definitely a productive asset. That being so, the criteria to determine possible income on the date of vesting would be to ascertain such compensation paid to similarly situated owners of neighboring forests on the date of vesting. Even otherwise, revenue authority can always make an estimation of possible income on the date of vesting if the property in question had been exploited by the appellants and then calculate compensation on the basis thereof in terms of Sections 18(1) (cc) and 19(1) (b) of KUZALR Act. We therefore find sufficient force in the argument of the counsel for the appellants that awarding no compensation attracts the vice of illegal deprivation of property even in the light of the provisions of the Act and therefore amenable to writ jurisdiction.

71. That being so, the omission of the Section 39(1) (e) (ii) of the UPZALR Act 1950 as amended in 1978 is of no consequence since the UPZALR Act leaves no choice to the State other than to pay compensation for the private forests acquired by it in accordance with the mandate of the law.

72. In view of the above, the present appeal is partly allowed while upholding the validity of the Act and particularly Sections 4A, 18(1) (cc) and 19 (1) (b) of the KUZALR Act, we direct the second respondent, i.e. Assistant Collector to determine and award compensation to the appellants by following a reasonable and intelligible criterion evolved on the

aforesaid guidelines provided and in light of the aforesaid law enunciated by this Court hereinabove. The appellants will also be entitled to interest @ six percent per annum on the compensation amount from the date of dispossession till the date of payment provided possession of the forest was handed and taken over formally by the Respondent physically and provided the appellant was totally deprived of physical possession of the forest. However, we would like to clarify that in case the physical/actual possession has not been handed over by the appellants to the State government or has been handed over at some subsequent date i.e. after the date of vesting, the interest on the compensation amount would be payable only from the date of actual handover/physical possession of the property in question and not from the date of vesting. In terms of the aforesaid findings, the present appeal stands disposed of. No costs.

R.P. Appeal partly allowed.

MAHENDRA SINGH
v.
STATE OF UTTARANCHAL
(Criminal Appeal No. 889 of 2006)

AUGUST 09, 2011

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

PENAL CODE, 1860:

s. 304 (Part-I) – Gunshot injury causing death of victim – Conviction u/s 302 and sentence of life imprisonment awarded by courts below – Plea that the injury was caused during scuffle – HELD: The evidence of prosecution witnesses and the site plan indicating the shot to have been fired from a distance of 14-18 feet not supported by medical evidence which shows gunshot injuries one of entry with tattooing marks around it and the other of exit – Further, the accused also sustained injuries – It is, therefore, possible in the light of the evidence, that the accused had indeed been attacked and that he had caused one injury in self-defence from a short distance – Therefore, his involvement in a case of murder is not spelt out but as he has used a rifle from a very close range, his obvious intention was to cause death – He is acquitted of the offence punishable u/s 302 – Accused convicted u/s 304 (Part-I) and sentenced to ten years rigorous imprisonment – Medical Jurisprudence – Evidence.

EVIDENCE:

Proving of an exception – Burden of proof – Held: The obligation to prove an exception lies on an accused but at the same time the onus of proof which the accused has to discharge is not as strict as in the case of the prosecution which has to prove its case beyond doubt – If the prosecution evidence itself shows that the defence taken by accused is

probable, he is entitled to claim the benefit of that evidence as well – Penal Code, 1860 – 304 (Part-I)

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 889 of 2006.

From the Judgment & Order dated 22.03.2006 of the High Court of Uttaranchal at Nainital in Criminal Appeal No. 848 of 2001.

P.S. Narasimha, K. Parameshwar, Shakeel Ahmed, Sadiya Shakeel for the Appellant.

S.S. Shamshery, Jatinder Kumar Bhatia for the Respondent.

The following order of the Court was delivered

O R D E R

1. This appeal arises out of the following facts:

1.1 Janardhan Pathak, the deceased, was a Gate Keeper with the Peepal Parao Forest Range which fell within the jurisdiction of Police Station Lal Kuan. As the deceased was coming out from his hut and proceeding towards the tea shop, the appellant, Mahendra Singh, who was a Police Constable, fired a shot at him with his service rifle killing him instantaneously. The murder was apparently committed because the deceased had complained to the Head Constable at Police Station Lal Kuan about the nefarious activities of the appellant. The appellant then ran away from the spot and got a case registered at Police Station Rudrapur against the deceased for offences punishable under Sections 342, 353, 332 of the Indian Penal Code and also deposited his rifle in Police Station Rudrapur vide Exhibit Ka 5 instead of P.S. Lal Kuan where the incident had happened. The post mortem revealed the presence of two gun shot injuries on the person of the deceased – one of entry and the other of exit, with the

wound of entry having tattooing marks around it.

1.2 The trial court relying on the prosecution evidence convicted the appellant on a charge of murder and under the Arms Act and sentenced him accordingly. The matter was then taken in appeal to the High Court and the High Court has confirmed the judgment of the trial court and dismissed the appeal.

2. Before us, Mr. P.S. Narasimha, the learned Senior Counsel for the appellant, has not seriously challenged the conviction of the appellant and has pointed out that in the light of the prosecution evidence itself it was apparent that the appellant had first been attacked and had also suffered several injuries and that during the course of a scuffle which followed the rifle had accidentally gone off and that the appellant was at the most guilty of having exceeded the right of private defence and was, therefore, liable to be punished for an offence of culpable homicide not amounting to murder. The learned counsel has focused on the fact that the gun shot injury had been caused to the deceased from a very close range and not from a distance of 12 or 15 feet as was the case of the eye witnesses and the prosecution.

3. Mr. S.S. Shamshery, the learned counsel for the State of Uttaranchal has, however, supported the judgment of the trial court as well as the High Court and has pointed out that the appellant, being a police official, was conscious of the fact that in order to get away from a case of murder he had to create a defence and for that reason had self-suffered some injuries and lodged a report in Police Station, Rudrapur instead of Police Station Lal Kuan.

4. We have considered the arguments advanced by the learned counsel for the parties.

5. It has to be borne in mind that the obligation to prove an exception lies on an accused but at the same time the onus

of proof which the accused has to discharge is not as strict as in the case of the prosecution which had to prove its case beyond doubt. It has also to be borne in the mind that it is very difficult, and often suicidal, for an accused to raise a plea whereby he admits his presence but if the prosecution evidence itself shows that the defence taken by him is probable, the accused is entitled to claim the benefit of that evidence as well. It will be seen that the case of the appellant, as projected by Mr. Narasimha, during the course of the arguments, is that the appellants had first been attacked and some injuries had first been caused to him and in the scuffle that followed one shot had been fired. He has also pointed out that the presence of tattooing around the wound was clearly indicative that the prosecution story that the gun shots had been fired from a distance of 12 to 14 feet was obviously wrong and it was, therefore, plausible to suggest that shot had been fired from a much closer range. We notice from the evidence of P.Ws. 2,5 and 8, as also from the site plan, that the shot had been fired from 15 to 18 feet. The injuries found on the dead body are produced herein below:

"1. Lacerated wound 1cm X .5cm X .5cm on dorsum of right thumb bleeding. Margins irregular.

2. Contusion 4cm X 2cm over bed of right shoulder. Colour was reddish.

3. Complaint of pain on back of neck but no external mark of injury and no tenderness was there.

4. Complaint of pain on right leg below knee joint. No external mark of injury. Shows tenderness."

6. Dr. Modi in his book, "A Text Book of Medical Jurisprudence and Toxicology" (24th Edition, page 543) has referred to the fact that signs of tattooing in the case of a rifle shot would NORMALLY be upto 75 cms. Obviously, in this situation the rifle could not have been fired from 15 to 18 feet.

It is also clear that the appellant has sustained some injuries though simple in nature and they too are reproduced below:

"(i) Abraded contusion just below the right eye (maxillary prominence) size 2cm X 2cm. Fresh oozing present.

(ii) Transverse incised wound lower part of right deltoid muscle 4cm X ¼ cm X skin deep. Oozing present.

(iii) Vertical lacerated wound left chest between right nipple and sternum 7cm X ¼ cm skin deep. Oozing present.

(iv) Lacerated wound left deltoid muscle (transversely oblique) 4 cm X 1/3 cm X skin deep. Oozing present."

7. It is, therefore, possible in the light of the aforesaid evidence, that the appellant had indeed been attacked and that he had caused one injury in self-defence from a short distance. We are, therefore, of the opinion that the appellant's involvement in a case of murder is not spelt out but as he has used a rifle from a very close range, his obvious intention was to cause death. He is, accordingly, convicted for an offence punishable under Section 304 Part I of the IPC.

8. We, accordingly, allow the appeal in the above limited terms acquit him of the offence under Section 302 of the IPC and award him a sentence of ten years rigorous imprisonment under Section 304(I) of the IPC.

R.P. Appeal allowed.

C. RONALD & ANR.

v.

STATE, U.T. OF ANDAMAN & NICOBAR ISLANDS

(Criminal Appeal No(s). 749 of 2005)

AUGUST 10, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Code of Criminal Procedure, 1973 – s.386(a) – Power of the appellate court to reverse an order of acquittal – Circulation of fake currency notes – Two accused – Appellant No.1-accused searched by S.I. and fake currency notes of Rs. 100 denomination recovered from his chest pocket – Fake notes also recovered from the house of appellant no.1 – Trial court acquitted the accused-appellants, but the High Court reversed that judgment and convicted them – On appeal, held: Since the language of s.386(a) Cr.P.C. is clear and it places no restrictions on the power of the appellate court to convert an order of acquittal into a conviction, one cannot place restrictions on this power for that would really be amending the statute – On facts, sufficient evidence on record to prove the guilt of the accused-appellants beyond reasonable doubt – Making or circulating fake currency is a serious offence – No reason to take a lenient view in the matter – However, in the facts and circumstances of the case, while upholding the conviction of the appellants, the period of his sentence reduced to five years rigorous imprisonment.

Interpretation of Statutes – Held: Where the words are clear, there is no scope for the Court to innovate or take upon itself the task of amending or altering the statutory provisions.

Witness – Police witness – Held: No principle of law that a statement made in court by a police personnel has to be disbelieved – Every statement of a policeman cannot be

assumed to be necessarily false.

Precedent – Held: Judgment of a court of law should not be read as a Euclid's theorem nor as a provision in a statute.

Bharat Petroleum Corporation vs. N.R. Vairamani **AIR 2004 S.C. 4778: 2004 (4) Suppl. SCR 923;** *Dr. Rajbir Singh Dalal vs. Chaudhary Devi Lal University* J.T. **2008 (8) S.C. 621: 2008 (13) SCR 477;** *Vemareddy Kumaraswamyreddy & Anr. vs. State of A.P.* **JT 2006 (2) 361;** *Union of India & Anr. vs. Deoki Nandan Aggarwal* **1992 Supp (1) SCC 323;** *Sanwat Singh & Ors. vs. State of Rajasthan* **AIR 1961 SC 715: 1961 SCR 120 and** *Salim Zia vs. State of Uttar Pradesh* **AIR 1979 SC 391: 1979 (2) SCR 394 – relied on.**

Shingara Singh vs. State of Haryana **(2003) 12 SCC 758 – referred to.**

Case Law Reference:

(2003) 12 SCC 758	**referred to**	**Para 7**
2004 (4) Suppl. SCR 923	**relied on**	**Para 9**
2008 (13) SCR 477	**relied on**	**Para 9**
JT 2006 (2) 361	**relied on**	**Para 11**
1992 Supp (1) SCC 323	**relied on**	**Para 12**
1961 SCR 120	**relied on**	**Para 15**
1979 (2) SCR 394	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 749 of 2005.

From the Judgment & Order dated 01.10.2004 of the High Court of Calcutta, Circuit Bench at Port Blair in Criminal Appeal No. 031 of 2002.

Shanty Bhushan, K.R. Sasiprabhu, M.K. Sreegesh, Somiran Sharma for the Appellants.

T.S. Doabia, Ashok Bhan, R.K. Rathore, Sunita Sharma, Rashmi Malhotra, D.S. Mahra for the Respondent.

The following order of the Court was delivered

O R D E R

1. Heard learned counsel for the parties.

2. This Appeal has been filed against the impugned judgment dated 01.10.2004 passed by the Calcutta High Court, Circuit Bench at Port Blair, in Criminal Appeal No. 31 of 2002.

3. The facts have been set out in great detail in the impugned judgment and hence we are not repeating the same here except wherever necessary.

4. It appears that on 26.11.1997 Sub Inspector Abdul Salam received a secret information that in the evening of 25.11.1997 C. Ronald, appellant No. 1 herein, participated in a gambling. Some hundred rupees notes which were sought to be used by him in the gambling were not accepted by the co-gamblers on the ground that they were fake, whereafter Ronald left the place. He was searched by S.I. Abdul Salam and fake currency notes of Rs. 100 denomination were recovered from his chest pocket. Panchnama was prepared and he was arrested. During interrogation Ronald disclosed the name of other co-accused. One Arun disclosed the name of R. Anil Kumar, appellant No. 2 herein.

5. Disclosures made by Arun and Anil Kumar were also referred to in the impugned judgment. During the investigation 42 fake notes were recovered from the house of Ronald wrapped in a red handkerchief from inside a shoe. Each of these notes bore the same serial number. Some fake currency notes were given by Anil to Arun, who tore them up and threw

them into a toilet, where these torn pieces were recovered from the septic tank.

6. The trial court acquitted the accused persons, but the High Court has reversed that judgment and convicted the accused persons.

7. Mr. Shanti Bhushan, learned senior counsel appearing for the appellants, contends that the trial court having taken a view and acquitted the appellants, the High Court ought not to have reversed the same. He has relied upon a decision of this Court in *Shingara Singh vs. State of Haryana,* (2003) 12 SCC 758 [para 26], wherein it was observed :-

> "... It is well settled that in an appeal against acquittal the High Court is entitled to re-appreciate the entire evidence on record but having done so, if it finds that the view taken by the trial court is a possible reasonable view of the evidence on record, it will not substitute its opinion for that of the trial court. Only in cases where the High Court finds that the findings recorded by the trial court are unreasonable or perverse or that the court has committed a serious error of law, or where the trial court had recorded its findings in ignorance of relevant material on record or by taking into consideration evidence which is not admissible, the High Court may be justified in reversing the order of acquittal..."

8. Mr. Shanti Bhushan has also shown us some other decisions which have taken the same view.

9. In this connection we would like to say that a judgment of a court of law should not be read as a Euclid's theorem nor as a provision in a statute, vide *Bharat Petroleum Corporation vs. N.R. Vairamani,* AIR 2004 S.C. 4778 (vide paragraphs 9 to 12), *Dr. Rajbir Singh Dalal vs. Chaudhary Devi Lal University* J.T. 2008 (8) S.C. 621, etc.

10. Section 386 (a) Cr.P.C. states that the appellate court may :

> "in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law".

11. A perusal of Section 386(a) Cr.P.C. shows that no restrictions have been placed by the Statute on the power of the appellate court to reverse an order of acquittal and convict the accused.

12. As observed by this court in *Vemareddy Kumaraswamyreddy & Anr. vs. State of A.P.* JT 2006(2) 361 (vide para 17) where the words were clear, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions.

13. In *Union of India & Anr. vs. Deoki Nandan Aggarwal* 1992 Supp (1) SCC 323 (vide para 14), it was observed :

> "It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there".

14. Since the language of Section 386(a) Cr.P.C. is clear and it places no restrictions on the power of the appellate court to convert an order of acquittal into a conviction, we cannot place restrictions on this power for that would really be amending the statute.

15. No doubt, it has been held in certain decisions of this court that there should be good and compelling reasons for the appellate court to convert an order of acquittal into a conviction, but these decisions have been carefully considered in the three-

Judge Bench of this court in *Sanwat Singh & Ors. vs. State of Rajasthan* AIR 1961 SC 715 (vide para 9) wherein it was observed:

> "The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's cse 61 Ind App 398: [(AIR 1934 PC 227 (2)] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified".

16. In Salim Zia vs. State of Uttar Pradesh AIR 1979 SC 391 (vide para 12) it was observed by this Court:

> "1. The High Court in an appeal against an order of acquittal under S.417 of the Code of Criminal Procedure, 1898 has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence, the order of acquittal should be reversed.
>
> 2. The different phraseology used in the judgments of this Court such as --
>
> (a) 'substantial and compelling reasons';
>
> (b) 'good and sufficiently cogent reasons';

(cc) 'strong reasons',

are not intended to curtail or place any limitation on the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion as stated above but in doing so it should give proper consideration to such matters as (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (ii) the right of the accused to the benefit of any real and reasonable doubt; and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses."

17. Moreover, in the present case, it has been observed by the High Court in the impugned judgment that :-

"We have already demonstrated that the view taken by the learned Sessions Judge is not a possible view on the state of evidence. On the contrary, we have amply demonstrated above that the learned Sessions Judge excluded from consideration the evidence which was there. He fell into grievous error in appreciation of the evidence and misdirected himself; entertained a doubt for which there was no foundation and expressed his helplessness because the witnesses particularly the seizure witnesses turned hostile and refused to tell the court the truth. Attempt on his part was lacking to marshal the evidence; to remove the grain from chaff; to take the help of that part of the evidence of the hostile witnesses which support the case of the prosecution. He commented upon insincerity of the investigating agency but did not put to use the material which was before him. We feel no hesitation in holding that the learned Sessions Judge was wrong and therefore we have reappraised the evidence and come to the conclusion indicated above."

18. Hence, we do not agree with submission advanced by Mr. Shanti Bhushan.

19. Mr. Shanti Bhushan then submitted that the statement under Section 164 Code of Criminal Procedure was wrongly taken into consideration.

20. In the present case, the person who made the statement under Section 164 Cr.P.C. also gave evidence before the trial court and was declared hostile. He was confronted with his statement under Section 164 Cr.P.C. only to show that his turning hostile was not bona fide. However, even if we ignore the statement under Section 164 Cr.P.C., we see no reason to disbelieve the police witnesses.

21. There is no principle of law that a statement made in court by a police personnel has to be disbelieved. It may or may not be believed. It is not that all policemen will tell lies. There are good and bad people in all walks of life. There are good and bad police men as well. We cannot assume that every statement of a policeman is necessarily false.

22. In the present case, there is nothing to show that the policemen were making false statements in the court. They had no enmity with the accused.

23. Mr. Shanti Bhushan submitted that it is possible that these policemen demanded some money from the accused which they did not give and hence they were falsely implicated.

24. This case was not set up by the accused at any point of time and no such suggestion was even made in the cross-examination.

25. It is next submitted by Mr. Shanti Bhushan that evidence adverse to the appellants was not put to them in their examination under Section 313 Cr.P.C.

26. This aspect has been considered by the High Court which has held that no prejudice has been caused to the accused on this account.

27. It is on record that fake currency notes are in wide circulation in Andaman and Nicobar Islands. The banks have stated that common people have often complained in this connection vide Exts. 21, 22 and 11. Witnesses have also been examined on that account.

28. There is sufficient evidence on record (discussed in detail by the High Court) to prove the guilt of the accused beyond reasonable doubt.

29. Making or circulating fake currency is a serious offence. We see no reason to take a lenient view in the matter.

30. However, in the facts and circumstances of the case, while upholding the conviction of the appellants we reduce the period of sentence to five years rigorous imprisonment.

31. By order dated 18.03.2005 this Court has granted bail to the appellants.

32. If the appellants have not served out sentence of five years rigorous imprisonment as awarded by us, then their bail bonds shall stand cancelled and they shall be taken into custody forthwith to complete the sentence of five years rigorous imprisonment as awarded by us. Any period of incarceration in jail which the appellants have already undergone shall be deducted from the aforesaid period of five years rigorous imprisonment.

33. If the appellants have already served out sentence of five years rigorous imprisonment, then their bail bonds shall stand discharged accordingly.

34. For the reasons stated above, the appeal is disposed of accordingly.

B.B.B. Appeal disposed of.

M/S. AGARWAL OIL REFINERY CORPORATION, KANPUR
v.
THE COMMISSIONER OF TRADE TAX, U.P. LUCKNOW
(Civil Appeal No. 2363 of 2007)

AUGUST 10, 2011

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

U.P. Trade Tax Act, 1948:

s.11 – Revisional jurisdiction – Scope of – Held: Normally High Court while exercising revisionary powers u/s.11 should not interfere with concurrent findings of fact by the lower authority, unless the findings recorded by the lower authorities are perverse or based on apparently erroneous principles which are contrary to law or where the finding of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice – Revision.

s.3-AAAA – Dealer purchased burnt mobil oil and refined the same but the assessing authority levied tax on the said burnt mobil oil u/s.3-AAAA treating it as "old discarded unserviceable store" – Statutory authorities and Tribunal held that the refined mobil oil is manufactured by the dealer from burnt mobil oil and the said item is taxable at the point of manufacturer and is not liable to be taxed at the point of sale to the consumer u/s.3-AAAA – High Court set aside the concurrent finding and held that appellant was liable to be taxed u/s.3-AAAA – Held: Tribunal as the second appellate forum is the last fact finding authority – Unless High Court, as a revisional authority, finds that the factual conclusions by both the appellate authorities are perverse, it cannot overturn the same – The order of the High Court is not sustainable – Matter remanded to the High Court for consideration afresh.

The case of the appellant-dealer was that it

purchased burnt mobil oil and refined the same but the assessing authority levied tax on the said burnt mobil oil under Section 3-AAAA of the U.P. Trade Tax Act, 1948 treating the said oil as "old discarded unserviceable store". The authorities set aside the order of the assessing authority. The Department filed revision before the High Court. The High Court reversed the concurrent finding of the statutory authorities by relying on the decision in **S/S Industrial Lubricants* and held that the appellant was liable to be taxed under Section 3-AAA during the years under consideration. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeal and remitting the matter to the High Court, the Court

HELD: 1.1. It is clear from the structure of Section 11 of the U.P. Trade Tax Act, 1948 that normally the High Court under revision does not interfere with concurrent findings of fact by the lower authority, unless the case involves any question of law. Traditionally, in exercise of revisional jurisdiction, High Court does not interfere with concurrent finding of fact, unless the findings recorded by the lower authorities are perverse or based on an apparently erroneous principles which are contrary to law or where the finding of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice. In this case none of these principles were attracted. [Para 8, 9] [1084-B-C]

1.2. In the instant case, the Tribunal as the second appellate forum is the last fact finding authority. From the admitted facts recorded by the Tribunal, it appeared that the appellant-dealer manufactured refined mobil oil from the raw material, i.e., the burnt mobil oil which it purchased and then sold a virtually new item in the market. In 1988-89 and 1989-90, the assessments were made under Rule 41(7) of the U.P. Trade Tax Rules, but

the said assessment was opened and a fresh assessment was made. Aggrieved by the same, the dealer preferred first appeal before the A.C.(J) who allowed both the appeals holding that the dealer was not liable to pay and quashed the imposition of tax upon dealer for the relevant assessment years. Aggrieved thereby, the revenue preferred a second appeal before the Tribunal. The Tribunal held that the burnt mobil oil on which the tax was imposed was purchased by the appellant from unregistered dealer like kabarie and hawkers in retail manner. The old PVC shoes and chappals purchased by the dealer and converted into granules and sold by them in the market are not treated under the category of 'old discarded and unserviceable stores' The case of burnt mobil oil is similar to the case of PVC shoes. The Tribunal also came to a finding that the refined mobil oil is manufactured by the dealer from burnt mobil oil. The item is taxable at the point of manufacturer and is not liable to be taxed at the point of sale to the consumer under Section 3-AAAA of the Act. [Paras 12, 13] [1086-A-H; 1087-A]

1.3. Unless the High Court, as a revisional authority, finds that the factual conclusions by both the appellate authorities were perverse, it cannot overturn the same by relying on a judgment which is factually distinguishable. In the judgment on which the High Court relied, there was no finding by the Tribunal, the last fact-finding authority, on the nature of the goods, which was the subject matter of the disputed transaction. The case on which the High Court relied was not the case of a dealer who after purchasing burnt mobil oil, manufactured refined mobil oil from that raw material. But the Tribunal, in the instant case, found on facts that the appellant manufactured refined mobil oil from the burnt mobil oil. Therefore, there was substantial factual difference between the instant case and the case on which the High Court relied while

dealing with the revision proceedings before it. The order of the High Court is not sustainable and is quashed. [Para 14, 15] [1087-B-F]

***Commissioner of Sales Tax vs. S/S. Industrial Lubricants* 1984U.P.T.C. 1101 – Distinguished.**

Case Law Reference:

1984 U.P.T.C. 1101 distinguished Para 4, 6, 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2363 of 2007.

From the Judgment & Order dated 15.12.2004 & 30.09.2005 of Trade Tax Revision Nos. 973 & 997 of 1996 and Civil Misc. Rectification Application Nos. 56268 & 56273 of 2005.

WITH

SLP (C) No. 2148 of 2008.

B.S. Chahar, Jyoti Sharma, Vinay Garg, Aarohi Bhalla, Gunnam Venkateswara Rao, Manoj Kumar Dwivedi, Aviral Shukla for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

2. This appeal is directed against the judgment and order passed by the High Court in Trade Tax Revisions in exercise of its revisional jurisdiction under Section 11 of U.P. Trade Tax Act, 1948(hereinafter referred to as the "Act"). The order of the Tribunal dated 22nd April, 1996 relating to assessment years 1988-89 and 1989-90 was impugned in Revisions before the High Court.

3. The case of the appellant, who was the dealer is that it purchased burnt mobil oil and refined the same mobil oil, but the assessing authority levied tax on the said burnt mobil oil

under Section 3-AAAA of the Act treating the said oil as "old discarded unserviceable store".

4. Admittedly, the first appeal, which was filed by the dealer against such assessment, was allowed and then again a further appeal was filed by the Commissioner of Trade Tax against the order of the first appellate authority. The said appeal by the Commissioner was also dismissed. Thereupon, the Commissioner, Trade Tax filed the revision before the High Court and the revisional Court overturned the concurrent finding of the statutory authorities. In doing so, the High Court came to a finding that the present controversy is covered by a decision of the High Court in the case of *Commissioner of Sales Tax vs. S/S. Industrial Lubricants* reported in 1984 U.P.T.C. 1101.

5. Following the said decision, the High Court held that burnt mobil oil purchased by the dealer, the appellant herein, is covered under the entry of "old, discarded and unserviceable store" being purchased from unregistered dealer and sold in the same condition. According to the High Court they are liable to be taxed as such under Section 3-AAAA of the Act during the years under consideration.

6. Learned counsel for the appellant while assailing the said finding of the High Court, submitted that the case is not covered by the decision rendered by the High Court in the case of *S/S. Industrial Lubricants* (supra). The only reasoning on the basis of which the High Court in *S/S Industrial Lubricants* (supra) allowed the revision is that mobil oil after having been used does not retain the character of mobil oil but it becomes "old, discarded and unserviceable store" and that is why the High Court agreed with the revenue that the burnt mobil oil, being old, discarded or unserviceable store, is liable to be taxed under the notifications dated 1.12.1973 and 4.11.1974 @ 3.5% and 4% respectively.

7. Reference in this connection may be made to the provision of Section 11 of the said Act to appreciate the extent

of revisional jurisdiction of High Court in dealing with the concurrent finding of fact. Section 11 of the said Act is set out below:

> 11. Revision by High Court in special cases.-(1) Any person aggrieved by an order made under sub-section (4) or sub-section (5) of Section 10, other than an order under sub-section (2) of that section summarily disposing of the appeal, or by an order passed under Section 22 by the Tribunal, may, within ninety days from the date of service of such order, apply to the High Court for revision of such order on the ground that the case involves any question of law.
>
> (2) Any person aggrieved by an order made by the Revising Authority or an Additional Revising Authority refusing to state the case under this section, as it stood immediately before April 27, 1978, hereinafter referred to as the said date, may, where the limitation for making an application to the High Court under sub-section (4), as it stood immediately before the said date, has not expired, likewise apply for revision to the High Court within a period of ninety days from the said date.
>
> (3) Where an application under sub-section (1) or sub-section (3), as they stood immediately before the said date, was rejected by the Revising Authority or an Additional Revising Authority on the sole ground that the period of one hundred and twenty days for making the reference, as specified in the said sub-section (1), has expired, such applicant may apply for revision of the order made under sub-section (2)of Section 10, to the High Court within sixty days from the said date on the ground that the case involves any question of law.
>
> (4) The application for revision under sub-section (1) shall precisely state the question of law involved in the case, and it shall be competent for the High Court to formulate the question of law or to allow any other question of law to be raised.

> (5) Every application for making a reference to the High Court under sub-section (1) or sub-section (3), as they stood immediately before the said date, pending before the Revising Authority or an Additional Revising Authority on the said date, shall stand transferred to the High Court. Every such application upon being so transferred and every application under sub-section (4), as it stood immediately before the said date, pending before the High Court on the said date, shall be deemed to be an application for revision under this Section and disposed of accordingly.
>
> (6) Where the High Court has before the said date, required the Revising Authority or an Additional Revising Authority to state the case and refer it to the High Court under sub-section (4), as it stood immediately before the said date, such authority shall, as soon as may be, make reference accordingly. Every reference so made, and every reference made by such authority before the said date in compliance with the requirement of the High Court under sub-section (4), as it stood before the said date, shall be deemed to be an application for revision under this section and disposed of accordingly.
>
> (6-A)Where the Revising Authority or an Additional Revising Authority has, before the said date, allowed an application under sub-section (1) or sub-section (3), as they stood immediately before the said date, and such authority has not made reference before the said date, it shall, as soon as may be, make reference, to the High Court. Every such reference, and every reference already made by such authority before the said date and pending before the High Court on the said date, shall be deemed to be an application for revision under this section and dispose of accordingly.

(7) Where an application under this section is pending, the High Court may, on an application in that behalf, stay recovery of any disputed amount of tax, fee or penalty payable, or refund of any amount due, under the order sought to be revised:

Provided that no order for the stay of recovery of such disputed amount shall remain in force for more than thirty days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(8) The High Court shall, after hearing the parties to the revision, decide the question of law involved therein, and where as a result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the Tribunal for fresh determination of the amount, and the Tribunal shall thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision.

(8-A) All applications for revision or orders passed under Section 10 in appeals arising out of the same cause of action in respect of the same assessment year shall be heard and decided together:

Provided that where any one or more of such applications have been heard and decided earlier, if the High Court, while hearing the remaining applications, considers that the earlier decision may be a legal impediment in giving relief in such remaining application, it may recall such earlier decisions and may thereafter proceed to hear and decide all the applications together.

(9) The provisions of Section 5 of the Limitation Act, 1963, shall, mutatis mutandis, apply to every application, for revision under this section.

Explanation.- For the purpose of this section, the

expression "any person" includes the Commissioner and the State Government."

8. It is made clear from the structure of Section 11 that normally the High Court under revision does not interfere with concurrent findings of fact by the lower authority, unless the case involves any question of law.

9. Traditionally in exercise of revisional jurisdiction, High Court does not interfere with concurrent finding of fact, unless the findings recorded by the lower authorities are perverse or based on an apparently erroneous principles which are contrary to law or where the finding of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice. In this case none of these principles are attracted.

10. In this connection, we may refer to the relevant provision of the Act to find out the real controversy in issue. Section 3AAAA of the Act which has come up for consideration in this case is set out hereinbelow:

"Section 3-AAAA- Liability to tax on purchase of goods in certain circumstances-Subject to the provision of Section 3, every dealer who purchases any goods liable to tax under this Act-

(a) from any registered dealer in circumstances in which no tax is payable by such registered dealer, shall be liable to pay tax on the purchase price of such goods at the same rate at which, but for such circumstances, tax would have been payable on the sale of such goods;

(b) from any person other than a registered dealer whether or not tax is payable by such person, shall be liable to pay tax on the purchase price of such goods at the same rate at which tax is payable on the sale of such goods;

Provided that no tax shall be leviable on the purchase price of such goods in the circumstances mentioned in clauses (a) and (b), if -

(i) such goods purchased from a registered dealer have already been subjected to tax or may be subjected to tax under this Act;

(ii) tax has already been paid in respect of such goods purchased from any person other than a registered dealer;

(iii) the purchasing dealer resells such goods within the State or in the course of inter-State trade or commerce or exports out of the territory of India, in the same form and condition in which he had purchased them;

(iv) such goods are liable to be exempted under Section 4-A of the Act".

11. The relevant entries which are covered in this controversy as per notification dated 7th September, 1981 and 31st May, 1985 are as under:

S.No x	Description of goods x	Point of Tax x	Rate of Tax x
31.	Oil of all kinds, other than those covered by any other entry of this list or by any other notification issued under the Act	M or I	4 per cent
32.	Old, discarded, unservice-centable or obsolete mac-hinery, stores or vehicles including waste products except cinder, coal ash and such items as are included in any other notification issued under the Act.	Sale to consumer	8 per cent

12. In the instant case, the Tribunal as the second appellate forum is the last fact finding authority. From the admitted facts recorded by the Tribunal it appears that the appellant-the dealer manufactures refined mobil oil from the raw material, i.e., the burnt mobil oil which it purchases and then sells a virtually new item in the market. In 1988-89 and 1989-90 the assessments were made under Rule 41(7) of the U.P. Trade Tax Rules, but the said assessment has been opened and a fresh assessment has been made. Aggrieved by the same, the dealer preferred first appeal before the A.C.(J) who allowed both the appeals by an order dated 26.5.1995 holding therein that the dealer is not liable to pay and quashed the imposition of tax upon dealer for the relevant assessment years. Aggrieved thereby, the revenue preferred a second appeal before the Tribunal. Before the said appellate authority, the revenue urged that the burnt mobil oil which is purchased by the assessee who was the manufacturer of refined oil is taxable at the point of sale to the consumer as it comes under the category of old and discarded material. The Tribunal did not accept the said contention by examining the facts and the records of the case. The Tribunal came to the following finding:

"…it is undisputed that the burnt mobil oil on which the tax has been imposed, has been purchased by the assessee respondent from unregistered dealer like kabarie and hawkers in retail manner. However, in the like manner the old PVC shoes and chappals purchased by the dealer who converted into granules and sold them in the market, they have not been treated under the category of 'old discarded and unserviceable stores' as held by the case laws cited by the assessee's counsel Sri S Rais, Advocate. In our opinion, the case of burnt mobil oil is similar to the case of PVC shoes etc. which are purchased by dealer for manufacture of plastic granules etc. by purchasing them from kabaris and hawkers etc. in retail manner."

13. The Tribunal also came to a finding that the refined mobil oil is manufactured by the dealer from burnt mobil oil. The item is taxable at the point of manufacturer and is not liable to be taxed at the point of sale to the consumer under Section 3-AAAA of the Act.

14. We are of the opinion that unless the High Court, as a revisional authority, finds that those factual conclusions by both the appellate authorities are perverse, it cannot overturn the same by relying on a judgment which is factually distinguishable. In the judgment on which the High Court relied, there is no finding by the Tribunal, the last fact-finding authority, on the nature of the goods, which was the subject matter of the disputed transaction. The case on which the High Court relied, namely, in the case of *S/S. Industrial Lubricants* (supra), is not the case of a dealer who after purchasing burnt mobil oil, manufactures refined mobil oil from that raw material. But the Tribunal in the instant case has found on facts that the appellant herein manufactured refined mobil oil from the burnt mobil oil. Therefore, there is substantial factual difference between the present case and the case on which the High Court relied while dealing with the revision proceedings before it. We are of the view that the High Court was not correct in relying on a decision, which is factually distinguishable.

15. For the reasons afore-stated, we cannot sustain the order of the High Court. The order of the High Court is quashed.

16. We remand the matter to the High Court and request the High Court to decide the revisions on the facts of the present case on the principle of revisional jurisdiction indicated hereinabove. We hope that the High Court will come to a reasoned conclusion in the facts and circumstances of the case.

17. We further make it clear that we have not expressed any opinion on the merits of the finding recorded by the Tribunal since the High Court is to re-examine the same afresh. With

these observations, the appeal is allowed and the matter is remanded to the High Court for a fresh decision of the revision proceedings on the lines indicated above.

18. In the facts of the case, there will be no order as to costs.

S.L.P.(C) NO. 2148 OF 2008

Delay condoned.

We do not find any merit in the special leave petition, which is accordingly dismissed.

D.G. Matters disposed of.

M/S. ROYAL ENFIELD (UNIT OF M/S. EICHER LTD.)
v.
COMMISSIONER OF CENTRAL EXCISE, CHENNAI
(Civil Appeal No. 4406 of 2010)

AUGUST 10, 2011

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

Central Excise Act, 1944 – s.4(4)(d)(i) – Valuation for purpose of excise duty – Appellant-assessee was manufacturing motorcycles – The motorcycles were cleared by the assessee to dealers located outside the city by sending them to their various depots on stock transfer basis and in packed condition from their factory – Whether the cost of packing charges expended/incurred by appellant-company was liable to be included in the assessable value of the motorcycles manufactured by appellant-company – Held: The packing given by appellant-company to their motorcycles was necessary for putting the excisable article in the condition in which it was generally sold in the wholesale market at the factory gate and, therefore, such cost was liable to be included in the value of the goods and the cost of such packing could not be excluded – Central Excise Tariff Act, 1985 – Chapter 87.

The appellant-assessee was manufacturing motorcycles falling under Chapter 87 of the Central Excise Tariff Act, 1985. Despite the fact that the said motorcycles were cleared by the assessee to dealers located outside the city by sending them to their various depots on stock transfer basis and in packed condition from their factory, the assessee did not include the value of packing charges in the assessable value for motorcycles. The appellant charged Rs.190/- as packing charges. The appellant-company filed price declaration

for the vehicles sold from their depots and therein declared the depot sale price per vehicle and claimed abatement of Rs.190/- per vehicle towards packing charges. The Assistant Commissioner of Central Excise disallowed the abatement of Rs. 190/- claimed by the assessee towards the cost of packing. The appellant-company filed appeal before the Commissioner of Central Excise [Appeals], which got rejected. Aggrieved, the assessee-company filed appeal before the Tribunal which also was rejected and, therefore, the present appeal was filed by the appellant-company.

The question which arose for consideration in the present appeal was as to whether the cost of packing charges expended/incurred by the appellant-company was liable to be included in the assessable value of the motorcycles manufactured by the appellant-company.

Dismissing the appeal, the Court

HELD:1.1. The provisions of the Central Excise Act, 1944 indicate that there is express provision in Section 4 of the Act for including the cost of packing in the determination of value for the purpose of excise duty. Sub-Section 4 (d)(i) along with explanation provide that where goods are delivered at the time of removal from the factory gate in a packed condition the value would include the cost of such packing but would not include such cost of packing which is of a durable nature and is returnable by the buyer to the assessee. [Para 11] [1097-H; 1098-A-B]

1.2. In the *Madras Rubber Factory Ltd.* case, a three-Judge Bench of this Court held that where the goods are delivered in a packed condition at the time of removal the cost of such packing shall be included. While recording the aforesaid conclusion this Court took notice of the aforesaid definition of value as given in sub-Section 4 of

Section 4 of the Act and held that the provision in the sub-clause is a plain one and does not admit of any ambiguity as what it says is that where the goods are delivered in a packed condition, at the time of removal, the cost of such packing shall be included and that only where such packing is of a durable nature and is returnable by the buyer to the assessee, should the cost of such packing be not included in the value of the goods. The aforesaid decision was rendered by this Court with respect to "tyres" which also were sold at the factory gate in a packed condition for onward easy transportation. In the background of the said case, it was held that the cost of such packing would be included in the assessable value. Almost similar are the facts of the present case. The authorities below as also the Tribunal found that the facts of the present case entirely fit in the facts of the aforesaid decision in the case of *Madras Rubber Factory Ltd.*. The said three authorities as also the Tribunal on analyzing the records came to a finding that the packing which is given by the appellant-company to their motorcycles is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate and, therefore, such cost is liable to be included in the value of the goods and the cost of such packing cannot be excluded. The aforesaid conclusions are based on cogent reasons and are also supported by a well-reasoned decision of a three Judges Bench of this Court. Therefore, the findings recorded by the Tribunal as also by the authorities below are confirmed. [Paras 14, 15, 16 and 18] [1100-E-G; 1101-F-H; 1102-A-D-E]

1.3. Although, the appellant-company submitted that the facts of this case are more akin to the cases of *Bombay Tyre International Ltd.* and also that *Godfrey Philips India Ltd. & Ors.* case considered the above situation of facts and law, all the aforesaid decisions, which are relied upon by the appellant, were taken notice

of in the subsequent decision in *Madras Rubber Factory Ltd.* and this Court after detailed discussion of such cases has given a very reasoned order which is applicable to the facts of the present case in full force. [Para 17] [1102-B-C]

Government of India v. M/s. Madras Rubber Factory Limited **1995 (77) ELT 433 (SC): (1995) 4 SCC 349 – relied on.**

Commissioner of Central Excise, Jaipur v. M/s. Eicher Limited **2001 (136) ELT 1029 [Tri. Delhi];** *Union of India & Ors. V. Bombay Tyre International Ltd.* **1983 (14) ELT 1896 (SC);** *Union of India & Ors. v. Godfrey Philips India Ltd. & Ors.***1985 (22) ELT 306 (SC);** *Hindustan Polymers v. Collector of Central Excise* **1989 (43) ELT 165 (SC) – referred to.**

Case Law Reference:

1995 (77) ELT 433 (SC)	**relied on**	**Para 6,10,14,16, 17**
2001 (136) ELT 1029 [Tri. Delhi]	**referred to**	**Para 6**
1983 (14) ELT 1896 (SC)	**referred to**	**Para 9, 12, 14, 17**
1985 (22) ELT 306 (SC)	**referred to**	**Para 9, 13, 14, 17**
1989 (43) ELT 165 (SC)	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4406 of 2010.

From the Judgment & Order dated 24.11.2009 of Customs, Excise and Service Tax Appellate Tribunal, Chennai, Chennai in Appeal No. E/872/03.

Alok Yadav, Krishna Mohan (for M.P. Devnath) for the Appellant.

R.P. Bhatti, Sunita Rani Singh, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By this judgment and order we propose to dispose of this appeal which is filed by the appellant-company challenging the judgment and order dated 24.11.2009 of the Customs, Excise and Service Tax Appellate Tribunal [for short "the Tribunal"], Chennai, whereby the Tribunal rejected the appeal filed by the appellant and upheld the order of the Commissioner of Central Excise [Appeals], Chennai.

2. The issue that arises for our consideration in the present case is as to whether the cost of packing charges expended/ incurred by the appellant-company is liable to be included in the assessable value of the motorcycles manufactured by the appellant-company.

3. The appellant-company, previously known as M/s. Eicher Limited – unit Royal Enfield Motors, are manufacturing motorcycles falling under Chapter 87 of the Central Excise Tariff Act, 1985. The issue relates to non-inclusion of the value of packing charges by the assessee-company in the assessable value for motorcycles despite the fact that the said motorcycles were cleared by the assessee to the dealers located outside Chennai by sending them to their various depots on stock transfer basis and in packed condition from their factory during the period from April, 1999 to December, 1999.

4. At the time of removal from the factory to depot the motorcycles were cleared in fully packed condition. It is also established from records that Rs. 190/- is being charged as packing charges by the appellant and, therefore, the said amount which was collected as packing charges must have been passed on to the buyers. The appellant-company filed price declaration in Annexure-II for the vehicles sold from their

depots and therein declared the depot sale price per vehicle and claimed abatement of Rs. 190/- per vehicle towards packing charges.

5. A show cause notice dated 4.10.1999 was issued by the respondent to the appellant-company for the period from April, 1999 to September, 1999 directing them to show cause as to why the aforesaid abatement claimed of Rs. 190/- should not be disallowed and as to why a differential duty of Rs. 4,41,043/- and Cess of Rs. 2,228/- should not be demanded. Thereafter, another similar show cause notice dated 24.2.2002 was also issued for a subsequent period, i.e., from October, 1999 to December, 1999 demanding differential duty of Rs. 2,45,602/- and Cess of Rs. 1,279/-.

6. The Assistant Commissioner of Central Excise, Chennai 'C' Division passed an order-in-original disallowing the abatement of Rs. 190/- claimed by the assessee towards the cost of packing and upheld the demand made in the show cause notices. While recording the aforesaid finding and the conclusion, the Assistant Commissioner referred to the decision of this Court in the case of *Government of India v. M/s. Madras Rubber Factory Limited* reported in 1995 (77) ELT 433 (SC): (1995) 4 SCC 349 and on another order of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in the case of *Commissioner of Central Excise, Jaipur v. M/ s. Eicher Limited* reported in 2001 (136) ELT 1029 [Tri. Delhi] in which the Tribunal, in respect of the same assessee, held that the cost of packing is to be included in the assessable value of the motorcycles manufactured by it. Aggrieved by the aforesaid order-in-original of the Assistant Commissioner the appellant-company filed an appeal before the Commissioner of Central Excise [Appeals], Chennai which got rejected by order dated 23.07.2003 while relying on the decision of CESTAT, Delhi in the case of *Commissioner of Central Excise, Jaipur* [supra].

7. Being aggrieved by the said order of the Commissioner

of Central Excise [Appeals], Chennai assessee-company filed an appeal before the Tribunal, Chennai which also was rejected by the impugned judgment and order dated 24.11.2009 and, therefore, the present appeal was filed in this Court by the appellant-company on which we heard the learned counsel appearing for the parties.

8. During the course of hearing our attention was drawn to Section 4 of the Central Excise Act, 1944 [for short "the Act"], the relevant portion of which is extracted below for better understanding and ready reference: -

"Section 4. Valuation of excisable goods for purposes of charging of duty of excise –

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

……

……

(4) For the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means –

(i) a factory or any other place or premises

of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and,

From where such goods are removed;

(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;

……

……

(d) "value", in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation – In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

……

……"

9. Relying on the same counsel appearing for the appellant-company submitted before us that the cost of the packing material cannot be included in the assessable value because the said cost of the packing material cannot be said to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal. He also submitted that the requisite packing is done so as to avoid scratch to the painted body and breakage of the lights fitted on to the motorcycles during transportation, and therefore, the cost of the aforesaid packing was not includable as per Section 4 of the Central Excise Act to the value of the motorcycles. In support of the aforesaid contentions he relied and referred to various judgments of this Court, viz., *Union of India & Ors. V. Bombay tyre International Ltd.* reported at 1983 (14) ELT 1896 (SC); *Union of India & Ors. v. Godfrey Philips India Ltd. & Ors.* reported at 1985 (22) ELT 306 (SC) and *Hindustan Polymers v. collector of Central Excise* reported at 1989 (43) ELT 165 (SC).

10. Counsel appearing for the respondent, however, submitted that the aforesaid submissions are untenable in view of the settled position of law in the decision of this Court in the case of *Government of India v. M/s. Madras Rubber Factory Limited* [supra]. He also drew our attention to the fact that the appellant has been realizing Rs. 190/- as packing charges from the buyers, therefore, the entire amount is passed on to the buyers by the appellant-company. He also submitted that the cases relied upon by the counsel appearing for the appellant are distinguishable on facts. In the light of the aforesaid submissions made on behalf of the counsel appearing for the parties we would proceed to discuss and answer the issue raised before us.

11. The provisions extracted hereinbefore from the Central Excise Act would indicate that there is express provision in Section 4 for including the cost of packing in the determination

of value for the purpose of excise duty. Sub-Section 4 (d)(i) along with explanation has relevant bearing on the present case. According to the said provision where goods are delivered at the time of removal from the factory gate in a packed condition the value would include the cost of such packing but would not include such cost of packing which is of a durable nature and is returnable by the buyer to the assessee.

12. In *Union of India & Ors. V. Bombay Tyre International Ltd*. reported at 1983 (14) ELT 1896 (SC): (1984) 1 SCC 467 this Court had an occasion to deal with the said provision and in paragraph of the said judgment this Court has held thus: -

> "15. The case in respect of the cost of packing is somewhat complex. The new Section 4(4)(d)(i) has made express provision for including the cost of packing in the determination of "value" for the purpose of excise duty. Inasmuch as the case of the parties is that the new Section 4 substantially reflects the position obtaining under the unamended Act, we shall proceed on the basis that the position in regard to the cost of packing is the same under the Act, both before and after the amendment of the Act. Section 4(4)(d)(i) reads:
>
> "(4) For the purposes of this section,—
>
> * * *
>
> (d) "value" in relation to any excisable goods,—
>
> (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee."
>
> Explanation.—In this sub-clause 'packing' means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;"

It is relevant to note that the packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessees, it is apparent that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of toothpaste or a bottle of tablets in a cardboard carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within Section 4(4)(d)(i). That is indeed conceded by learned counsel for the assessee. It is the cost of secondary packing which has raised serious dispute. Secondary packing is of different grades. There is the secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. Is all the packing, no matter to what degree, in which the wholesale dealer takes delivery of the goods to be considered for including the cost thereof in the "value"? Or does the law require a line to be drawn somewhere? We must remember that while packing is necessary to make the excisable article marketable, the statutory provision calls for strict construction because the levy is sought to be extended beyond the manufactured article itself. *It seems to us that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy.* To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate."

13. In *Union of India & Ors. v. Godfrey Philips India Ltd. & Ors.* reported at 1985 (22) ELT 306 (SC) this Court again considered a similar issue. What was decided by the majority of Judges in the said case was that the cost of packing done for protection of excisable goods during the transportation is also includible in assessable value. The said case basically revolved round the cost of corrugated fibreboard containers and all the three learned Judges uniformly reiterated the principles and the test evolved in Bombay Tyre International but arrived at divergent conclusions (the majority comprising Pathak and Sen, JJ. taking one view and Bhagwati, C.J., the other) on the basis of differing perceptions as to the factual situation in that case. As was noted in the said case the majority and minority came to different conclusions not on account of their adopting a different test or principle but only on account of their differing perceptions of the factual situation. So far as the test applicable is concerned, all the three learned Judges were at one and in agreement.

14. Finally in the decision of *Government of India v. Madras Rubber Factory Ltd.* reported at 1995 (77) ELT 433 (SC) a three-Judge Bench of this Court held that where the goods are delivered in a packed condition at the time of removal the cost of such packing shall be included. While recording the aforesaid conclusion this Court took notice of the aforesaid definition of value as given in sub-Section 4 of Section 4 of the Act. After noticing the aforesaid definition it was held that the provision in the sub-clause is a plain one and does not admit of any ambiguity as what it says is that where the goods are delivered in a packed condition, at the time of removal, the cost of such packing shall be included and that only where such packing is of a durable nature and is returnable by the buyer to the assessee, should the cost of such packing be not included in the value of the goods. It was also held in that decision that the concept of primary and secondary packing which is recognized to some extent in the decision of this Court in Bombay Tyre International Ltd. case [supra], which is not

possible to be wished away and is merely a refinement and is not borne out by the express language of the enactment and, therefore, the same is to be resorted to with care and circumspection. Thereafter, the Court proceeded to discuss the case of *Bombay Tyre International Ltd.* [supra] and also the decision in *Godfrey Philips India Ltd. & Ors.* [supra]. Having discussed both the cases, this Court laid down the test in the following terms: -

> "43. …….Whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. If it is, then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded.
>
> ……"

15. The aforesaid decision was rendered by this Court with respect to "tyres" which also were sold at the factory gate in a packed condition for onward easy transportation. In the background of the said case, it was held that the cost of such packing would be included in the assessable value.

16. Almost similar are the facts of the present case. The authorities below as also the Tribunal found that the facts of the present case entirely fit in the facts of the aforesaid decision in the case of *Madras Rubber Factory Ltd.* [supra]. The said three authorities as also the Tribunal on analyzing the records came to a finding that the packing which is given by the appellant-company to their motorcycles is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate and, therefore, such cost is liable to be included in the value of the goods and the cost of such packing cannot be excluded. The aforesaid

conclusions are based on cogent reasons and are also supported by a well-reasoned decision of three Judges Bench of this Court.

17. Although, the counsel appearing for the appellant-company vehemently submitted that the facts of this case are more akin to the cases of *Bombay Tyre International Ltd.* [supra] and also to the that of *Godfrey Philips India Ltd. & Ors.* case [supra] having considered the above situation of facts and law, we are of the considered opinion, that all the aforesaid decisions, which are relied upon by the counsel appearing for the appellant, were taken notice of in the subsequent decision in *Madras Rubber Factory Ltd.* [supra] and this Court after detailed discussion of such cases has given a very reasoned order which is applicable to the facts of the present case in full force.

18. Therefore, we agree and confirm the findings recorded by the Tribunal as also by the authorities below and dismiss this appeal but leaving the parties to bear their own costs.

B.B.B. Appeal dismissed.

EASTERN COALFIELDS LTD.

v.

M/S TETULIA COKE PLANT (P) LTD. & ORS.

(Civil Appeal No. 6888 of 2011)

AUGUST 10, 2011

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

COAL:

Refund of excess price paid – Scheme of e-auction introduced by Union of India – Held ultra vires of Article 14 of the Constitution and quashed by Supreme Court in Ashoka Smokeless Coal India (P) Ltd. – Coal companies directed to refund the excess amount paid by the purchasers – Writ petition involving similar issues pending before High Court – Disposed of, following the decision of Supreme Court in Ashoka Smokeless Coal India's case – Held: It cannot be said that the effect of the decision in Ashoka Smokeless Coal India's case would be restricted only to those cases which were before the Supreme Court and not for all cases which were pending in different High Courts at that stage, at least to the issues which were common in nature – Without taking a plea of unjust enrichment either in the writ petition or before the Supreme Court, the plea cannot be entertained at the time of argument, particularly, in view of the fact that the respondents did not have any notice of such a plea taken for the first time at argument stage – In the instant case, it is a case of refund of price recovered by the appellant in excess and not of any kind of payment of tax or duty – Besides, the appellant has already refunded such excess amount realised to many other parties without raising any such plea – If anything is done by a party in violation of the law, consequence has to follow and the party is bound to return the money to the parties from whom excess amount has been

realised – Pursuant to the orders of Supreme Court, the accounts in terms of the orders of the High Court have been verified and the said accounts have been settled –Therefore, appropriate steps shall be taken to give effect to the judgment and order passed by the High Court – The amount in terms of the settled accounts shall be paid by the respondents in accordance with law – Unjust enrichment – Plea – Constitution of India, 1950 – Article 14.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6888 of 2011.

From the Judgment and Order dated 04.10.2010 of the High Court of Calcutta in APO No. 226 and 321 of 2010, WP No. 1279 of 2005 and GA No. 1929 of 2010.

P.P. Malhotra, ASG, Anip Sachthey, Mohit Paul and Shagun Matta for the Appellant.

Ashwani K. Dhatwalia, Piyush Meharia, Amit Meharia and Meharia & Company for the Respondents.

The following order of the Court was delivered

O R D E R

Leave granted.

This appeal is directed against the judgment and order dated 4.10.2010 passed by the Calcutta High Court whereby the Division Bench of the High Court dismissed the appeal of the Appellant herein and while doing so, affirmed the findings and conclusions arrived at by the learned Single Judge.

A writ petition was filed by the respondents herein before the Calcutta High Court which was registered as Writ Petition No. 1279 of 2005. In the said writ petition the respondents challenged the legality of the e-auction scheme introduced by the Union of India and adopted by the Appellant herein. In the

said writ petition, an interim order was also passed on 08.08.2005 with regard to the liability for payment of price for purchasing coals under e-auction scheme and for furnishing bank guarantee in connection thereof.

During the pendency of the said writ petition in the High Court, some other writ petitions involving similar issues and also pending before the Calcutta High Court and also other High Courts were transferred to this Court. This Court passed certain interim orders. However, finally the said cases were taken up for final hearing and were disposed of by a judgment and order rendered on 01.12.2006 in the matter of *Ashoka Smokeless Coal India (P) Ltd. & Ors. Vs. Union of India & Ors.* reported in (2007) 2 SCC 640. By the said judgment and order this Court upheld the challenge of the writ petitioners therein to the scheme of e-auction. This Court in the said judgment further held that the said scheme of e-auction was invalid. Consequently, this Court declared the same as ultra vires of Article 14 of the Constitution of India and quashed the said e-auction scheme.

Contempt petitions were filed by some of the parties thereto in which several orders came to be passed by this Court whereby this Court directed the coal companies for refunding the excess amount paid by the purchasers who were petitioners before this Court in those cases.

The writ petition filed by the respondents, however, was pending consideration before the High Court. After the disposal of the cases involving similar issues which were raised and also disposed of by the aforesaid decision, which is now reported in (2007) 2 SCC 640. The writ petition of the respondents herein also was taken up for consideration and a judgment and order was passed by the learned Single Judge disposing of the said writ petition on 25.03.2010. By the said order the High Court followed the decision of this Court in *Ashoka Smokeless Coal India (P) Ltd.* (supra) and passed orders and certain directions. The respondents were directed

to furnish all documents to the counsel for coal company showing actual payments made by the respective applicants during the period from May, 2005 to December, 2006 and the difference between the amount paid and the amount notified by April 30, 2010. Another direction which was passed was that the documents furnished shall be verified by the concerned coal companies and in case of any difference, the parties to deliberate upon the matter so as to enable them to come to an accepted solution.

The legality of the aforesaid judgment and order came to be challenged by filing an appeal before the Division Bench of the High Court which was dismissed, as stated hereinbefore. Still aggrieved, the Appellants have filed the present appeal on which we have heard the learned counsel appearing for the parties.

Mr. P.P. Malhotra, learned Additional Solicitor General has submitted before us that the respondents herein were not parties when the matter was heard by this Court nor were they parties when the interim orders were passed by this Court and, therefore, the respondents cannot get the benefit which arises out of the interim orders passed and the final orders passed by this Court in the case of *Ashoka Smokeless Coal India (P) Ltd.* (supra). It is submitted that as their writ petition was a separate writ petition, the same will have to be considered on its own facts and merit. The learned Additional Solicitor General also sought to submit that to the facts of the present case, the principles of unjust enrichment would be applicable and on that ground also the respondents cannot claim for any refund claiming payment of the same.

We have also heard the counsel appearing for the respondents on the issues raised. Having considered the submissions and having gone through the records, we proceed to dispose of this appeal by recording our reasons thereof.

There is no dispute with regard to the fact that the legality

of the scheme of e-auction was challenged by filing writ petitions in various High Courts by the traders and companies dealing with coal. Some of those petitions were transferred to this Court pursuant to orders of this Court, the leading case being *Ashoka Smokeless Coal India (P) Ltd.* (supra) which was taken up for consideration along with connected matters and the same were disposed of by this Court and the said decision is now reported in (2007) 2 SCC 640. By the aforesaid judgment, this Court has upheld the challenge of the writ petitioners to the legality of the scheme of e-auction. The aforesaid prayer of the writ petitioners was accepted and this Court held that the scheme of e-auction was invalid and violative of Article 14 of the Constitution of India and, therefore, it was declared to be ultra vires to the Constitution and this Court quashed the e-auction scheme. It must be indicated herein that the present respondent also filed the writ petition in question in the Calcutta High Court before the aforesaid decision was rendered and in his case also interim order was passed by the Calcutta High Court. After the disposal of Ashoka Smokeless Coal India (P) Ltd., the writ petition filed by the respondent herein which was pending was also considered and the same was allowed following the decision of this Court in *Ashoka Smokeless Coal India (P) Ltd.* (supra) as by that decision, this Court has declared the entire scheme to be invalid and ultra vires to the Constitution. Therefore, any action taken pursuant to the said scheme is also illegal and null and void. Following the ratio of the said decision this Court directed the coal companies to refund the price of the coal paid in excess of the notified price under e-auction scheme. Certain guidelines were also laid down as to how such payments is to be made. The said decision of the learned Single Judge was upheld by the Division Bench of the High Court by affirming the conclusions and analysing all the issues that were raised before it.

We are unable to accept the contention of the learned Additional Solicitor General that whatever is challenged in the present petition is only an interim order. It is not so because

the respondents herein also challenged the legality of the e-auction scheme in the writ petition. The High Court has not disposed of only an interim prayer but has disposed of the entire writ petition by its judgment and order dated 25.03.2010. Consequently, it must also be held that when the entire scheme is set at naught by this Court, whatever action has been taken following the said e-auction by the coal company has also been declared to be illegal and, therefore, the coal company has become liable to refund the entire money which was collected in excess of the notified price. That is the consequence of quashing of the scheme and the same came to be reiterated by this Court while contempt petitions were filed and were disposed of. Therefore, it cannot be said that the effect of the decision of *Ashoka Smokeless Coal India (P) Ltd.* (supra) would be restricted only to those cases which were before this Court and not for all cases which were pending in different High Courts at that stage, at least to the issues which are common in nature.

Learned Additional Solicitor General has also submitted before us that the respondents are not entitled to the benefit, if they are otherwise entitled to on the principles of unjust enrichment. We specifically asked the learned Additional Solicitor General during the course of the arguments to show us whether any such plea was taken in the writ petition which was filed before the learned Single Judge. The learned Additional Solicitor General was unable to show that any such defence or plea was taken about unjust enrichment in the pleadings filed before the learned Single Judge. Such an issue was also not argued before the learned Single Judge as no such reference is there in the order of learned Single Judge. It is, however, stated by the learned Additional Solicitor General that such an issue was raised before the Division Bench. But we could not find the same raised in pleadings nor was it considered. But a mention is made in the judgment that such a plea was argued. However, on going through the records, we find that no such ground has also been taken even in the

Memorandum of Appeal filed in the present appeal. Therefore, without taking a plea of unjust enrichment either in the writ petition or before this Court, we are not inclined to allow him to argue the plea at the time of argument and entertain such a plea, particularly, in view of the fact that the respondents did not have any notice of such a plea taken for the first time at argument stage. In the present case, it is a case of refund of price recovered by the appellant in excess and not of any kind of payment of tax or duty. Besides, the appellant has already refunded such excess amount realised to many other parties without raising any such plea.

If anything is done by a party in violation of the law, consequence has to follow and they are bound to return the money to the parties from whom excess amount has been realised. There is also no document placed on record in support of any such plea. Bald allegation of this nature cannot be accepted particularly when no such plea has been raised in this Court.

In that view of the matter, we find no reason to take a different view than what is taken by the learned Single Judge of the High Court of Calcutta as also by the Division Bench of the same Court. Pursuant to the orders passed by this Court, the accounts in terms of the orders of the learned Single Judge has been verified and the said accounts have been settled. Therefore, appropriate steps shall be taken now to give effect to the judgment and order passed by the learned Single Judge.

The amount in terms of the settled accounts shall be paid by the respondents in accordance with law within a period of two months, failing which the amount will carry an interest @9% per annum.

In terms of the aforesaid order, this appeal is disposed of, leaving the parties to bear their own costs.

R.P. Appeal disposed of.

STATE OF JHARKHAND & ORS. ETC.
v.
M/S. SHIVAM COKE INDUSTRIES, DHANBAD, ETC.

(Civil appeal Nos. 6889-6891 of 2011)

AUGUST 10, 2011

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

Bihar Finance Act, 1981:

s. 46 (4) – Exercise of suo motu power of revision by Joint Commissioner of Commercial Taxes – On facts, revised assessment order passed by the Deputy Commissioner, Commercial Taxes Division – Subsequently, new Deputy Commissioner brought to the notice of Joint Commissioner, the illegalities committed by his predecessor in the revised assessment order – Initiation of suo motu proceeding u/s. 46(4) and issuance of notice/Memo to the assessees by the Joint Commissioner within a period of three years in some cases and in some cases soon after the expiry of three years period, to determine the legality and propriety of the revised assessment orders – Legality of – Held: Suo motu power of revision was legally and properly exercised by the Joint Commissioner – He exercised his own independent mind for issuing the notice and also recorded his own reasons for coming to a conclusion as to why the power u/s 46 (4) should be exercised – Thereafter, issued notice to the assessees after forming a decision – Though the Deputy Commissioner pointed out the illegalities and irregularities committed in the revised assessment orders passed by his predecessor, but there was no reference in the notice to the letter of the Deputy Commissioner and any other materials contained with the said letter – Therefore, it cannot be said that while coming to the aforesaid conclusion in the impugned notice, the

Commissioner was influenced only by the opinion of the Deputy Commissioner – It was not a revision initiated on the basis of any application filed by the aggrieved party namely the Deputy Commissioner but initiation of a revisional proceeding by the Joint Commissioner by forming his own opinion and satisfaction to exercise suo motu power vested u/s. 46 (4) – Thus, order passed by the High Court as also the Joint Commissioner setting aside the revised assessment order is set aside – Matter remitted back to the Joint Commissioner for consideration afresh.

s. 46(4) – Initiation of suo motu revisional proceeding by the Commissioner or by the Joint Commissioner – Period of Limitation – Held: No period of limitation is prescribed for suo motu revision proceeding by the Commissioner or the Joint Commissioner – When the language of the legislature is clear and unambiguous nothing could be read or added to the language which is not stated specifically – If the legislature intended to provide for any period of limitation or intended to apply the said provision of Article 137 into s. 46(4) the legislature would have specifically said so in the Act itself – On facts, the High Could read application of Article 137 of the Limitation Act to s. 46 (4) which was not correct – However, such power cannot be exercised by the revisional authority indefinitely – It has to be exercised within a reasonable period of time which depends on the facts and circumstances of the case – Joint Commissioner exercised suo motu powers of revision within about three years of time in some cases and in some cases soon after the expiry of three years period which was within a reasonable period of time – Limitation Act, 1963 – Article 137.

Order passed by the Joint Commissioner setting aside the revised assessment order – Propriety and maintainability of – Held: Said order was passed during the pendency of the writ petition in the High Court – Assessee could not contest the matter very effectively before the Joint Commissioner – Thus, the order passed by the Joint Commissioner is set

aside and matter is remitted back to the Joint Commissioner.

Respondent-assessees, engaged in processing of coal to coke were assessed to tax for Financial Years, determining the tax on intra-State sales transactions as well as Central Sales Tax on inter-State sales transactions. Respondent challenged the assessment order before the Joint Commissioner of Commercial Taxes who remanded the assessment proceedings. The Deputy Commissioner of Commercial Taxes passed the revised assessment orders reversing the then inter-State sales under Section 3(a) of the Central Sales Tax Act 1956 into the intra-State sales. Pursuant thereto, the respondents filed an application for refund of excess amount of tax. Subsequently, the Deputy Commissioner got changed and the new Deputy Commissioner opined that the revised assessment orders did not conform to the appellate direction and informed the Joint Commissioner about the same. The Joint Commissioner initiated the proceeding *suo motu* under Section 46(4) of the Bihar Finance Act, 1981 and issued notice/Memo directing the respondent to furnish the complete sets of books of account in order to determine the legality and propriety of the said revised assessment orders. In some cases, sou motu power of revision was exercised within a period of three years and in some beyond the expiry of three years period, but soon thereafter. Thereafter, the respondents filed writ petition for quashing the notice/ Memo issued by the Joint Commissioner; as also the order passed by the Joint Commissioner whereby he set aside the revised assessment order. The High Court allowed the writ petitions. Therefore, the appellant-State filed the instant appeals.

The question which arose for consideration in the instant appeals were whether the *suo motu* power of revision under Section 46(4) of the Bihar Fianance Act,

1981, vested with the Joint Commissioner was legally and properly exercised; whether or not the action taken by the Department was barred by limitation and whether such action was bad for not having been initiated within a reasonable time; and whether the order dated 26.11.2007 passed by the Joint Commissioner setting aside the revised assessment order dated 26.12.2003 is proper and could be maintained.

Remitting back the matter to the Joint Commissioner, the Court

HELD: 1.1 Under Section 46 of the Bihar Finance Act, 1981 it is the Commissioner who on the basis of an application filed by an aggrieved party revise the order passed by any authority subordinate to him. He also has the additional power alongwith the Joint Commissioner as a delegatee as provided under Section 46 (4) of the BFT Act, 1981 to revise an order passed by an authority subordinate to it by exercising its *suo motu* power. This is delegated in terms of the notification issued by the State of Bihar under S.O. No. 795 dated 28th June 1986. [Paras 13 and 14] [1127-D-F]

1.2 In all these appeals, there were letters written by the Deputy Commissioner of Commercial Taxes to the Joint Commissioner (Administration). In one of such letter, it is stated by the Deputy Commissioner that the said communication is regarding filing of *suo motu* revision under Section 46(4) of the BFT Act, 1981. The Deputy Commissioner pointed out some alleged mistakes in the original tax assessment order and the revised order. He also stated in that communication that he is unable to agree with the revised tax assessment order and reimbursement order passed by the Divisional Incharge and therefore, according to his opinion a revision should be filed under Section 46(4) of the BFT Act, 1981 against the revised tax assessment order.

Thereafter, the notice for revision was issued on 17.12.2007 to the respondents by the Joint Commissioner of Commercial Taxes (Administration). [Paras 22 and 23] [1129-E-H; 1130-A]

1.3 A bare perusal of the notice issued on 17.12.2007, would indicate that the said notice was issued by the Joint Commissioner by exercising his individual *suo motu* power as provided under Section 46(4). It is not a case where such notice was issued on the basis of an application filed by the Deputy Commissioner. This is obvious because in the said notice, there is absolutely no reference made of the application sent by the Deputy Commissioner. If from the available records of a particular case, the Joint Commissioner forms an independent opinion that the same is a case where *suo motu* power of Revision should be exercised, he is empowered to exercise such *suo motu* power of revising an order which appears to be illegal and without jurisdiction to the competent authority who is empowered to issue such notice by recording his reasons for coming to such a conclusion in the notice itself. [Para 26] [1131-C-F]

1.4 In the instant case, the Joint Commissioner exercised his own independent mind for issuing the notice and also recorded his own reasons for coming to a conclusion as to why the power under Section 46(4) should be exercised. Having recorded the said reason, such notice was issued to the assessee after forming a decision. The assessee was informed by issuing the said notice that the legality and propriety of the revised assessment order has not been established because of the reasons mentioned in the notice and therefore, the revision of the said orders is proposed as it has been considered necessary. By the said notice, the assessee was directed to be present before the Joint Commissioner and place his side as to why the revised assessment

order should not be set aside. [Para 27] [1131-G-H; 1132-A-B]

1.5 The respondent being aggrieved by the issuance of the said order filed a writ petition before the High Court. The High Court, however, did not grant any stay of the said notice and permitted the respondent to contest the said notice in accordance with law during the course of which the Joint Commissioner of Commercial Taxes set aside the revised orders and sent back the matter for fresh assessment to the assessing officer. The said subsequent development which took place during the pendency of the writ petition in the High Court was not addressed to and decided by the High Court as the High Court disposed of the entire writ petition on two issues namely on the issue of the ambit and scope of Section 46(4) of the BFT Act, 1981 and also on the ground of limitation. The Deputy Commissioner, Commercial Taxes Division pointed out in communication to the Joint Commissioner several loopholes in the revised assessment orders passed by the assessing officer. [Paras 28-29] [1132-C-G]

1.6 The Deputy Commissioner also pointed out how the assessee made conflicting claims and statements and also how while upholding such contradictory claims, there has been a revenue loss for the department. Alongwith his letter, some of the relevant records were transmitted to the Joint Commissioner. It is true that the Deputy Commissioner, Commercial Taxes Division brought out and pointed out some of the illegalities and irregularities committed in the revised assessment orders passed by his predecessor in the assessment orders relating to the respondent. But the impugned notice issued by the Joint Commissioner *ex facie* indicates that he being the competent authority formed an independent opinion and personal satisfaction that the legality and

propriety of the revised assessment orders was not established because of the reasons specifically stated in the said notice and therefore, he thought it fit to exercise his power of *suo motu* revision consequent upon which the said notice was issued. [Paras 30-31] [1132-F-H]

1.7 There is no reference in the said notice to the letter and any other materials contained with the letter of the Deputy Commissioner anywhere in the notice and therefore, it cannot be said that while coming to the aforesaid conclusion in the impugned notice, the Commissioner was influenced only by the opinion of the Deputy Commissioner. On consideration of the records, it was not a revision initiated on the basis of any application filed by an aggrieved party namely the Deputy Commissioner but initiation of a Revisional proceeding by the Joint Commissioner by forming his own opinion and satisfaction to exercise suo motu power vested under Section 46(4) of the BFT Act on the basis of the materials on record. [Para 32] [1133-C-E]

2.1 No period of limitation is prescribed for initiation of suo motu revisional proceeding by the Commissioner or the Joint Commissioner as the case may be, whereas a period of limitation is prescribed for filing a revision application by an aggrieved party for initiation of the revisional jurisdiction of the Commissioner which period is 90 days, as is stood at that relevant time. [Para 34] [1133-H; 1134-A-B]

2.2 The High Court held that there cannot be an unlimited period of limitation even for exercising of suo motu revisional power for initiation of a proceeding by the Commissioner or the Joint Commissioner as the case may be and therefore, provision of Article 137 of the Limitation Act was read into the Act laying down that at least within a period of three years from the date of accrual of the cause of action such a power of suo motu

Revision should be exercised by the Joint Commissioner. [Para 35] [1134-C-D]

2.3 The legislature has not stated in the provision at all regarding the applicability of Article 137 of the Limitation Act to Section 46(4) of the BFT Act. If the legislature intended to provide for any period of limitation or intended to apply the said provision of Article 137 into Section 46(4), the legislature would have specifically said so in the Act itself. When the language of the legislature is clear and unambiguous, nothing could be read or added to the language, which is not stated specifically. The High Court wrongly read application of Article 137 of the Limitation Act to Section 46(4) of the BFT Act. Such a power cannot be exercised by the revisional authority indefinitely. Such extra ordinary power i.e. suo motu power of initiation of revisional proceeding has to be exercised within a reasonable period of time and what is a reasonable period of time would depend on the facts and circumstances of each case. [Paras 36 and 39] [1134-E-F; 1135-B]

Sakuru vs. Tanaji **(1985) 3 SCC 590: 1985 (2) Suppl. SCR 109;** *Sulochana Chandrakant Galande vs. Pune Municipal Transport and Ors.* **(2010) 8 SCC 467: 2010 (9) SCR 476;** *Govt. of India v. Citedal Fine Pharmaceuticals, Madras and Ors.* **(1989) 3 SCC 483:1989 (3) SCR 465;** *State of Punjab and Ors. v. Bhatinda District Co-operative Milk Producers Union Ltd.* **(2007) 11 SCC 363: 2007 (11) SCR 14 – referred to.**

2.4 On perusal of the records, it is found that such powers have been exercised within about three years of time in some cases and in some cases soon after the expiry of three years period. Such period during which power was exercised by the Joint Commissioner cannot be said to be unreasonable by any stretch of imagination in the facts of the instant case. Three years period cannot

be said to be a very long period and therefore, in all these cases, the power was exercised within a reasonable period of time. [Para 44] [1136-D-E]

3.1 The order dated 26.11.2007 was passed by the Joint Commissioner while the respondent was fighting out the litigation in the High Court and therefore, it was not possible for the assessee to give his entire focus and attention and also to give full concentration to the said proceeding pending before the Joint Commissioner. The counsel for the appellant also could not dispute the fact that the respondent was somewhat handicapped in contesting the said matter very effectively before the Joint Commissioner. [Para 46] [1137-A-C]

3.2 Considering the entire facts and circumstances of the case, the order dated 26.11.2007 is set aside and the matter is remitted back to the Joint Commissioner once again to hear the parties and to pass fresh order in respect of the legality and propriety of the revised assessment order dated 26.12.2003. The impugned judgment and order passed by the High Court is set aside to the said extent while remitting back the matter. [Para 47] [1137-C-D]

Case Law Reference:

1985 (2) Suppl. SCR 109	**Referred to**	**Para 37**
2010 (9) SCR 476	**Referred to**	**Para 41**
1989 (3) SCR 465	**Referred to**	**Para 42**
2007 (11) SCR 14	**Referred to**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6889-6891 of 2011.

From the Judgment & Order dated 14.03.2008 of the High Court of Jharkhant at Ranchi in WP(T) No. 6377 of 2007 with

WP(T) No. 5895 & 5892 of 2007.

WITH

C.A. Nos. 6892 & 6893 of 2011.

Ratan Kumar Choudhuri, Brahamajeet Mishra, Akshay Shukla, Anil Kumar Jha, Chhaya Kumari for the Appellants.

Shyam Divan, Arijit Mazumdar, Rameshwar Prasad Goyal, Pradeep Kumar Bakshi, S.L. Aneja, Achint Ranjan Singh for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Delay condoned in SLP (C) No. 8424 of 2010.

2. Leave granted.

By this common judgment and order, we propose to dispose of these appeals as they involve similar issues both of facts as also of law and therefore, they were heard together.

3. Appeals arising out of SLP (Civil) Nos. 19104-19106 of 2008 are directed against the judgment and order dated 14.3.2008 in WP (T) No. 6377 of 2007, WP (T) No. 5895 of 2007 and WP (T) No. 5892 of 2007. The appeal arising out of SLP (Civil) No. 21491 of 2008 is directed against the judgment and order dated 19.3.2008 in WP (T) No. 6071 of 2007 and the appeal arising out of SLP (Civil) No. 8424 of 2010 is directed against the judgment and order dated 31.7.2009 in W.P. (T) 54 of 2009 passed by the High Court of Jharkhand at Ranchi allowing all the Writ Petitions filed by the respondents herein.

CIVIL APPEAL ARISING OUT OF SLP (C) NO. 19104 OF 2008

4. The facts leading to the filing of the case in the appeal arising out of SLP (C) No. 19104 of 2008 are that the

respondent-M/s Shivam Coke Industries, Dhanbad is a manufacturer of coal and was registered under the provisions of the Bihar Finance Act, 1981 [now repealed - for short "BFT Act, 1981"] and presently under the provisions of Jharkhand Value Added Tax, 2005. Respondent-assessee being manufacturers of hard coke buys coal from Bharat Coking Coal Ltd. after making the payment of local Sales Tax @ 4% which is being used as an input for the purpose of manufacturing the hard coke. Respondent was assessed to tax for the Financial Years 1988-89, 1992-93 and 1996-97 determining the tax on intra-State sales transactions as well as Central Sales Tax on inter-State sales transactions. Respondent preferred an Appeal before the Joint Commissioner of Commercial Taxes (Appeals), Dhanbad Division, Dhanbad against the assessment orders passed between 26.4.1990 to 23.12.1998 for the Financial Years 1988-89, 1992-93 and 1996-97, who vide order dated 25.08.2003 remanded the aforesaid assessment proceedings by a common order to re-examine the books of account and to re-determine the nature of sales as to whether they are intra-state sales or inter-state sales, on the basis of the books of account and the audit reports as well as on the basis and within the meaning and scope of Section 3(a) of the Central Sales Tax Act, 1956 (for short "the CST Act"). Thereafter, Deputy Commissioner of Commercial Taxes, Dhanbad Circle on the basis of guidelines issued by the Joint Commissioner of Commercial Taxes (Appeals) passed the revised assessment orders on 26.12.2003 reversing the then inter-State sales under Section 3(a) of the CST Act 1956 into the intra-State sales. Respondent on 10.3.2005 filed an application for refund of excess amount of tax after adjustment of the amount to be paid by Respondent. Accordingly, on 21.8.2006 notice was issued by Deputy Commissioner of Commercial Taxes to Respondent to file its refund application before the Joint Commissioner of Commercial Taxes since the amount refundable to the Respondent is above Rs. 25,000/-. Thereafter in the year 2006, as is alleged by the respondent, the Deputy Commissioner of the Dhanbad Circle got changed

and the new Deputy Commissioner examined the revised assessment orders of the Respondent and he opined that the revised assessment orders do not conform to the appellate direction and Deputy Commissioner informed the Joint Commissioner of Commercial Taxes (Administration) about his observations. The Joint Commissioner of Commercial Taxes (Administration), Dhanbad Division, Dhanbad [Appellant No. 4] then initiated the proceeding *suo motu* under Section 46(4) of the adopted Bihar Finance Act, 1981 [now repealed] and issued notice/Memo No. 744 dated 1.8.2007 directing the Respondent to furnish the complete sets of books of account in order to determine the legality and propriety of the said revised assessment orders conforming to the appellate order. On 28.11.2007 Respondent filed Writ Petition before the High Court of Jharkhand which was registered as WP (T) No. 6377 of 2007 praying for a direction to quash the notice/Memo No. 883 dated 20.9.2007 [which was issued in pursuance to earlier notice/Memo No. 744 dated 1.8.2007] issued by the Joint Commissioner of Commercial Taxes (Administration) for initiating the proceeding suo motu under Section 46(4) of the repealed BFT Act, 1981 and also for quashing the order dated 26.11.2007 passed by the Joint Commissioner of Commercial Taxes by which he set aside the revised assessment order dated 26.12.2003. The High Court of Jharkhand vide its order dated 14.03.2008 allowed the Writ Petitions of the respondent herein against which the appellants have filed the present appeals on which we heard the learned counsel appearing for the parties.

CIVIL APPEALS ARISING OUT OF SLP (C) NOS. 19105-06 OF 2008

5. The facts leading to the filing of appeals arising out of SLP (C) Nos. 19105-06 of 2008 are that the Respondent -M/s. Rani Sati Coke Manufacturing Company, Baliyapur, Dhanbad is engaged in processing of coal to coke and was assessed to tax for the Financial Years from 1984-85 to 2000-

2001 determining the tax on "intra-State sales" transactions, as well as Central Sales Tax on inter-State sales transactions. Respondent filed an appeal against the assessment orders passed between 29.12.1987 to 10.3.2003 for the Financial Years from 1984-85 to 2000-01 and the appellate authority, i.e., the Joint Commissioner of Commercial Taxes (Appeal), Dhanbad Division, Dhanbad remanded the aforesaid assessment proceedings by a common order to re-examine the nature of intra-State sales and inter-State sales on the basis of the books of account and the audit reports as well as on the basis of the meaning and scope of Section 3(a) of the CST Act, 1956. Thereafter, the Deputy Commissioner of Commercial Taxes passed the revised assessment order vide orders dated 14.12.2005 and 29.12.2005 reversing / converting the then inter-State sales under Section 3(a) of the CST Act, 1956 into the intra-State sales. Pursuant thereto, Respondent filed prescribed refund application before the Deputy Commissioner of Commercial Taxes. Thereafter in the year 2006, it is alleged by the respondents that, the Deputy Commissioner of the Dhanbad Circle got changed and the new Deputy Commissioner examined the revised assessment orders of the Respondent and he opined that the revised assessment orders do not conform to the appellate direction and as such do not have any merit as they were re-assessed on the basis of same facts for converting the then inter-State sales into the intra-State sales, which resulted the claim of refund and Deputy Commissioner informed the Joint Commissioner of Commercial Taxes (Administration) about his observations. Pursuant to this Joint Commissioner of Commercial Taxes (Administration) initiated the proceeding suo motu under Section 46(4) of the Bihar Finance Act, 1981 and issued notice No. 850 dated 06.09.2007 directing Respondent to furnish the complete sets of books of account, in order to determine the legality and propriety of the said revised assessment orders conforming to the appellate order. Thereafter, Respondent No. 2 filed two Writ Petitions before the High Court of Jharkhand which were registered as W.P. (T)

Nos. 5892 and 5895 of 2007 praying for the direction to the appellants for immediate refund of the entire amount arising out of the revised assessment orders in which High Court directed the appellants to participate in revision proceedings, after which Respondent filed an amended petition before the High Court by bringing the fact that the revision proceedings under Section 46(4) of the Bihar Finance Act, 1981 was opened on the basis of an application of the Deputy Commissioner which is not permitted as per the provisions of the repealed BFT Act, 1981 and that the same is also barred by limitation. The High Court of Jharkhand vide its order dated 14.03.2008 allowed the Writ Petitions of the respondents herein against which the appellants have filed the present appeals on which we heard the learned counsel appearing for the parties.

CIVIL APPEALS ARISING OUT OF SLP (C) NO. 21491 AND 8424 OF 2008

6. The appeals arising out of SLP(C) No. 21491 of 2008 are against the judgment and order of the High Court of Jharkhand dated 19.03.2008 following the judgment in WP (T) NO. 6377 of 2007. The facts of this appeal and also of the appeal arising out of SLP (C) No. 8424 of 2010 are similar to the other appeals at hand. So, we need not go into the detailed facts of the said two appeals.

7. The learned counsel appearing for the appellant while taking us to the impugned judgment and also the connected records submitted that judgment and order passed by the High Court is incorrect. He further submitted that the findings arrived at by the High Court are erroneous and based on wrong readings of the materials available on record.

8. The learned counsel appearing for the respondents on the other hand while drawing support from the impugned judgment and order submitted that the findings recorded by the High Court are findings of fact and therefore this Court should not interfere with the aforesaid conclusions of fact arrived at by

the High Court by giving cogent reasons for its conclusions.

9. Upon reading the entire records and materials placed and also upon hearing the learned counsel appearing for the parties, in our considered opinion three following issues appear to arise for our consideration;

(a) Whether the *suo motu* power of revision under Section 46(4) of the BFT Act, 1981, vested with the Joint Commissioner was legally and properly exercised in the present case;

(b) Whether or not the action taken by the Department was barred by limitation and whether such action was bad for not having been initiated within a reasonable time;

(c) Whether the order dated 26.11.2007 passed by the Joint Commissioner setting aside the revised assessment order dated 26.12.2003 is proper and could be maintained;

10. We propose to deal with the aforesaid three issues one after the other and record our reasons for coming to the decision in each of the aforesaid issues;

Issue 1: Whether exercise of Suo Motu power of revision as provided under Section 46(4) of the BFT Act, 1981 could be upheld;

11. Section 46 of the BFT Act, 1981 with which we are concerned in the present case came to the statute book with the enactment of Bihar Finance Act, 1981. The aforesaid Act was a consolidated Act which was passed by the State Legislature amending the law relating to levy of tax on sale and purchase of goods. In the said Act, Section 45 provides for the provision of filing an appeal whereas Section 46 of the Act lays down the provision of revision. In the present case, we are only concerned with the provision of revision and in our estimation,

the entire provision of Section 46 should be extracted hereinafter.

46. Revision – (1) Subject to such rules as may be made by the State Government an order passed on an appeal under sub-section (1) or (2) of section 45 may, on application, be revised by the Tribunal.

(2) Subject as aforesaid any order passed under this part or the rules made thereunder, other than an order passed by the Commissioner under sub-section (5) of section 9 or an order against which an appeal has been provided in section 45 may, on application be revised.

(a) by the Joint Commissioner, if the said order has been passed by an authority not above the rank of Deputy Commissioner; and

(b) by the Tribunal, if the said order has been passed by the Joint Commissioner or Commissioner.

(3) Every application for revision under this section shall be filed within ninety days of the communication of the order which is sought to be revised, but where the authority to whom the application lies is satisfied that the applicant had sufficient cause for not applying within time, it may condone the delay.

(4) The Commissioner may, on his own motion call for an examine the records of any proceeding in which any order has been passed by any other authority appointed under section 9, for the purpose of satisfying himself as to the legality or propriety of such order and may, after examining the record and making or causing to be made such enquiry as he may deem necessary, pass such order as he thinks proper.

(5) No order under this section shall be passed without giving the appellant as also the authority whose order is sought to be revised or their representative, a reasonable opportunity of being heard.

(6) Any revision against an appellate order filed and pending before the Joint Commissioner or a revision against any other order filed and pending before the Deputy Commissioner since before the enforcement of this part shall be deemed to have been filed and/or transferred respectively to the Tribunal and Joint Commissioner; and any revision relating to a period prior to the enforcement of this part against an appellate order, or against any other order passed by an authority not above the rank of Deputy Commissioner shall, after the enforcement of this part, be respectively filed before the Tribunal and the Joint Commissioner.

12. The said Act came to be amended in 1984. Section 10 of the Bihar Finance Amendment Act, 1984 amended Section 46 in some respect which again is extracted hereinbelow:-

10. *Amendment of section 46 of the Bihar Act V, 1981 (Part I)*. – In sub-section (3) of section 46 of the said Act for the word “sixty” the word “ninety” shall be substituted.

(2) For sub-section (4) the following sub-section shall be substituted namely :-

“4 (a) The Commissioner may, on his own motion call for and examine the records of any proceeding in which any order has been passed by any other authority appointed under section 9, for the purpose of satisfying himself as to the legality or property of such order and may, after examining the record and making or causing to be made such enquiry as he may deem necessary, pass such order as he thinks proper.

13. By inserting a provision namely Section 7 of the Bihar Finance (Amendment) Ordinance, 1989, clause (b) of sub-Section (4) has been deleted with effect from May, 1989. Therefore, the statutory provision that now stands and is operative is that Section 46 provides for a revision of all appellate and other orders passed by various authorities under the BFT Act, 1981. According to the statutory provision as applicable, power of revision is vested with the Tribunal and the Joint Commissioner, which power is to be exercised on application by any person aggrieved, but subject to time limit prescribed in sub-Section (3) i.e. 90 days of the communication of the order with a further power to condone the delay, if sufficient cause is shown. There is an additional power vested on the Commissioner which empowers the Commissioner to initiate suo motu revision proceedings at any time and for exercising such power no limitation has been prescribed in the statute. The power of the Commissioner to initiate such suo motu revisional proceeding has been delegated to the Joint Commissioner of Commercial Taxes (Administration) against the orders of the officers lower than his rank which is so delegated in terms of the notification issued by the State of Bihar under S.O. No. 795 dated 28th June 1986.

14. It is thus established that under Section 46 of the BFT Act, 1981, it is the Commissioner who on the basis of an application filed by an aggrieved party revise the order passed by any authority subordinate to him. He also has the additional power alongwith the Joint Commissioner as a delegatee as provided under Section 46(4) of the BFT Act, 1981 to revise an order passed by an authority subordinate to it by exercising its suo motu power.

15. In all these appeals, the Joint Commissioner of Commercial Taxes has exercised the power vested on him under Section 46(4) of the BFT Act, 1981 which power in most cases concerning the present appeals was exercised by him within a period of three years but in some other cases beyond

the expiry of three years period, but soon thereafter.

16. In that view of the matter, counsel appearing for the respondent submitted in the High Court that exercise of such power by the Joint Commissioner after expiry of more than two years time is illegal, without jurisdiction and bad in law. The Division Bench of the Jharkhand High Court found force in the aforesaid submissions of the counsel appearing for the respondent and held that such suo motu power vested on an authority must be exercised within three years period which is a period prescribed under Article 137 of the Limitation Act, 1963. According to the High Court where no time limit is prescribed for filing a revision, Article 137 of the Limitation Act would apply to such cases. It was further held that since under Section 46(4), no time limit is prescribed the limitation as prescribed under Article 137 of the Limitation Act would apply to the facts and circumstances of the present case.

17. Counsel appearing for the appellant, however, submitted before us that the aforesaid contentions on the face of it cannot be accepted as a correct position in law for by enacting sub-Section (4) in Section 46, the legislature thought it fit not to impose any restriction or time limit so far as limitation is concerned and therefore to hold that Article 137 of the Limitation Act would apply to such provisions is nothing but misreading of the provisions for if that was the intention of the legislature it would have so stated specifically by making the said provision applicable to a case like this.

18. The counsel therefore, submitted that such power of initiation of suo motu revision proceedings by the Commissioner or Joint Commissioner as the case may be should be held to be without any time or such restriction or at least it should be held that such exercise of power of revision could be exercised suo motu within a reasonable time depending on the facts and circumstances of each case.

19. Another submission which is advanced by the counsel

appearing for the respondent was that the Joint Commissioner has exercised the power of suo motu revision in the instant case on the basis of an application filed by the Deputy Commissioner which was sent to the Joint Commissioner by him and that application was drawn up and submitted under Section 46(4) itself and therefore, the entire exercise of power by the Joint Commissioner is fallacious, untenable and should be held to be illegal.

20. The counsel appearing for the appellant, however, refuted the said allegations and submitted that although Deputy Commissioner had written a letter to the Joint Commissioner bringing to his notice some mistakes and errors apparent on the face of records and illegalities by his predecessor in his order, but, it was a power which was exercised by the Joint Commissioner independently on his own accord and therefore, it cannot be said that the aforesaid power was exercised illegally or without jurisdiction.

21. We may therefore, refer to the materials on record so as to record our findings on the aforesaid issue.

22. In all these appeals, there are letters which were written by the Deputy Commissioner of Commercial Taxes to the Joint Commissioner (Administration). One of such letter is dated 28.8.2007. In the said letter it is stated by the Deputy Commissioner that the said communication is regarding filing of suo motu revision under Section 46(4) of the BFT Act, 1981. The aforesaid letter by the Deputy Commissioner, Commercial Taxes was written to the Joint Commissioner (Administration). In the said letter, the Deputy Commissioner has pointed out some alleged mistakes in the original tax assessment order and the revised order. He also stated in that communication that he is unable to agree with the revised tax assessment order and reimbursement order passed by the Divisional Incharge and therefore, according to his opinion a revision should be filed under Section 46(4) of the BFT Act, 1981 against the revised tax assessment order dated 29.12.2005

23. Our attention was also drawn to the notice for revision issued by the Joint Commissioner of Commercial Taxes (Administration). One of the notices is dated 17.12.2007 issued to M/s. Shivam Coke Industries namely the respondent herein for the assessment years 1988-1989 to 1992-1993 and 1996-1997. The said notice reads as follows:-

> "Whereas all the points and facts have not been considered while passing the revised assessment orders pertaining to the above cases which were to be considered as per directions of the appellate court, hence the related revised assessment orders are not in conformity neither the directions of the appellate court and the provisions of law.
>
> In the light of the above facts the legality & propriety of the revised assessment orders has not been established and hence the revision of the said orders have been considered necessary.
>
> You are hereby directed to be present before the undersigned on 15.5.2007 and place your side as to why the above stated revised orders should not be set aside?
>
> Joint Commissioner of Commercial Taxes (Adm.)
>
> Dhanbad Division, Dhanbad"

24. Such orders are also existing against similar notices in the connected matters.

25. Relying on the aforesaid two documents, the counsel for the respondent submitted before us that it is apparent on the face of the record that the Joint Commissioner of Commercial Taxes initiated the suo motu action on the basis of the letter of the Deputy Commissioner, Commercial Taxes who had stated that the revision should be filed under Section 46(4) of the BFT Act, 1981. It was submitted in such a situation and that since it is an application filed by the Deputy

Commissioner, the same was a power to be exercised under Section 46 (2) of the BFT Act, 1981 which is an ordinary power of revision to be exercised by the competent authority on an application filed by the aggrieved party and here the Deputy Commissioner. According to the counsel, since the Deputy Commissioner is an aggrieved party, he could file such an application seeking for revision within a period prescribed i.e. 90 days and in that view of the matter even if the Joint Commissioner exercises suo motu power, such power could and should have been exercised within a period of 90 days as prescribed.

26. We are, however, unable to accept the aforesaid contentions for the simple reason that a bare perusal of the notice issued on 17.12.2007, the contents of which have been extracted hereinbefore would indicate that the aforesaid notice was issued by the Joint Commissioner by exercising his individual suo motu power as provided under Section 46(4). It is not a case where such notice was issued on the basis of an application filed by the Deputy Commissioner. This is obvious because in the said notice, there is absolutely no reference made of the application sent by the Deputy Commissioner. If from the available records of a particular case, the Joint Commissioner forms an independent opinion that the same is a case where suo motu power of Revision should be exercised, he is empowered to so exercise such suo motu power of revising an order which appears to be illegal and without jurisdiction to the competent authority who is empowered to issue such notice by recording his reasons for coming to such a conclusion in the notice itself.

27. In the present case, the Joint Commissioner has exercised his own independent mind for issuing the notice and also recorded his own reasons for coming to a conclusion as to why the power under Section 46(4) should be exercised. Having recorded the aforesaid reason, such notice was issued to the assessee after forming a decision. The assessee was

informed by issuing the said notice that the legality and propriety of the revised assessment order has not been established because of the reasons mentioned in the notice and therefore, the revision of the said orders is proposed is it has been considered necessary. By the said notice, the assessee was directed to be present before the Joint Commissioner and place his side as to why the above revised assessment order should not be set aside.

28. The respondent being aggrieved by the issuance of the aforesaid order filed a writ petition before the High Court. The High Court, however, did not grant any stay of the aforesaid notice and permitted the respondent to contest the said notice in accordance with law during the course of which the Joint Commissioner of Commercial Taxes has set aside the revised orders and sent back the matter for fresh assessment to the assessing officer.

29. The aforesaid subsequent development which had taken place during the pendency of the writ petition in the High Court has not been addressed to and decided by the High Court as the High Court has disposed of the entire writ petition on two issues namely on the issue of the ambit and scope of Section 46(4) of the BFT Act, 1981 and also on the ground of limitation.

30. The Deputy Commissioner, Commercial Taxes Division has pointed out in his communication to the Joint Commissioner several loopholes in the revised assessment orders passed by the assessing officer. The Deputy Commissioner has also pointed out how the assessee has made conflicting claims and statements and also how while upholding such contradictory claims, there has been a revenue loss for the department. Alongwith his letter, some of the relevant records were transmitted to the Joint Commissioner. It is true that the Deputy Commissioner, Commercial Taxes Division has brought out and pointed out some of the illegalities and irregularities committed in the revised assessment orders

passed by his predecessor in the assessment orders relating to the respondent.

31. But the impugned notice issued by the Joint Commissioner ex facie indicates that he being the competent authority has formed an independent opinion and personal satisfaction that the legality and propriety of the revised assessment orders has not been established because of the reasons specifically stated in the said notice and therefore he has thought it fit to exercise his power of suo motu revision consequent upon which the aforesaid notice was issued.

32. There is no reference in the said notice to the letter and any other materials contained with the letter of the Deputy Commissioner anywhere in the notice and therefore, it cannot be said that while coming to the aforesaid conclusion in the impugned notice, the Commissioner was influenced only by the opinion of the Deputy Commissioner. On consideration of the records we are satisfied that it was not a revision initiated on the basis of any application filed by an aggrieved party namely the Deputy Commissioner but initiation of a Revisional proceeding by the Joint Commissioner by forming his own opinion and satisfaction to exercise suo motu power vested under Section 46(4) of the BFT Act on the basis of the materials on record. The aforesaid contention is therefore, rejected.

Issue 2 - Whether or not the action taken by the Department was barred by limitation

33. The next issue which now arises for our consideration is whether the aforesaid exercise of power of drawing up a revisional proceeding by exercising suo motu power was not exercised within the period of limitation or within a reasonable period of time.

34. We have also extracted the provision which clearly indicates that no period of limitation is prescribed for initiation

of suo motu revisional proceeding by the Commissioner or the Joint Commissioner as the case may be, whereas a period of limitation is prescribed for filing a revision application by an aggrieved party for initiation of the revisional jurisdiction of the Commissioner which period is 90 days, as is stood at that relevant time.

35. The High Court has held that there cannot be an unlimited period of limitation even for exercising of suo motu revisional power for initiation of a proceeding by the Commissioner or the Joint Commissioner as the case may be and therefore provision of Article 137 of the Limitation Act was read into the Act laying down that at least within a period of three years from the date of accrual of the cause of action such a power of suo motu Revision should be exercised by the Joint Commissioner.

36. We are again unable to accept the aforesaid contention as the legislature has not stated in the provision at all regarding the applicability of Article 137 of the Limitation Act to Section 46(4) of the BFT Act. If the legislature intended to provide for any period of limitation or intended to apply the said provision of Article 137 into Section 46(4), the legislature would have specifically said so in the Act itself. When the language of the legislature is clear and unambiguous, nothing could be read or added to the language, which is not stated specifically. Therefore, the High Court wrongly read application of Section 137 of the Limitation Act to Section 46(4) of the BFT Act.

37. It is a settled position of law that while interpreting a statute, nothing could be added or subtracted when the meaning of the section is clear and unambiguous. In this connection we may also refer to the decision of this Court in *Sakuru vs. Tanaji* reported in (1985) 3 SCC 590 wherein it was stated by this Court that the Limitation Act applies to courts and not to quasi judicial authority.

38. The aforesaid principle and settled position of law was

totally ignored by the High Court while laying down that Article 137 of the Limitation Act would be applicable to the facts and circumstances of the present case.

39. We would, however, agree with the position that such a power cannot be exercised by the revisional authority indefinitely. In our considered opinion, such extra ordinary power i.e. suo motu power of initiation of revisional proceeding has to be exercised within a reasonable period of time and what is a reasonable period of time would depend on the facts and circumstances of each case.

40. For this proposition, a number of decisions of this Court can be referred to on which reliance was placed even by the counsel appearing for the respondent.

41. In *Sulochana Chandrakant Galande Vs. Pune Municipal Transport and Others* reported in (2010) 8 SCC 467, this Court dealing with the issue of "reasonable time" held as follows:-

> 29. In view of the above, we reach the inescapable conclusion that the revisional powers cannot be used arbitrarily at a belated stage for the reason that the order passed in revision under Section 34 of the 1976 Act, is a judicial order. What should be reasonable time, would depend upon the facts and circumstances of each case.

42. In *Govt. of India v. Citedal Fine Pharmaceuticals, Madras and Others* reported in (1989) 3 SCC 483:

> 6. ……While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable

> period, would depend upon the facts of each case…..

43. In *State of Punjab & Ors. v. Bhatinda District Cooperative Milk Producers Union Ltd.* reported in (2007) 11 SCC 363

> 18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.

44. Now, the question that arises for our consideration is whether the power to exercise Suo motu revisional jurisdiction by the Joint Commissioner in the present cases was exercised within a reasonable period. On perusal of the records, we find that such powers have been exercised within about three years of time in some cases and in some cases soon after the expiry of three years period. Such period during which power was exercised by the Joint Commissioner cannot be said to be unreasonable by any stretch of imagination in the facts of the present case. Three years period cannot be said to be a very long period and therefore, in all these cases, we hold that the power was exercised within a reasonable period of time.

Issue 3: Whether the order dated 26.11.2007 passed by the Joint Commissioner is proper and could be maintained;

45. Having decided the aforesaid two issues in the aforesaid manner, the next and the last issue that arises for our consideration is whether the order dated 26.11.2007 passed by the Joint Commissioner setting aside the revised assessment order dated 27.12.2003 is proper and could be maintained, as the said order was passed during the pendency of the writ petition in the High Court.

46. On this issue also, we have heard the learned counsel appearing for the parties. The aforesaid order dated 26.11.2003 was passed while the respondent was fighting out the litigation in the High Court and therefore, it was not possible for the assessee to give his entire focus and attention and also to give full concentration to the aforesaid proceeding pending before the Joint Commissioner. The learned counsel appearing for the appellant also could not dispute the fact that the respondent was somewhat handicapped in contesting the aforesaid matter very effectively before the Joint Commissioner.

47. Considering the entire facts and circumstances of the case, we also set aside the order dated 26.11.2007 and remit back the matter to the Joint Commissioner once again to hear the parties and to pass fresh order in respect of the legality and propriety of the revised assessment order dated 26.12.2003. Consequently, the matter is now remitted to the Joint Commissioner of Commercial Taxes to pass order in accordance with law giving reasons for its decisions as expeditiously as possible. The impugned judgment and order passed by the High Court is set aside to the aforesaid extent while remitting back the matter as aforesaid, leaving the parties to bear their own costs.

N.J. Matters disposed of.

SAROJBEN ASHWINKUMAR SHAH
v.
STATE OF GUJARAT AND ANR.
(Criminal Appeal No. 1554-1557 of 2011)

AUGUST 10, 2011

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

Code of Criminal Procedure, 1973 – s. 319 – Power to proceed against other persons appearing to be guilty of offence – On facts, complaint u/s. 138 Negotiable Instruments Act against a firm and its partners – Subsequently, application u/s. 319 for joining appellant and one other person as co-accused in the complaint, on basis of document (copy of registration of the firm) whereby the proposed accused were shown as partners of the firm – Direction by Judicial Magistrate to join them as co-accused – Said order upheld by the High Court – On appeal, held: High Court failed to consider whether the Magistrate had addressed to the essential aspects before invoking power u/s. 319 – Also the High Court did not advert to the question whether or not filing of copy of registration of the firm by its partners would be covered by expression in the course of inquiry into or trial and evidence occurring in s. 319 which would also show that the appellant committed the offence – With regard to the criminal liability of a partner in the firm, there has to be evidence that when the offence was committed, the partner was in-charge of and was responsible to the firm for the conduct of the business of the firm – High Court did not consider these aspects – Thus, matter remitted back to the High Court for reconsideration – Negotiable Instrument Act, 1881 – ss. 138 and 141.

Code of Criminal Procedure, 1973 – s. 319 – Power under – Ambit and scope of – Explained.

Respondent No. 2 filed a complaint against a partnership firm and its two partners-accused no. 2 and 3, before the Judicial Magistrate, alleging commission of offence under Section 138 of the Negotiable Instruments Act, 1881 and under Section 114 of the Penal Code, 1860. Subsequently, the complainants filed an application under Section 319 of the Code of Criminal Procedure, 1973 for joining two other partners - 'PL' and appellant, as accused no. 4 and accused no. 5 respectively. It was averred that accused nos. 2 and 3 submitted a copy of the registration of the firm wherein proposed accused no. 4 and 5 were shown as partners of the firm. The Judicial Magistrate directed that 'PL' and the appellant be joined as accused no. 4 and 5. The High Court upheld the order. Thus, the appellant filed the instant appeal.

Allowing the appeals, the Court

HELD: It would transpire from the order of the High Court that after noticing the provisions contained in Section 319 Cr.P.C. and its scope, the High Court proceeded to hold that the order of the Magistrate did not call for any interference. The High Court, however, failed to consider whether Magistrate has addressed to the essential aspects before invoking his power under Section 319 of the Code. Moreover, the High Court did not advert to the question whether or not filing of copy of registration of the firm by Accused Nos. 2 and 3 would be covered by expressions 'in the course of any inquiry into or trial' and 'evidence' occurring in Section 319 of the Code and also the aspect as to whether such document could be treated as an evidence to show that the appellant (newly added accused) has committed an offence of cheating under Section 420 IPC. As regards the criminal liability of a partner in the firm, in light of the provisions contained in Section 141 of the Act, there has to be evidence that at the time the offence was

committed, the partner was in-charge of and was responsible to the firm for the conduct of the business of the firm. A perusal of the impugned order would show that all these relevant aspects have not been considered by the High Court at all and the petitions under Section 482 of the Code were dismissed. As the matter needs to be considered by the High Court afresh, the orders of the Magistrate is not dealt with on merit lest it may prejudice the consideration of the petitions under Section 482 of the Code before the High Court. The impugned order is set aside. Criminal Miscellaneous Application are restored to the original number for hearing and reconsideration by the High Court in accordance with law. [Paras 17 and 18] [1150-B-G]

Joginder Singh and Anr. v. State of Punjab and Anr. **(1979) 1 SCC 345: 1979 (2) SCR 306;** *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors.* **(1983) 1 SCC 1: 1983 (1) SCR 884;** *Michael Machado and Anr. v. Central Bureau* **(2000) 3 SCC 262: 2000 (1) SCR 981;** *Shashikant Singh v. Tarkeshwar Singh and Anr.* **(2002) 5 SCC 738: 2002 (3) SCR 400;** *Krishnappa v. State of Karnataka* **(2004) 7 SCC 792: 2004 (3) Suppl. SCR 894;** *Palanisamy Gounder and Anr. v. State represented by Inspector of Police.* **(2005) 12 SCC 327;** *Guriya alias Tabassum Tauquir and Ors. vs. State of Bihar and Anr.* **(2007) 8 SCC 224: 2007 (10) SCR 385 – referred to.**

Case Law Reference:

1979 (2) SCR 306	**Referred to**	**Para 9**
1983 (1) SCR 884	**Referred to**	**Para 10**
2000 (1) SCR 981	**Referred to**	**Para 11**
2002 (3) SCR 400	**Referred to**	**Para 12**
2004 (3) Suppl. SCR 894	**Referred to**	**Para 13**

(2005) 12 SCC 327	**Referred to**	**Para 14**
2007 (10) SCR 385	**Referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1554-1557 of 2011.

From the Judgment and Order dated 05.05.2010 of the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 5157, 5158, 5159 and 5160 of 2000.

Huzefa Ahmadi, Pradhuma Gohil, Vikas Singh, S. Hari Haran and Jayesh Bhairaria (for Charu Mathur) for the Appellant.

Sanjoy Ghose (for Anitha Shenoy) Jesal and Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. These four appeals, by special leave, are directed against the common order of the Gujarat High Court whereby single Judge of that Court refused to interfere with the orders (all dated July 11, 2000) of the Judicial Magistrate First Class, Prantij directing addition of the present appellant as an accused (Accused No. 5) in various complaints.

3. For the sake of brevity and convenience, we shall refer to the facts from the appeal arising from complaint (Criminal Case no. 1132 of 1999) pending in the Court of Judicial Magistrate First Class, Prantij. Respondent no. 2—Gulamnabi Hebatkhan Sumara – filed a complaint against (i) M/s. Rashmi Builders, a partnership firm, (ii) Ashwinkumar Tribhovandas Shah and (iii) Chandravadan Gopaldas Thakkar in the Court of Judicial Magistrate, First Class, Prantij. It was alleged in the complaint that M/s. Rashmi Builders (Accused No. 1) is a duly registered partnership firm and Ashwinkumar Tribhovandas Shah (Accused No. 2) and Chandravadan Gopaldas Thakkar

(Accused No. 3) are its partners. On the recommendation and advise of one Balkabhai alias Himatlal Dwarkadas Lal, a financial broker, the complainant lent and advanced a sum of Rs. 5 lakhs to the firm. The firm through its partner Ashwinkumar Tribhovandas Shah acknowledged the receipt of the said amount and also executed and delivered a promissory note for Rs. 5 lakhs on the same date. Later in discharge of its liability, the firm through its partner (Accused No. 2) issued a cheque for Rs. 5 lakhs drawn on the Federal Bank of India, Fort Branch, Bombay and delivered the same to Balkabhai alias Himatlal Dwarkadas Lal who handed over the said cheque to the complainant along with the promissory note. The complainant presented the said cheque for encashment on May 31, 1999 with his Banker but the same was dishonoured on June 3, 1999 with the remark "account closed". The complainant then sent a statutory notice of 15 days to the firm and its two partners which was received by them on or about June 23, 1999. The accused failed and neglected to make payment within the statutory period and instead in its reply dated June 29, 1999, the firm denied having entered into any financial transaction with the complainant. The complainant thus alleged that the accused have committed offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'N.I. Act') and under Section 420 and Section 114 of the Indian Penal Code. The other complaints were lodged by Usmanmiya Nanumiya Ghori, Mohamad Umarkhan Akbarkhan Ghori and Daudbhai Rasulbhai Mansuri against the above three accused on the identical facts.

4. The Judicial Magistrate, First Class, Prantij took cognizance in the above complaints against the three accused, namely, (i) M/s. Rashmi Builders (a partnership firm), (ii) Ashwinkumar Tribhovandas Shah and (iii) Chandravadan Gopaldas Thakkar.

5. On November 4, 1999, the complainant in each of the complaints made an application under Section 319 of the Code

of Criminal Procedure, 1973 (for short, 'the Code') for joining Paresh Lakshmikant Vyas and Sarojben Ashwinkumar Shah (appellant herein) as Accused Nos. 4 and 5 respectively. It was averred that Accused Nos. 2 and 3 have submitted a copy of the registration of the firm—M/s. Rashmi Builders (Accused No. 1) wherein the proposed Accused No. 4 and Accused No. 5 have been shown as the partners of the firm and in this view of the matter, it was prayed that complainant may be permitted to join them as accused.

6. The Judicial Magistrate First Class, Prantij, as noted above, has directed that Paresh Lakshmikant Vyas and Sarojben Ashwinkumar Shah (appellant herein) be joined as Accused Nos. 4 and 5 and the High Court maintained such direction.

7. Section 319 of the Code reads as under :

"S. 319. Power to proceed against other persons appearing to be guilty of offence.—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the court, he may be arrested or summoned, as the circumstances of' the case may require, for the purpose aforesaid.

(3) Any person attending the court although not under arrest or upon a summons, may be detained by such court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the court proceeds against any person under sub-section (1), then-

(a) The proceedings in respect of such person shall be commenced afresh, and witnesses re-heard:

(b) Subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced."

8. The ambit and scope of the power of the Court under Section 319 of the Code has come up for consideration before this Court on more than one occasion.

9. In *Joginder Singh and Another v. State of Punjab and Another*[1], this Court stated that the power conferred under Section 319(1) of the Code is applicable to all courts including a Sessions Court and the Court has power to add any person, not being the accused before it, against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused.

10. In the case of *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Others,*[2] this Court (at page 8) held as under :

"19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the

1. (1979) 1 SCC 345.
2. (1983) 1 SCC 1.

other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

11. In *Michael Machado and Another v. Central Bureau of Investigation and Another*[3], this Court on extensive consideration of the provision contained in Section 319 stated the (at pages 267-268) as follows :

"11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then, what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence

3. (2000) 3 SCC 262.

connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.

xxx xxx xxx xxx xxx

14. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action.

12. In *Shashikant Singh v. Tarkeshwar Singh and Another*[4], this Court considered the scope of Section 319 of the Code at page 743 of the Report in the following words:

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being

4. (2002) 5 SCC 738.

the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

13. In *Krishnappa v. State of Karnataka*[5], this Court reiterated what has been repeatedly stated that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

5. (2004) 7 SCC 792.

14. In *Palanisamy Gounder and Another v. State represented by Inspector of Police*[6], this Court referred to two earlier decisions of this Court in *Michael Machado*[3] and *Krishnappa*[5] and observed that power under Section 319 of the Code cannot be exercised so as to conduct a fishing inquiry.

15. In *Guriya alias Tabassum Tauquir and Others v. State of Bihar and Another*[7] most of the above decisions were referred to and it was observed that the parameters for dealing with an application under Section 319 of the Code have been laid down in these cases.

16. The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this :

(i) The Court can exercise the power conferred on it under Section 319 of the Code suo motu or on an application by someone.

(ii) The power conferred under Section 319(1) applies to all courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the court.

(iv) The power to proceed against any person, not

6. (2005) 12 SCC 327.

7. (2007) 8 SCC 224.

being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word 'evidence' in Section 319 contemplates the evidence of witnesses given in court in the inquiry or trial. The court cannot add persons as accused on the basis of materials available in the charge-sheet or the case diary but must be based on the evidence adduced before it. In other words, the court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the court to the constraints imposed in Section 319 (4) that proceedings in respect of newly – added persons shall be commenced afresh from the beginning of the trial.

(viii) The court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion.

17. Now, if the order of the High Court is seen, it would transpire that after noticing the provisions contained in Section 319 and its scope, the High Court proceeded to hold that the order of the Magistrate did not call for any interference. The High Court, however, failed to consider whether Magistrate has addressed to the essential aspects before invoking his power under Section 319 of the Code. Moreover, the High Court did not advert to the question whether or not filing of copy of registration of the firm by Accused Nos. 2 and 3 would be covered by expressions 'in the course of any inquiry into or trial' and 'evidence' occurring in Section 319 of the Code and also the aspect as to whether such document could be treated as an evidence to show that the appellant (newly added accused) has committed an offence of cheating under Section 420 IPC. As regards the criminal liability of a partner in the firm, in light of the provisions contained in Section 141 of the N.I. Act, there has to be evidence that at the time the offence was committed, the partner was in-charge of and was responsible to the firm for the conduct of the business of the firm. A perusal of the impugned order would show that all these relevant aspects have not been considered by the High Court at all and the petitions under Section 482 of the Code were dismissed. As, in our view, the matter needs to be considered by the High Court afresh, we refrain from dealing with the orders of the Magistrate on merit lest it may prejudice the consideration of the petitions under Section 482 of the Code before the High Court.

18. Consequently, these appeals are allowed and the impugned order dated May 5, 2010 is set aside. Criminal Miscellaneous Application Nos. 5157 of 2000, 5158 of 2000, 5159 of 2000 and 5160 of 2000 are restored to the original number for hearing and reconsideration by the High Court in accordance with law.

N.J. Appeals allowed.