VIDUR IMPEX AND TRADERS PVT. LTD. AND OTHERS
v.
TOSH APARTMENTS PVT. LTD. AND OTHERS
(Civil appeal No. 5918 of 2012 etc.)

AUGUST 21, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Code of Civil Procedure, 1908 – Or. I r. 10(2) and Or. XL – Agreement for sale in respect of suit property by R-2 in favour of R-1 – Thereafter R-2 giving possession of property to R-4 – Suit for specific performance by R-1, before Delhi High Court – Interim injunction by Delhi High Court from transferring or alienating the property – R-2 in violation of interim order executed sale deeds in favour of appellants – The appellants further executing agreement for sale in favour of Developers – Delhi High Court appointing Receiver – Developers filing case against the appellants in Calcutta for execution of sale deed in their favour – Calcutta High Court directing the appellants to execute sale deed in favour of Developers and also appointed a Receiver – Delhi High Court restraining the appellants, the Developer and the Receiver appointed by Calcutta High Court from taking possession of the property – Calcutta High Court when came to know about the pending litigation before Delhi High Court, made its order subject to the order of Delhi High Court – Appellant's application for impleadment in the suit filed by R-1 dismissed by Delhi High Court – The application of Developer seeking continuation of Receiver appointed by Calcutta High Court also dismissed – By impugned order Division Bench of Delhi High Court upheld the three orders of Single Judge of Delhi High Court in rejecting the application for impleadment and the application for continuation of Receiver appointed by Calcutta High Court and in appointing the Receiver – On

appeal, held: The impleadment of appellant and Developers in the suit was rightly rejected – Court can implead a 'necessary party' or a 'proper party' – In a suit for specific performance, a purchaser can be impleaded, if his conduct is above board and whose application for impleadment is filed within reasonable time – The appellants and the Developers were neither necessary nor proper parties – They were strangers to the agreement for sale deed executed in favour of R-1 – Sale was executed in favour of the appellants and further by appellants in favour of Developers in violation of interim injunction in the suit – The application was also highly belated – Delhi High Court was right in appointing the Receiver and in rejecting the continuation of the Receiver appointed by Calcutta High Court – In the instant case, doctrine of comity of jurisdictions of courts, cannot be invoked as the order of Calcutta High Court was obtained by concealing the fact of pending litigation before Delhi High Court – The appellants and the Developers imposed with cost of Rs. 5 lakhs each for the conduct of suppressing facts from Calcutta High Court – Doctrine of comity of jurisdiction of courts.

Words and Phrases :

'Necessary party' and 'Proper party' – Meaning of, in the context of Code of Civil Procedure, 1908.

Respondent No. 2 (owner of the suit property) executed an agreement for sale in favour of respondent No. 1 on 13.9.1988. In 1992 respondent No. 2 handed over the possession of the suit property to respondent No. 4. Respondent No. 1 on coming to know about the alienation for the property to respondent No. 4, filed suit No. 425/1993 in Delhi High Court for specific performance of agreement for sale dated 13.9.1988. The High Court by interim order dated 18.2.1993 restrained respondent Nos. 2 and 4 from transferring, alienating or part with

possession or create third party interest in the suit property.

On 19.2.1997, respondent No. 2 executed 6 agreements for sale in favour of the 6 appellant-Companies (in Civil Appeal No. 5918/12) and executed 6 sale-deeds in their favour on 30.5.1997. In the meantime, the appellant-Companies executed agreement for sale in favour of the Developers (appellant in Civil Appeal No. 5917/12) by agreement dated 18.3.1997. Thereupon, respondent No. 1 filed contempt petition against respondent Nos. 2 and 4 and the appellants. High Court entertained the petition against respondent Nos. 2 and 4 but declined to do so qua the appellants observing that case was not made out against them. Delhi High Court appointed Receiver.

The Developers opened another front of litigation in Calcutta against the appellant-companies, alleging that they failed to execute the sale-deed in terms of the agreement dated 18.3.1997. The dispute was referred for arbitration. The sole Arbitrator passed award directing the appellant-companies to hand-over the possession of the property to the Developers and to execute sale-deed in its favour. As the appellant-companies failed to comply with the award, Calcutta High Court, in application of the Developers, directed the appellant-companies to comply with the award. Calcutta High Court also appointed a Receiver to take possession of the suit property. The Receiver (appointed by Calcutta High Court), took symbolic possession of the suit property.

Respondent No. 1 filed application, impleading respondent Nos. 2 and 4, appellant-companies and the Developers and prayed for order restraining respondent Nos. 2 and 4 from handing-over possession and restraining the appellants from taking possession in the garb of order passed by Calcutta High Court.

Respondent No. 4 also filed application seeking injunction against dispossession. Delhi High Court passed interim order in favour of the applicants.

Respondent No. 4 also approached Calcutta High Court and brought to the notice of the Court, the order of Delhi High Court restraining the appellants and Developers from interfering with his possession. Calcutta High Court ordered that any order passed by it, if is in conflict with the order of Delhi High Court, it would be subject to the order of Delhi High Court.

In 2008, the appellant-companies filed application for their impleadment as defendants in the Suit No. 425/1993. Single Judge of High Court dismissed the application.

The Developers, respondent No. 4 and the appellants filed 3 appeals challenging different orders. Division Bench of High Court dismissed all the appeals and held that Single Judge of Delhi High Court was right in appointing a Receiver and also approved rejection of the applications for impleadment and also the application for continuation of the Receiver appointed by Calcutta High Court. Hence the present appeals by the appellant-Companies and also the Developers.

The questions for consideration before this Court were whether the appellants were entitled to be impleaded as parties in Suit No. 425/1993 on the ground that during the pendency of the suit, they had purchased the suit property; and whether the Delhi High Court was justified in appointing the Receiver and directing him to take possession of the property in dispute.

Dismissing the appeals, the Court

HELD: 1.1 The broad principles which should govern disposal of an application for impleadment are: The court can, at any stage of the proceedings, either on an

application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment. [Para 36] [350-B-H; 351-A-B]

Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay **(1992) 2 SCC 524: 1992 (2) SCR 1;** *Anil Kumar Singh v. Shivnath Mishra* **(1995) 3 SCC 147: 1994 (5) Suppl. SCR 135;** *Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd.* **(2010) 7 SCC 417: 2010 (7) SCR 790;** *Kasturi v. Iyyamperumal* **(2005) 6 SCC 733: 2005 (3) SCR 864;** *Amit Kumar Shaw v. Farida Khatoon* **(2005) 11 SCC 403: 2005 (3) SCR 509;** *Savitri Devi v. DJ, Gorakhpur* **(1999) 2 SCC 577: 1999(1) SCR 725;** *Vinod Seth v. Devinder Bajaj* **(2010) 8 SCC 1: 2010 (7) SCR 424;** *Surjit Singh v. Harbans Singh* **(1995) 6 SCC 50: 1995 (3) Suppl. SCR 354 ;** *Sarvinder Singh v. Dalip Sisngh* **(1996) 5 SCC 539: 1996 (4) Suppl. SCR 271 ;** *Bibi Zubaida Khatoon v. Nabi Hassan* **(2004) 1 SCC 191: 2003 (5) Suppl. SCR 290 – relied on.**

1.2 Respondent No.1 had filed suit for specific performance of agreement dated 13.9.1988 executed by respondent No.2. The appellants and the Developers are total strangers to that agreement. They came into the picture only when respondent No.2 entered into a clandestine transaction with the appellants for sale of the suit property and executed the agreements for sale, which were followed by registered sale deeds and the appellants executed agreement for sale in favour of the Developers. These transactions were in clear violation of the order of injunction passed by the Delhi High Court which had restrained respondent No.2 from alienating the suit property or creating third party interest. The agreements for sale and the sale deeds executed by respondent No.2 in favour of the appellants did not have any legal sanctity. The status of the agreement for sale executed by the appellants in favour of the Developers was no different. These transactions did not confer any right upon the appellants or the Developers. Therefore, their presence is not at all necessary for adjudication of the question whether respondent Nos.1 and 2 had entered into a binding agreement and whether respondent No.1 is entitled to a decree of specific performance of the said agreement. That apart, after executing agreement for sale dated 18.3.1997 in favour of the Developers, the appellants cannot claim to have any subsisting legal or commercial interest in the suit property and they cannot take benefit of the order passed by the Calcutta High Court for appointment of an arbitrator which was followed by an order for appointment of receiver because the parties to the

proceedings instituted before that court deliberately suppressed the facts relating to Suit No.425/1993 pending before the Delhi High Court and the orders of injunction passed in that suit. [Para 37] [351-D-H; 352-A-B]

1.3 The application for impleadment filed by the appellants was highly belated. Although, the appellants have pleaded that at the time of execution of the agreements for sale by respondent No.2 in their favour in February 1997, they did not know about the suit filed by respondent No.1, it is difficult, if not impossible, to accept their statement because the smallness of time gap between the agreements for sale and the sale deeds executed by respondent No.2 in favour of the appellants and the execution of agreement for sale by the appellants in favour of the Developers would make any person of ordinary prudence to believe that respondent No.2, the appellants and the Developers had entered into these transactions with the sole object of frustrating agreement for sale dated 13.9.1988 executed in favour of respondent No.1 and the suit pending before the Delhi High Court. In the application for impleadment filed by them, the appellants did not offer any tangible explanation as to why the application for impleadment was filed only on 4.2.2008 i.e. after 7 years of the passing of injunction order dated 22.1.2001 and, this constituted a valid ground for declining their prayer for impleadment as parties to Suit No.425/1993. [Para 38] [352-C-H; 353-A-B]

Surjit Singh v. Harbans Singh **(1995) 6 SCC 50 – relied on.**

Kasturi v. Iyyamperumal **(2005) 6 SCC 733: 2005 (3) SCR 864 – held inapplicable.**

Nagubai Ammal v. B Shama Rao **AIR 1956 SC 593: 1956 SCR 451 ;***Khemchand S. Choudhari v. Vishnu Hari*

(1983) 1 SCC 18: 1983 (1)SCR 898 – referred to.

2.1 Delhi High Court was justified in appointing the receiver and directing him to take possession of the property. The plea of the Developers to invoke the doctrine of comity of jurisdictions of the courts for continuance of the receiver appointed by the Calcutta High Court has no merit. When the Developers approached the Calcutta High Court, the Delhi High Court was already seized with the suit involving the subject matter of the award. The contention of the appellants and the Developers that they were unaware of the proceedings before the Delhi High Court cannot be accepted because in Suit No.161/1999 filed by respondent No.2 for declaring that the agreements for sale and the sale deeds relied upon by the appellants were false and fabricated, a specific reference was made to the suit filed by respondent No.1. That apart, in its order dated 15.2.2001 passed in the application filed by respondent No.4 in EC No.10/2000, the Single Judge of the Calcutta High Court categorically observed that the said court had not been apprised of the facts relating to the suit pending before the Delhi High Court and the injunction orders passed therein including order dated 8.2.2001 restraining the receiver of the Calcutta High Court from taking possession of the property and that if these facts had been disclosed, the Court would have been slow in passing the order that it had passed earlier and hence the order passed by it, if it is in conflict with the order passed by the Delhi High Court, would be subject to that order and the Developers who is a party to the proceedings before the Delhi High Court can approach the said court for obtaining appropriate orders. This shows that on being apprised of the correct facts, the Single Judge of the Calcutta High Court had shown due respect to the orders passed by the Delhi High Court and directed that the same should operate till they are

modified or vacated at the instance of the appellants or the Developers. The course of action adopted by the Calcutta High Court was in consonance with the notion of judicial propriety. Therefore, the Developers cannot invoke the doctrine of comity of jurisdictions of the courts for seeking continuance of the receiver appointed by the Calcutta High Court. [Para 40] [353-F-H; 354-A-H; 355-A]

2.2 The Single Judge and the Division Bench of the Delhi High Court have assigned detailed and cogent reasons for appointing a receiver to take care of the suit property. The clandestine nature of the transactions entered into between respondent No.2 and the appellants on the one hand and the appellants and the Developers on the other, would give rise to strong presumption that if a receiver is not appointed, further attempts would be made to alienate the property in similar fashion. Therefore, there is no justification to interfere with the impugned order or the one passed by the Single Judge of the Delhi High Court. [Para 41] [355-B-D]

Jayaram Mudaliar v. Ayyaswamia and Ors. **(1972) 2 SCC 200: 1973(1) SCR 139 ;** *Rajender Singh and Ors. v. Santa Singh and Ors.***(1973) 2 SCC 705: 1974 (1) SCR 381 ;** *Joginder Singh Bedi v. Sardar Singh and Ors.* **26 (1984) DLT 162 Del (DB);** *Sanjay Gupta v. Kalawati and Ors.* **(1992) 53 DRJ 653 – referred to.**

3. For the contumacious conduct of suppressing facts from the Calcutta High Court and thereby prolonging the litigation, the appellants and the Developers are saddled with cost of Rs.5 lakhs each. The amount of cost shall be deposited by them with the Supreme Court Legal Services Committee. [Para 43] [355-E-F]

Case Law Reference:

1973 (1) SCR 139	**Referred to**	**Para 20**

1974 (1) SCR 381	**Referred to**	**Para 20**
26 (1984) DLT 162 Del (DB)	**Referred to**	**Para 20**
(1992) 53 DRJ 653	**Referred to**	**Para 20**
1956 SCR 451	**Referred to**	**Para 22**
1983 (1) SCR 898	**Referred to**	**Para 22**
1992 (2) SCR 1	**Relied on**	**Para 26**
1994 (5) Suppl. SCR 135	**Relied on**	**Para 27**
2010 (7) SCR 790	**Relied on**	**Para 28**
2005 (3) SCR 864	**Relied on**	**Para 29**
	Held inapplicable	**Para 39**
2005 (3) SCR 509	**Relied on**	**Para 30**
1999 (1) SCR 725	**Relied on**	**Para 31**
2010 (7) SCR 424	**Relied on**	**Para 32**
1995 (3) Suppl. SCR 354	**Relied on**	**Paras 33 and 39**
1996 (4) Suppl. SCR 271	**Relied on**	**Para 34**
2003 (5) Suppl. SCR 290	**Relied on**	**Para 35**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5918 of 2012.

From the Judgment & Order dated 20.02.2009 of the High Court of Delhi at New Delhi in FAO (OS) No. 324 of 2008.

WITH

C.A. No. 5917 of 2012.

Sunil Gupta, Dr. Abhishek Manu Singhvi, Sanjay Jain, Manoj, Aparna Sinha, Bijoy Kumar Jian, C. Mukund. P.V.

Saravana Raja, Dr. Kailash Chand, Mandeep Singh Vinaik, Rohan Thawani, Vandana Sehgal, Hardeep Singh Anand, D.K. Thakur, Anil Katiyar, Sanjeev Anand, Yakesh Anand, Murari Kumar, Prateek K., Nimit Mathur for the appearing parties.

The Judgment of the Court delivered by

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

2. Whether M/s. Vidur Impex and Traders Pvt. Ltd., and five other companies (hereinafter described as the appellants), who are said to have purchased the suit property, i.e. 21, Aurangzeb Road, New Delhi in violation of the order of injunction passed by the learned Single Judge of the Delhi High Court are entitled to be impleaded as parties to Suit No.425/1993 filed by respondent No.1 – M/s. Tosh Apartments Pvt. Ltd. is one of the two questions which arises for consideration in these appeals filed against judgment dated 20.2.2009 of the Division Bench of the Delhi High Court. The other question which needs consideration is whether the Delhi High Court was justified in appointing a receiver with a direction to take possession of the suit property despite the fact that the Calcutta High Court had already appointed a receiver at the instance of M/s. Bhagwati Developers Pvt. Ltd. (for short, 'Bhagwati Developers').

3. The suit property was leased by the Secretary of State for India to Sidh Nath Khanna and Sukh Nath Khanna sometime in 1930. After 12 years, the Governor General in Council sanctioned the grant of perpetual lease in favour of one of them, namely, Sidh Nath Khanna. In the family partition which took place in December 1955, the suit property fell to the share of Shri Devi Prasad Khanna, who was one of the heirs of Sidh Nath Khanna. He rented out the same to the Sudan Embassy on 12.9.1962. In October 1977, the name of respondent No.2-Pradeep Kumar Khanna (son of Devi Prasad Khanna), who died during the pendency of the litigation before the High Court and is represented by his legal representatives, was entered in the records of the Ministry of Works and Housing, Land and

Development Office and the lease was transferred in his name.

4. In March 1980, respondent No.2 mortgaged the suit property to Shri S.N. Tondon. After 5 years, he entered into a collaboration agreement with Shri Arun Kumar Bhatia (respondent No.3) for construction of a multi-storied building. He also executed an agreement for sale in favour of respondent No.3. In November 1987, respondent No.2 took loan from Shri Avtar Singh and created an equitable mortgage in his favour. On 13.9.1988, respondent No.2 executed an agreement for sale in favour of respondent No.1 for a consideration of Rs.2.5 crores. After some time, respondent No.3 executed assignment deed dated 13.12.1988 in favour of respondent No.2. Simultaneously, the parties cancelled the collaboration agreement. After 3 months, respondent No.2 mortgaged the suit property in favour of respondent No.4. In 1992, respondent Nos. 2 and 4 entered into an agreement whereby the latter agreed to provide various services including the one that he will get the suit property vacated from the Sudan Embassy and for that he will charge Rs.4 crores.

5. The Sudan Embassy vacated the suit property on 12.5.1992 and handed over possession to respondent No.2, who is said to have handed over the same to respondent No.4. On coming to know about the proposed alienation of property by respondent No.2, respondent No.1 filed Suit No.425/1993 in the Delhi High Court for specific performance of agreement for sale dated 13.9.1988, award of damages and injunction. It also filed IA No.1947/1993 under Order 39 Rules 1 and 2 CPC. The learned Single Judge passed order dated 18.2.1993 and directed that defendant Nos. 1 and 3 (respondent Nos. 2 and 4 herein) shall not transfer, alienate or part with possession in any manner or create third party rights in respect of the suit property. After receiving summons, respondent Nos.2 and 4 filed IA No. 10730/1993 under Order 7 Rule 11 for rejection of the plaint on the ground that the same was barred by time. The learned Single Judge dismissed the application vide order dated 5.4.1994 and directed that interim order dated 18.2.1993

shall continue.

6. On 19.2.1997, respondent No.2 executed 6 agreements for sale in favour of the appellants for a total consideration of Rs.2.88 crores. In furtherance of those agreements, six sale deeds were executed and registered on 30.5.1997. In the meanwhile, the appellants executed agreement for sale dated 18.3.1997 in favour of Bhagwati Developers for a consideration of Rs.4.26 crores and received Rs.3.05 crores.

7. At that stage, respondent No.1 filed IA No. 8145/1998 for restraining respondent Nos.2 and 4 from handing over possession of the suit property to any other person. Respondent No.2 contested the application by asserting that he had not executed any sale deed in favour of the appellants and that possession of the suit property had already been handed over to respondent No.4. Thereupon, respondent No.1 filed CCP No. 118/1998 under Order 39 Rule 2A CPC with the allegation that the non-applicants including the appellants herein had entered into a conspiracy for the purpose of grabbing the property in violation of the order of injunction passed by the High Court. The learned Single Judge entertained the contempt petition against respondent Nos. 2 and 4 but declined to do so qua the appellants by observing that no prima facie case had been made out against those who were not parties to the suit. Respondent No.1 also filed IA No.8146/1998 under Order 26 Rule 9 read with Order 39 Rule 7 and Section 151 CPC for appointment of Local Commissioner and IA No.8147/1998 under Order 40 Rule 1 read with Section 151 CPC for appointment of a receiver. The Court Commissioner appointed by the High Court to ascertain whether respondent Nos. 2 and 4 were in possession of the suit property, submitted report dated 10.2.2000 with the finding that respondent No.4 was in actual possession.

8. Respondent No.2 filed application dated 16.12.1998 for vacating interim order dated 18.2.1993. He pleaded that the agreement for sale executed in favour of respondent No.1 was,

in fact, a loan agreement and the same was violative of Section 24 read with Section 23 of the Indian Contract Act, 1872. He further pleaded that the agreement was void and unenforceable because the requisite permission had not been obtained under Section 269 UC of the Income-Tax Act. Respondent No.2 also filed Suit No. 161/1999 for grant of a declaration that sale deeds executed in favour of the appellants were fictitious and were not binding on him. After about 2 years, Shri Bhupinder Singh, Advocate filed IA No. 255/2001 for withdrawal of the suit on the ground that the parties have amicably settled their dispute. Soon thereafter, the advocate who had instituted the suit, filed IA No.1537/2001 for restoration of the suit by asserting that IA No.255/2001 had been filed by an advocate who was not authorised to do so. The learned Single Judge directed that the application be listed only after filing of an affidavit by respondent No.2 that he had not authorised Shri Bhupinder Singh, Advocate to file I.A. No.255/2001. Respondent No.2 did not file the required affidavit till his death and as a result, I.A. No.1537/2001 is said to be still pending.

9. Another front of litigation was opened by Bhagwati Developers with the allegation that the appellants have failed to execute the sale deed in terms of agreement dated 18.3.1997. The dispute between Bhagwati Developers and the appellants was referred to the sole arbitration of Dr. Debasis Kundu, an Advocate of the Calcutta High Court. The Arbitrator passed award dated 7.1.1999 and directed the appellants to hand over vacant possession of the suit property along with the building to Bhagwati Developers on or before 31.1.1999 and also execute the sale deed after securing requisite permission and no objection certificate from the competent authorities. Simultaneously, Bhagwati Developers was directed to pay the balance amount of Rs.1,20,90,000/-.

10. As the appellants failed to act in consonance with the arbitral award, Bhagwati Developers filed an application under Section 36 of the Arbitration and Conciliation Act, 1996 in the Calcutta High Court, which was allowed by the learned Single

Judge of that High Court vide order dated 17.8.2000 and a direction was issued to the appellants to comply with the arbitral award. The learned Single Judge also appointed Shri Nar Narayan Ganguli, Advocate as receiver and directed him to take possession of the suit property. When the receiver came to Delhi for execution of the award, respondent No.4 refused to hand over possession. Thereupon, the Calcutta High Court directed the police authorities at Delhi to assist the receiver for ensuring compliance of order dated 17.8.2000. Armed with that direction, the receiver visited Delhi on 19.1.2001 and 5.2.2001 and took symbolic possession of the suit property by putting locks and seals on all the inner and outer gates.

11. When the representative of respondent No.1 learnt about the award of the arbitrator and the order passed by the Calcutta High Court, he filed IA No.625/2001 in the Delhi High Court under Order 39 Rules 1 and 2 read with Section 151 CPC impleading respondent Nos. 2 and 4, the appellants and Bhagwati Developers as parties and prayed that respondent Nos. 2 and 4 be restrained from handing over possession of the suit property and that the appellants be restrained from taking forcible possession in the garb of some order passed by the Calcutta High Court. The learned Single Judge of the Delhi High Court passed an ex-parte interim order dated 22.1.2001 and restrained respondent Nos. 2 and 4 from delivering possession of the suit property to the appellants and also restrained the latter from taking possession. Bhagwati Developers challenged that order in FAO (OS) No.90/2001, which was dismissed by the Division Bench of the High Court on 2.3.2001 with liberty to approach the learned Single Judge for appropriate order.

12. Respondent No.4 also filed IA No. 1211/2001 in the Delhi High Court for grant of injunction by alleging that an attempt is being made to dispossess him in the garb of an order passed by the Calcutta High Court. The learned Single Judge passed ex-parte interim order dated 8.2.2001 and restrained the appellants, Bhagwati Developers, the receiver

appointed by the Calcutta High Court and Delhi Police from interfering with the possession of respondent No.4. Some of the observations made in that order, which have bearing on the disposal of these appeals, are extracted below:

> "*Quite clearly Respondents No.4 to 9 in this application were aware of the fact that Defendant No.1 had filed Suit No.161/99. A mention was made in the plaint in Suit No. 161/99 that the present suit, that is, Suit No.425/93 was pending in this Court. So, Respondents No.4 to in this application were also aware of the pendency of this suit. It appears that Respondents No.4 to 9 in this application did not bother to find out the correct factual position with regard to the possession of the suit property or with regard to the interim orders passed by this Court.*
>
> Well before all this, and apparently expecting Defendant No.1 to perform the Agreement to sell, these 6 persons who are Respondents No.4 to 9 in this application entered into an agreement to sell the suit property to Respondent No.10 in this application.
>
> There appear to have been some disputes between Respondents No.4 to 9 in this application and Respondent No.10 in the application in respect of the suit property. Since there was an arbitration clause in the agreement between them, they referred the matter to arbitration. The learned Arbitrator gave an Award dated 7th January, 1999 wherein he directed Respondents No. 4 to 9 in this application to hand over peaceful vacant possession of the suit property to Respondent No.10 in this application. No objections appear to have been filed to this Award with the result that Respondent No.10 in this application filed proceedings in the Calcutta High Court praying for a direction for the appointment of a Receiver to take physical possession of the suit property. The Calcutta High Court passed an order apparently directing the Receiver to take possession of the suit property. On 13th December, 2000

the Calcutta High Court directed the police authorities to render all assistance to the Receiver to take steps in accordance with the earlier order passed by the Calcutta High Court.

When the Receiver and the police authorities came to take possession of the suit property, L.K. Kaul became aware of the proceedings in the Calcutta High Court.

It is submitted that there has been gross concealment and misrepresentation of facts by Defendant No.1 in the suit to Respondents No.4 to 9 in this application. There has also been gross misrepresentation and concealment of fact by Respondents No.4 to 9 in this application to Respondent No.10 in this application. It is also submitted that there is also a gross concealment and, therefore, a misrepresentation of facts by Respondents No.4 to 10 in this application insofar as the learned Arbitrator is concerned. Consequently, there has also been a gross concealment and, therefore, a misrepresentation of the facts so far as Calcutta High Court is concerned. It is submitted that had all these facts been brought to the notice of the concerned parties as well as to the learned Arbitrator and the Calcutta High Court, there would have been no question of any appointment of a Receiver in violation of the orders passed by this Court on 18th February, 1993 read with order dated 31st January, 2000.

I am prima facie satisfied that Defendant No.1 and Respondents No.4 to 10 in this application are playing a cat and mouse game with this Court. There has been a serious concealment and misrepresentation of facts by Defendant No.1 in this suit. There has also been a serious concealment and misrepresentation of facts by Respondents No.4 to 9 in this application insofar as Respondent No.10 in this application is concerned. Respondents No.4 to 10 are at fault in not finding out what the correct facts are and making necessary

enquiries in this regard. They appear to have deliberately misled the learned Arbitrator and the Calcutta High Court."

(emphasis supplied)

13. Respondent No.4 filed another application (IA No. 9576/2001) for restraining the appellants from executing the sale deed in favour of Bhagwati Developers. The learned Single Judge entertained the application and passed interim order in terms of the prayer made. The same respondent filed an application in EC No.10/2000 pending before the Calcutta High Court and brought to the notice of that High Court, order dated 8.2.2001 passed by the Delhi High Court in Suit No. 425/1993. After taking cognizance of the rival submissions, the learned Judge of the Calcutta High Court passed order dated 15.2.2001 and made it clear that the order passed by that Court will be subject to the order which may be passed by the Delhi High Court. The relevant portions of that order are reproduced below:

"The facts remain that these facts were neither disclosed to the decree-holder nor to the Arbitrator and this question was not necessary to be gone into while executing the decree and, as such, it was also not placed before this Court and this Court having not been apprised of such facts had passed an order for taking over possession of the property. In the order dated 8.2.2001 the Delhi High Court had taken a note of this position. Be that as it may, it is not necessary to make any observation with regard to the findings made therein, nor this Court can comment on the order passed by another Court on the basis of the materials placed before it. But it appears that there is every possibility of conflicting orders being passed in respect of the self-same properties between the parties or those claiming through one or the other of them by two High Courts. *Judicial propriety demands that the court should maintain its decorum and dignity and should not*

pass any order which will lie in conflict with each other. It is the parties who may fight each other but not the Courts. If some order is passed, it is expected that another Court should pay proper regards and respect to such order. Since it is pointed out that these facts were not disclosed before this Court, therefore what would have been the effect if these facts would have been disclosed before this Court is a question which cannot now be presumed, but in all probabilities it sees that if these facts were disclosed before this Court, this Court might have been slow in passing the order that had been passed earlier. Therefore, the order passed by this Court, if it is in conflict with the order passed by the Delhi High Court, the same shall always be subject to the order that might be passed by the Delhi High Court.

Since Delhi High Court has also passed an order by which certain direction was given to the Receiver appointed by this Court, therefore, it is no more necessary to pass any further order. *In my view, the decree-holder in this proceedings who is added as Defendant No.10 in the Delhi High Court suit should approach the Delhi High Court for obtaining the appropriate orders if he is so advised. If there is a conflict of decree which might affect a proceeding in another High Court, in that event the same has to be thrashed out in an appropriate proceeding*. It is very difficult to enter into such question in an execution proceeding unless such question be raised in a proceeding under Order XXI Rule 97 C.P.C. From the records of this Court, it does not appear that any such application under Order XXI Rule 97 has ever been made in order to enable the parties to resisting possession in execution of the decree, so that they would have an opportunity to place their cases about the executability of the decree against them."

(emphasis supplied)

14. Thereafter, Bhagwati Developers filed IA No. 2268/2003 in Suit No.425/1993 pending before the Delhi High Court with the prayer that the receiver appointed by the Calcutta High Court be continued. Respondent No.1, who had already filed IA No.8147/1998 for appointment of receiver, contested the application of Bhagwati Developers by asserting that it had no locus standi in the matter because the agreement by which it purchased the property from the appellants was fraudulent in nature. Respondent No.1 also reiterated its prayer for appointment of a receiver by the Delhi High Court by contending that respondent No.4 was a ranked trespasser and there was every possibility of his entering into clandestine deals and alienating the property. On his part, respondent No.4 pleaded that his possession was lawful because respondent No.2 had put him in possession in furtherance of the agreement executed in 1992.

15. At this stage, we may mention that respondent No.4 also filed IA No.7373/2006 in Suit No.425/1993 for grant of leave to amend the written statement by incorporating the fact that respondent No.2 had agreed to pay Rs.4 crores as service charges for getting the property vacated from the Sudan Embassy with a stipulation that in the event of non-payment of the amount, vacant and peaceful possession of the suit property will be handed over to him; that even though he got the property vacated from the Sudan Embassy, respondent No.2 did not pay the amount and handed over possession of the property as security for the same. Respondent No.4 claimed that these facts could not be incorporated in the original written statement because his earlier lawyer thought that the same were not necessary for deciding the suit filed by respondent No.1 for specific performance and permanent injunction. Respondent No.4 also sought incorporation of the fact that the property had been mortgaged to him and he was in possession as a mortgagee. Respondent No.1 opposed the prayer for amendment by asserting that respondent No.4 was seeking to make out a new case which was contrary to the defence set

up in the original written statement.

16. By an order dated 3.9.2007, the learned Single Judge of the Delhi High Court dismissed IA No. 2268/2003 and IA No. 7373/2006 and allowed IA No.8147/1998. He first considered the applications filed by respondent No.1 and Bhagwati Developers in the matter of appointment of receiver and held:

> "26. Undoubtedly the initial agreement to sell is between the plaintiff and defendant No.l (since deceased) now being represented by his legal heirs. However, yet another agreement to sell come into existence on 18th March, 1977 between Bhagwati Developers Private Limited and respondents 4 to 9 by which 6 companies agreed to sell the said property in favour of Bhagwati Developers with arbitration clause contained in the agreement and that dispute shall be subject to the jurisdiction of Calcutta High Court. The Court fails to understand as to how the dispute relating to immovable property which is situated in Delhi could be taken to Calcutta for adjudication by completing bye passing the provisions of Section 16 of the Code of Civil Procedure. It is also evident on record that defendant No. 3 who is currently in possession does not enjoy the status either of licensee or of lessee nor he is there any other capacity with the consent of either of the parties. He is simply holding over the possession once open a time he was given the task of getting of Sudan Embassy vacated. This Court really wonder about the sanctity of such kind of agreements as executed between the plaintiff and defendant No.3 and between defendant No.l and defendant No. 3 for the purpose of getting the Sudan Embassy vacated. Rent Control laws seem to have been thrown to the winds. Task is taken by individual to get the premises vacated from Sudan Embassy and that too for consideration. I am afraid if such an agreement has a legal sanctity. That being so the possession of defendant No.3 cannot be termed as legal in the suit property. If at all his services charges were not paid he has the legal remedy either with the plaintiff or defendant No.l. Under no law he can be permitted to retain the possession of the property. Therefore in any case he has to go out of the property he being stranger to the suit property having no title or interest of any nature. Learned counsel for the plaintiff has also been able to establish by way of various authorities referred to above that it is a fit case where Receiver should be appointed for the management of the property who can manage the affairs of the suit property under the supervision of the Court as there is every likelihood that in the eventuality of not appointing the Receiver there is strong likelihood of the property being usurped in a clandestine manner so as to frustrate the claims of the rightful claimant. Even otherwise not appointing the Receiver at this juncture might lead to multifarious litigation.
>
> 27. Therefore in order to prevent all these wrongs and further damage and waste to the property, appointment of Receiver has become essential so as to preserve the property. Therefore, Sh. Rajesh Gupta, Advocate is hereby appointed as Receiver. His fee is fixed at Rs.50,000/- initially subject to revision, depending on the quantum of work he might have to undertake while acting as Receiver to be paid by the plaintiff. He will manage the affairs of the suit property by removing defendant No.3 from the suit property. If need arise, he may take the assistance of the police to thwart any resistance and also may break open the locks of the property and make an inventory of the goods lying therein. If he required to do any work in respect of the property like maintenance, he shall seek prior permission from the Court. This application is accordingly allowed.
>
> 28. This order shall also take care of the application of Bhagwati Developers Pvt. Ltd. proposed defendant No. 10 wherein while treating the possession of defendant

No.3 as unlawful possession in the suit property has sought directions from this court that the Receiver appointed by the High Court of Calcutta be continued and the possession of the property be handed over to him who should retain the property in his possession as in the capacity of Receiver. I may state that when the matter was taken to Calcutta High Court between six alleged transferees and Bhagwati Developers Pvt. Ltd., the Calcutta High Court in its order dated 13th February, 2001 clearly indicated that the decree passed by the Calcutta High Court if comes in conflict with the order passed by Delhi High Court, the same shall always be subject to the order that might be passed by the Delhi High Court.

29. In view of the fact that this court while allowing the application of the plaintiff has appointed Receiver for managing the control and supervision of the property in question. Therefore, the order passed by the Calcutta High Court appointing Receiver has to be kept in abeyance as Calcutta High Court itself stated that decision of Delhi High Court shall have precedence over their decision. This being so, plea of the proposed defendant No. 10 that Receiver so appointed by Calcutta High Court should continue, cannot be accepted."

17. The learned Single Judge then considered the application filed by respondent No.4 for amendment of the written statement and dismissed the same by recording the following observations:

"True, law of amendment is quite liberal and Courts ordinarily permits amendment provided such amendments are not mischievous in nature with a view to delay the legal proceedings and setting up entirely new case than the one pleaded earlier but in this case, I may say that written statement was filed way back in 1993 and good number of years have passed, but it never struck the defendant to make such amendment simply by putting the blame on

earlier lawyer. Even otherwise amendment which is sought to be made was well within the knowledge of defendant No. 3. During all these years when proceedings were continuing that he was being termed as trespasser. What prevented him to explain his true position at the earliest is not explained at all. To me it seems that when arguments were being heard and the counsel for the parties put up their respective claims then it has struck the mind of defendant No. 3 to apply for such amendment as it might work to his advantages. If at all he was in possession because of defendant No.l's consent he should have pleaded so at the earliest. Such belated amendment which is otherwise totally inconsistent to the stand taken earlier in the written statement cannot be allowed as in that case it would amount to take the case back to the year 1993 when the suit was filed. Therefore this application has no merit, it being full of malice, the same is dismissed."

18. After about 11 years of the execution of agreements for sale in their favour by respondent No.2, the appellants filed IA No.1861/2008 under Order 1 Rule 10(2) CPC for impleadment as defendants in Suit No. 425/1993. They pleaded that by virtue of the agreements for sale and the sale deeds executed by respondent No.2, they have become absolute owners of the suit property and, as such, they are entitled to be impleaded as defendants in the suit filed by respondent No.1. The appellants also invoked the doctrine of lis pendens embodied in Section 52 of the Transfer of Property Act, 1882 and pleaded that having purchased the property during the pendency of the suit by respondent No.1, they have acquired the right to contest the same. The appellants relied upon the orders passed by the Delhi High Court in IA Nos. 625/2001, 1211/2001 and 9576/2001 to show that respondent No.1 was very much aware of the agreements for sale and the sale deeds executed in their favour by respondent No.2 and the agreement executed by them in favour of Bhagwati Developers and pleaded that it was the duty of respondent No.1 to have

suo motu impleaded them as parties to the suit. In the reply filed on behalf of respondent No.1, it was pleaded that the suit for specific performance had been filed because respondent No.2 did not execute the sale deed in furtherance of agreement for sale dated 13.9.1988 and the appellants who are not parties to that agreement do not have the locus to contest the suit. Respondent No.1 also raised an objection of delay by asserting that the appellants had sought impleadment after 11 years of having entered into a clandestine transaction with respondent No.2. Respondent No. 1 relied upon orders dated 22.1.2001, 24.1.2001 and 8.2.2001 passed by the Delhi High Court and Suit No. 161/1999 field by respondent No.2 for grant of a declaration that the sale deeds allegedly executed in favour of the appellants were forged and fabricated, to show that the appellants were very much aware of Suit No.425/1993 and pleaded that their assertion about lack of knowledge was false because they had been contesting Suit No.161/1999 for almost 7 years. Another plea taken by respondent No.1 was that the transactions entered into between respondent No.2, the appellants and Bhagwati Developers were ex facie illegal and on the basis of such transactions the appellants did not acquire any right or interest in the suit property.

19. The learned Single Judge dismissed IA No. 1861/2008 vide order dated 26.5.2008, relevant extracts of which are reproduced below:

> "The cumulative sequence of events noticed above leads this Court to conclude that the vendor P.K. Khanna allegedly sold the properties in 1997. The applicants also claim as such. They were aware about the existence of this suit if not in 1999 at least from 2001 onwards, when they were made parties in an application and subject to an injunction. Their conduct in approaching, for impleadment, now seven years later, cannot be countenanced. That apart, as held in Kasturi's case their impleadment would completely alter the nature of the suit which was instituted

> in 1993 for specific performance of a contract, of 1988.
>
> There is no whisper of leave having been obtained by their vendor, to this transaction. The record shows that the vendor was admittedly restrained by an injunction from parting with possession or creating third party rights in respect of the suit property, on 18th February, 1993. That order was subsequently confirmed after hearing the vendor/P.K. Khanna i.e. first defendant on 5th April, 1994. In view of the principles spelt out in Bibi Zubaida Khatoon and Surjit Singh accepting this application would defeat the ends of justice and undermine public policy."

20. Bhagwati Developers challenged order dated 3.9.2007 in FAO (OS) No. 514 of 2007. Respondent No.4 also challenged that order in FAO (OS) No. 400 of 2007. The appellants questioned order dated 26.5.2008 in FAO (OS) No. 324 of 2008. The Division Bench of the High Court dismissed all the appeals and approved the orders passed by the learned Single Judge. The Division Bench referred to order dated 15.2.2001 passed by the Calcutta High Court and the judgments in *Surjit Singh v. Harbans Singh* (1995) 6 SCC 50, *Jayaram Mudaliar v. Ayyaswamia & Ors.* (1972) 2 SCC 200, *Rajender Singh & Ors. v. Santa Singh & Ors.* (1973) 2 SCC 705, *Joginder Singh Bedi v. Sardar Singh & Ors.* 26 (1984) DLT 162 Del (DB) and *Sanjay Gupta v. Kalawati & Ors.* (1992) 53 DRJ 653 and held that the learned Single Judge was justified in appointing a receiver for protecting the suit property because respondent No.2 had flouted the injunction order with impunity and if the receiver was not appointed there was every possibility of further alienation of the suit property. Paragraph 26 of the impugned judgment in which the Division Bench of the High Court enumerated the factors necessitating appointment of receiver by the learned Single Judge and paragraph 33 are extracted below:

> "26. Following developments and circumstances in this

behalf need mention and/or reiteration:

(a) The suit filed by the plaintiff is predicated on agreement to sell dated 13.9.1988 purportedly executed in its favour by the defendant No.l, owner of the suit property, which is earliest transaction in point of time.

(b) Suit, on this basis, filed in April 1993 is also earliest legal proceeding instituted by the plaintiff. In this suit, ad interim injunction dated 18.2.1993 was passed restraining defendant Nos.1 & 3 from transferring, alienating or parting with possession of the suit property in any manner or creating third party rights therein.

(c) The plaintiff also filed another IA No.9154/1993 seeking restraint against the defendant No.l as well as defendant No.3 from changing the nature of the suit property by making structural changes, additions or alterations therein. In this application orders were passed directing them not to carry out any structural additions, alterations and permitted only the renovations like painting, polishing of the suit property.

(d) In spite of the restraint order dated 18.2.1993, the defendant No.l allegedly transferred the suit property by executing purported six sale deeds on 28.5.1997 in favour of Vidur Impex & Traders and others.

It is the submission of learned counsel appearing for the plaintiff that intentionally six sale deeds were executed showing consideration of Rs.48 lacs each keeping the same below the prescribed limit of Rs.50 lacs with a fraudulent intent to avoid the application of Chapter XX-C of the Income-Tax Act.

(e) On coming to know of the aforesaid sale transactions, the plaintiff filed application under Order XXXIX Rule 1 & 2 CPC for restraining the defendant Nos.1 & 2 from transferring possession of the suit property to the said six transferees under the alleged six sale deeds. Restraint order to this effect was passed by the learned Single Judge. Further orders were passed restraining these six transferees (defendant No.s 4 to 9) from acting upon the impugned sale deeds.

(f) Defendant No.l in his reply took the stand that impugned sale deeds were forged and fabricated and were not executed by him. He even filed suit No. 161/1999 for declaration to this effect. However, this suit was withdrawn on 10.1.2001 vide application IA No. 255/2001 purported to have been moved by him through Shri Bhupinder Singh, Advocate, on the statement of Advocate without the presence of the defendant No.l or his statement. Thereafter, IA No.1537/2001 was moved by the defendant No.l stating that he had not authorized any counsel to make an application for withdrawal of the suit and the whole proceedings were collusive, fraudulent and that he had not entered into any compromise with the said six transferees. Though we are not concerned with these proceedings, this fact is mentioned to highlight the manner in which the transactions are taking place, that too in the teeth of injunction order passed in Suit No.425/1993 and the vacillating attitude of the defendant No.l (since deceased).

(g) Though there was restraint order against defendant Nos. 4 to 9, i.e. Vidur Impex & Traders and others, not to act upon the impugned sale deeds, they entered into agreement dated 18.3.1997 for

transfer of their purported rights and interest in the suit property in favour of Bhagwati Developers. This agreement contained an arbitration clause, on the basis of which the Arbitrator was appointed and consent award passed. Again, without commenting upon the validity or otherwise of such proceedings, which would naturally be thrashed out in appropriate proceedings, suffice it to state was that all this was happening in violation of the injunction order passed in the instant suit. Attempt was made to get the Receiver appointed from the Calcutta High Court and take possession of the suit property.

33. In this behalf, we agree with the submission of Mr. Singhvi, learned senior counsel for the plaintiff, that in a suit for specific performance, the court has ample power and jurisdiction to appoint a receiver, in Kerr on Receivers 16th Edition (on page 58), it has been laid down that if a fair prima facie case for the specific performance of a contract is made to appear, the court may interfere upon motion and appoint receiver. In Foot Note No. 37, reference has been made to case law including *C. Kennedy v. Lee* (1870) 3 MER 441, M. cloudy. Phelp (1838) 2 JUR 962. The appointment may be made in such circumstances before the order for a sale is made absolute. **(**Re: Stephard, (1892) 31 IR 95)."

21. The Division Bench approved the rejection of the appellants' prayer for impleadment as parties in Suit No. 425/ 1993 by observing that after executing the agreement for sale in favour of Bhagwati Developers they do not have any subsisting interest in the property. The Division Bench also agreed with the learned Single Judge that the application filed by the appellants lacked bona fides because they purchased the suit property from respondent No.2 despite the order of injunction passed by the High Court and there was no tangible explanation for filing the application after a long time gap of about 8 years.

22. Learned senior counsel for the appellants emphasised that his clients were not aware of the agreement for sale executed by respondent No.2 in favour of respondent No.1, the suit for specific performance and permanent injunction filed by respondent No.1 in the Delhi High Court and injunction order dated 18.2.1993 till January, 2001 when the learned Single Judge restrained respondent Nos.2 and 4 from transferring possession of the suit property to the appellants, and argued that the High Court committed serious error by declining their prayer for impleadment as parties to the suit. He submitted that the appellants are bona fide purchasers for consideration and are entitled to contest the suit filed by respondent No.1, else their right in the suit property will get jeopardized. Learned senior counsel then argued that the agreement for sale executed by the appellants in favour of Bhagwati Developers did not result in alienation of the suit property and the High Court committed an error in holding that the appellants had no subsisting right in the subject matter of the suit. He relied upon the judgments of this Court in *Nagubai Ammal v. B Shama Rao* AIR 1956 SC 593, *Khemchand S. Choudhari v. Vishnu Hari* (1983) 1 SCC 18 , *Savitri Devi v. DJ, Gorakhpur* (1999) 2 SCC 577, *Kasturi v. Iyyamperumal* (2005) 6 SCC 733, Amit Kumar Shaw v. Farida Khatoon (2005) 11 SCC 403, *Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd.* (2010) 7 SCC 417 and *Vinod Seth v. Devinder Bajaj* (2010) 8 SCC 1, and argued that respondent No.1 should be directed to implead the appellants as parties to the suit because their rights will be adversely affected if a decree is passed in favour of respondent No.1. Learned senior counsel submitted that impleadment of the appellants will enable the Court to comprehensively decide all the issues and will also obviate the necessity of further litigation in the matter.

23. Learned senior counsel appearing for Bhagawati Developers invoked the doctrine of comity of jurisdiction of the Courts and argued that in view of the order passed by the Calcutta High Court for appointment of receiver who had already

taken possession of the suit property, the Delhi High Court should have refrained from exercising its power to appoint receiver with a direction to him to take over the property.

24. Learned senior counsel for respondent No. 1 relied on *Surjit Singh v. Harbans Singh* (supra) and argued that the appellants are neither necessary nor proper parties because the agreements for sale and the sale deeds executed by respondent No.2 in their favour had no legal sanctity. Learned senior counsel submitted that the alienation of suit property by respondent No.2 in violation of the injunction granted by the Delhi High Court was nullity and such a transaction did not create any right in favour of the appellants or Bhagwati Developers so as to entitle them to contest the litigation pending between respondent Nos.1 and 2. Learned senior counsel submitted that in a suit for specific performance, any transfer which takes place in violation of an injunction granted by the Court would be hit by the doctrine of lis pendens enshrined in Section 52 of the Transfer of Property Act, 1882. Learned senior counsel further submitted that on the date of filing IA No.1861/2008 the appellants did not have any subsisting interest in the suit property because they had already executed an agreement for sale in favour of Bhagwati Developers and received substantial part of the consideration and the mere fact that they were made parties in the interlocutory applications filed before the Delhi High Court cannot entitle them to seek impleadment as defendants in the pending suit. Learned senior counsel then argued that the agreement to sell executed between the appellants and Bhagwati Developers and the proceedings instituted before the Calcutta High Court were collusive and fraudulent and the appellants and Bhagwati Developers cannot take benefit of the order passed by that Court. He emphasized that even though the appellants and Bhagwati Developers had knowledge of the suit pending before the Delhi High Court, they deliberately suppressed this fact from the Calcutta High Court and succeeded in persuading the Court to appoint an arbitrator and

a receiver. Learned senior counsel submitted that the doctrine of comity of jurisdictions cannot be invoked by Bhagwati Developers because the Delhi High Court was already seized of the matter and the application filed by respondent No.1 for appointment of receiver was pending since 1998. Learned senior counsel lastly argued that the Delhi High Court did not commit any error by appointing a receiver because respondent Nos.2, 4, the appellants and Bhagwati Developers tried to grab the suit property by entering into clandestine transactions.

25. We have considered the respective arguments/ submissions. The first question that requires determination is whether the appellants are entitled to be impleaded as parties in Suit No. 425/1993 on the ground that during the pendency of the suit they had purchased the property from respondent No.2. Order 1 Rule 10(2) CPC which empowers the Court to delete or add parties to the suit reads as under:

> "10 (2) Court may strike out or add parties - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name, of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

26. In *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* (1992) 2 SCC 524, this Court interpreted the aforesaid provision and held:

> "Sub-rule (2) of Rule 10 gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment

of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or a proper party may be added. *A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case."*

(emphasis supplied)

27. In *Anil Kumar Singh v. Shivnath Mishra* (1995) 3 SCC 147, this Court interpreted Order 1 Rule 10(2) in the following manner:

"By operation of the above-quoted rule though the court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the court must be satisfied that the presence of the party to be added, would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party-defendant is not a substantive right but one of procedure and the court has discretion in its proper exercise. The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings."

28. In *Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd.* (supra), this Court considered the scope of Order 1 Rule 10(2) CPC and observed:

" The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice."

(emphasis supplied)

29. In *Kasturi v. Iyyamperumal* (supra), this Court

considered the question whether a person who sets up independent title and claims possession of the suit property is entitled to be impleaded as party to a suit for specific performance of contract entered into between the plaintiff and the defendant. In that case, the trial Court allowed the application for impleadment on the ground that respondent Nos.1 and 4 to 11 were claiming title and possession of the contracted property and, therefore, they will be deemed to have direct interest in the subject matter of the suit. The High Court dismissed the revision filed by the appellant and confirmed the order of the trial Court. While allowing the appeal and setting aside the orders of the trial Court and the High Court, this Court referred to Order 1 Rule 10(2) CPC and observed:

> *"In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are — (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party*.
>
> As noted hereinearlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit

for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker v. Small made the following observations:

"It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

The aforesaid decision in Tasker was noted with approval in *De Hoghton v. Mone. Turner,* L.J. observed:

"Here again his case is met by Tasker in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed."

(emphasis supplied)

30. In *Amit Kumar Shaw v. Farida Khatoon* (supra), this Court examined the correctness of the order passed by the Calcutta High Court which had approved the dismissal of the application filed by the appellants for impleadment as parties to the suit filed by the original owner Khetra Mohan Das and the transferees, namely, Birendra Nath Dey and Smt. Kalyani Dey. One Fakir Mohammad claimed right, title and interest in the suit property by adverse possession. The suit was decreed by the trial Court. On appeal, the same was remanded for fresh adjudication of the claim of the parties. Fakir Mohammad challenged the order of remand by filing two second appeals. During the pendency of the appeals, Birendra Nath Dey assigned leasehold interest in respect of a portion of the suit property to the appellants. Smt. Kalyani Dey sold the other portion of the suit property to the appellants. When the appellants applied for recording their names in the municipal records, they came to know about the pendency of the appeals. Immediately thereafter, they filed an application for impleadment which was rejected by the High Court. This Court referred to the provision of Order 1 Rule 10(2) and Order 22 Rule 10 CPC as also Section 52 of the Transfer of Property Act, 1882 and observed:

"Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that *pendente lite*, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a *lis pendens*, the following elements must be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.

2. The suit or proceeding must not be collusive.

3. The litigation must be one in which right to immovable property is directly and specifically in question.

4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The doctrine of *lis pendens* applies only where the *lis* is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee *pendente lite* can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee *pendente lite* to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly

defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order 22 Rule 10 an alienee *pendente lite* may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests."

(emphasis supplied)

31. In *Savitri Devi v. DJ, Gorakhpur* (supra), this Court upheld the order passed by the trial Court for impleadment of respondent Nos.3 to 5, who had purchased the suit property without knowledge of the pending litigation, as parties. On behalf of the appellant, it was argued that respondent Nos. 3 to 5 cannot be treated as necessary parties because alienation made in their favour was in violation of the injunction order passed by the Court. In support of this argument, reliance was placed on the judgment in *Surjit Singh v. Harbans Singh* (supra). This Court distinguished that judgment by observing that in that case the assignors and the assignees had knowledge of the injunction order passed by the Court and held that the order passed by the trial Court which was affirmed by the District Judge and the High Court does not call for interference.

32. In *Vinod Seth v. Devinder Bajaj* (supra), this Court interpreted Section 52 of the Transfer of Property Act, 1882 and observed:

"It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will

be subject to the decision in the suit.

The principle underlying Section 52 of the TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of Section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit."

33. In *Surjit Singh v. Harbans Singh* (supra), this Court considered the question whether a person to whom the suit property is alienated after passing of the preliminary decree by the trial Court, which had restrained the parties from alienating or otherwise transferring the suit property, has the right to be impleaded as party. The trial Court accepted the application filed by the transferees and the order of the trial Court was confirmed by the lower appellate Court and the High Court. While allowing the appeal against the order of the High Court, this Court observed:

"In defiance of the restraint order, the alienation/ assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these

circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes. Once that is so, Pritam Singh and his assignees, respondents herein, cannot claim to be impleaded as parties on the basis of assignment. Therefore, the assignees-respondents could not have been impleaded by the trial court as parties to the suit, in disobedience of its orders."

34. In *Sarvinder Singh v. Dalip Singh* (1996) 5 SCC 539, this Court considered the question whether the respondent who purchased the property during the pendency of a suit for declaration filed by the appellant on the basis of the registered Will executed by his mother is entitled to be impleaded as party and observed:

"The respondents indisputably cannot challenge the legality or the validity of the Will executed and registered by Hira Devi on 26-5-1952. Though it may be open to the legal heirs of Rajender Kaur, who was a party to the earlier suit, to resist the claim on any legally available or tenable grounds, those grounds are not available to the respondents. Under those circumstances, the respondents cannot, by any stretch of imagination, be said to be either necessary or proper parties to the suit. A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. In either case the respondents cannot be said to be either necessary or proper parties to the suit in which the primary relief was found on the basis of the registered Will executed by the appellant's mother, Smt Hira Devi. Moreover, admittedly the respondents claimed right, title and interest pursuant to the registered sale deeds said to have been executed by the defendants-heirs

of Rajender Kaur on 2-12-1991 and 12-12-1991, pending suit.

Section 52 of the Transfer of Property Act envisages that:

"During the pendency in any court having authority within the limits of India ... of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

(emphasis supplied)

35. In *Bibi Zubaida Khatoon v. Nabi Hassan* (2004) 1 SCC 191, this Court was called upon to consider the correctness of the High Court's order, which declined to interfere with the order passed by the trial Court dismissing the applications filed by the appellant for impleadment as party to the cross suits of which one was filed for redemption of mortgage and the other was filed for specific performance of the agreement for sale. While dismissing the appeal, this Court referred to the judgments in *Sarvinder Singh v. Dalip Singh*

(supra) and *Dhurandhar Prasad Singh v. Jai Prakash University* (2001) 6 SCC 534 and observed that there is no absolute rule that the transferee pendente lite shall be allowed to join as party in all cases without leave of the Court and contest the pending suit.

36. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his

acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

37. In the light of the above, we shall now consider whether the learned Single Judge and the Division Bench of the High Court committed an error by dismissing the appellants' application for impleadment as parties to Suit No.425/1993. At the cost of repetition, we consider it necessary to mention that respondent No.1 had filed suit for specific performance of agreement dated 13.9.1988 executed by respondent No.2. The appellants and Bhagwati Developers are total strangers to that agreement. They came into the picture only when respondent No.2 entered into a clandestine transaction with the appellants for sale of the suit property and executed the agreements for sale, which were followed by registered sale deeds and the appellants executed agreement for sale in favour of Bhagwati Developers. These transactions were in clear violation of the order of injunction passed by the Delhi High Court which had restrained respondent No.2 from alienating the suit property or creating third party interest. To put it differently, the agreements for sale and the sale deeds executed by respondent No.2 in favour of the appellants did not have any legal sanctity. The status of the agreement for sale executed by the appellants in favour of Bhagwati Developers was no different. These transactions did not confer any right upon the appellants or Bhagwati Developers. Therefore, their presence is not at all necessary for adjudication of the question whether respondent Nos.1 and 2 had entered into a binding agreement and whether respondent No.1 is entitled to a decree of specific performance of the said agreement. That apart, after executing agreement

for sale dated 18.3.1997 in favour of Bhagwati Developers, the appellants cannot claim to have any subsisting legal or commercial interest in the suit property and they cannot take benefit of the order passed by the Calcutta High Court for appointment of an arbitrator which was followed by an order for appointment of receiver because the parties to the proceedings instituted before that Court deliberately suppressed the facts relating to Suit No.425/1993 pending before the Delhi High Court and the orders of injunction passed in that suit.

38. We are in complete agreement with the Delhi High Court that the application for impleadment filed by the appellants was highly belated. Although, the appellants have pleaded that at the time of execution of the agreements for sale by respondent No.2 in their favour in February 1997, they did not know about the suit filed by respondent No.1, it is difficult, if not impossible, to accept their statement because the smallness of time gap between the agreements for sale and the sale deeds executed by respondent No.2 in favour of the appellants and the execution of agreement for sale by the appellants in favour of Bhagwati Developers would make any person of ordinary prudence to believe that respondent No.2, the appellants and Bhagwati Developers had entered into these transactions with the sole object of frustrating agreement for sale dated 13.9.1988 executed in favour of respondent No.1 and the suit pending before the Delhi High Court. In any case, the appellants will be deemed to have become aware of the same on receipt of summons in Suit No.161/1999 filed by respondent No.2 for annulment of the agreements for sale and the sale deeds in which respondent No.2 had clearly made a mention of Suit No.425/1993 filed by respondent No.1 for specific performance of agreement for sale dated 13.12.1988 and injunction or at least when the learned Single Judge of the Delhi High Court entertained IA No.625/2001 filed by respondent No.1 and restrained respondent Nos.2 and 4 from transferring possession of the suit property to the appellants.

However, in the application for impleadment filed by them, the appellants did not offer any tangible explanation as to why the application for impleadment was filed only on 4.2.2008 i.e. after 7 years of the passing of injunction order dated 22.1.2001 and, in our considered view, this constituted a valid ground for declining their prayer for impleadment as parties to Suit No.425/1993.

39. The ratio of the judgment in *Kasturi v. Iyyamperumal* (supra), on which heavy reliance has been placed by the learned senior counsel for the appellants, does not help his clients. In the present case, the agreements for sale and the sale deeds were executed by respondent No.2 in favour of the appellants in a clandestine manner and in violation of the injunction granted by the High Court. Therefore, it cannot be said that any valid title or interest has been acquired by the appellants in the suit property and the ratio of the judgment in *Surjit Singh v. Harbans Singh* (supra) would squarely apply to the appellants' case because they are claiming right on the basis of transactions made in defiance of the restraint order passed by the High Court. The suppression of material facts by Bhagwati Developers and the appellants from the Calcutta High Court, which was persuaded to pass orders in their favour, takes the appellants out of the category of bona fide purchaser. Therefore, their presence is neither required to decide the controversy involved in the suit filed by respondent No.1 nor required to pass an effective decree.

40. The next question which merits consideration is whether the Delhi High Court was justified in appointing the receiver and directing him to take possession of the property. Though, learned senior counsel appearing for Bhagwati Developers has sought to invoke the doctrine of comity of jurisdictions of the Courts for continuance of the receiver appointed by the Calcutta High Court, we do not find any merit in his submission. It is not in dispute that respondent No.1 had filed the suit for specific performance on 1.2.1993 and the

learned Single Judge of the Delhi High Court passed the order of injunction on 18.2.1993. The arbitral award for specific performance of the agreement for sale of the same property entered into between the appellants and Bhagawati Developers was obtained on 7.1.1999. The execution proceedings were instituted in the Calcutta High Court in 2000 and the order for appointment of receiver was passed on 12.8.2000. It is thus clear that when Bhagwati Developers approached the Calcutta High Court, the Delhi High Court was already seized with the suit involving the subject matter of the award. The contention of the appellants and Bhagawati Developers that they were unaware of the proceedings before the Delhi High Court cannot be accepted because in Suit No.161/1999 filed by respondent No.2 for declaring that the agreements for sale and the sale deeds relied upon by the appellants were false and fabricated, a specific reference was made to the suit filed by respondent No.1. That apart, in its order dated 15.2.2001 passed in the application filed by respondent No.4 in EC No.10/2000, the learned Single Judge of the Calcutta High Court categorically observed that the said Court had not been apprised of the facts relating to the suit pending before the Delhi High Court and the injunction orders passed therein including order dated 8.2.2001 restraining the receiver of the Calcutta High Court from taking possession of the property and that if these facts had been disclosed, the Court would have been slow in passing the order that it had passed earlier and hence the order passed by it, if it is in conflict with the order passed by the Delhi High Court, would be subject to that order and Bhagawati Developers who is a party to the proceedings before the Delhi High Court can approach the said Court for obtaining appropriate orders. This shows that on being apprised of the correct facts, the learned Single Judge of the Calcutta High Court had shown due respect to the orders passed by the Delhi High Court and directed that the same should operate till they are modified or vacated at the instance of the appellants or Bhagwati Developers. The course of action adopted by the Calcutta High Court was in consonance with

the notion of judicial propriety. Therefore, Bhagwati Developers cannot invoke the doctrine of comity of jurisdictions of the Courts for seeking continuance of the receiver appointed by the Calcutta High Court.

41. The learned Single Judge and the Division Bench of the Delhi High Court have assigned detailed and cogent reasons for appointing a receiver to take care of the suit property. The clandestine nature of the transactions entered into between respondent No.2 and the appellants on the one hand and the appellants and Bhagwati Developers on the other would give rise to strong presumption that if a receiver is not appointed, further attempts would be made to alienate the property in similar fashion. Therefore, we do not find any valid ground much less justification to interfere with the impugned order or the one passed by the learned Single Judge of the Delhi High Court.

42. In view of the above conclusions, we do not consider it necessary to advert to the documents filed by respondent No.1 before this Court for the first time and the additional affidavit filed by Smt. Bhanwari Devi Lodha on behalf of Bhagwati Developers.

43. In the result, the appeals are dismissed. For their contumacious conduct of suppressing facts from the Calcutta High Court and thereby prolonging the litigation, the appellants and Bhagwati Developers are saddled with cost of Rs.5 lakhs each. The amount of cost shall be deposited by them with the Supreme Court Legal Services Committee within a period of three months.

44. Since the proceedings pending before the Delhi High Court were stayed by this Court, we request the High Court to make an endeavour to dispose of the pending suit as early as possible.

K.K.T. Appeals dismissed.

STATE OF HARYANA AND ORS.
v.
VIJAY SINGH AND ORS.
(Civil Appeal No. 5947 of 2012)

AUGUST 22, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Service Law – Seniority – Ad-hoc appointment of respondents as Masters in different subjects / Physical Training Instructor / Hindi Teacher – Subsequently regularized – After regularization, claim of respondents that the period of ad-hoc service be counted towards seniority – Claim not accepted by the department – Respondents filed writ petition – High Court held that seniority of the respondents be fixed by taking into account their ad hoc service – Justification – Held: Not justified – Till framing of the 1998 Rules, appointments to the posts of Masters and Teachers were governed by the 1995 Rules – In terms of r.3 of the 1955 Rules, only the Director was competent to make appointments and after the Selection Board was constituted vide Notification dated 28-1-1970, the Director could make appointment only on recommendation of the Board – Further in terms of r.8 of the 1955 Rules, every appointee was required to be placed on probation – Respondents were neither appointed by the Director (the competent authority) on the recommendations of the Board nor they were placed on probation – They were appointed on purely ad hoc basis without following the procedure prescribed for regular appointment – Mere fact that the ad hoc appointments of respondents were preceded by sending requisitions to the Employment Exchanges and recommendations by the District Selection Committee cannot lead to an inference that they were appointed on regular basis – Further, in terms of r.9 of the 1955 Rules, inter se seniority

was required to be determined by the dates of confirmation while in terms of r.11 of the 1998 Rules inter se seniority was to be determined by the length of continuous service on the post – Respondents were appointed on purely ad hoc basis and continued to serve as such till regularization of their service – Therefore, their seniority could not be fixed either u/r.9 of the 1955 Rules or r.11 of the 1998 Rules by counting their service from the date of their initial ad hoc appointments – Punjab Educational Service, Class III, School Cadre Rules, 1955 – rr. 3, 8 and 9 – Haryana State Education School Cadre (Group-C) Service Rules, 1998 – r.11.

The respondents were appointed as - Masters in the subjects of Science, Maths and Social Studies / Physical Training Instructor / Hindi Teacher purely on ad hoc basis between 1994 and 1996 by the District Education Officers. In furtherance of the policy decision taken by the State Government, the services of the respondents were regularized w.e.f. 1-10-2003. After regularization of their services, the respondents claimed that the period of ad-hoc service should be counted towards seniority because they were recruited on the basis of selection made by the District Selection Committee from among the candidates sponsored by the Employment Exchanges. The department did not accept their plea and in the provisional gradation list of the Haryana Education Service Class III, their names were shown below those who were appointed on regular basis prior to 1-10-2003.

The respondents challenged the provisional gradation list in a Writ Petition on the ground that the same was discriminatory. In response, the appellants pleaded that the Provisional Gradation List was prepared in accordance with Rule 11 of the Haryana State Education School Cadre (Group 'C') Service Rules, 1998 and the service rendered by the respondents before regularization cannot be taken into consideration for the purpose of fixation of seniority. The High Court held that

the seniority of the respondents be fixed by taking into account their ad hoc service and, therefore, the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. Till the framing of the Haryana State Education School Cadre (Group-C) Service Rules, 1998, the appointments to the posts of Masters and Teachers were governed by the Punjab Educational Service, Class III, School Cadre Rules, 1955. [Para 11] [376-C]

1.2. A reading of order dated 16.10.1995 issued by District Education Officer, Panipat makes it crystal clear that even though respondent No.1 was appointed as Science Master on the recommendations of the District Level Committee, his appointment was purely ad hoc with a tenure of six months or till the availability of a candidate for regular appointment, whichever was earlier. The other respondents were appointed in the same manner with similar stipulation. The reason why the respondents were appointed on purely ad-hoc basis is not far to seek. The concerned District Education Officers did send requisitions to the Employment Exchanges and appointments were made on the recommendations of the District Level Committee but all this was not in consonance with the mandate of the 1955 Rules and Notifications dated 28.1.1970 and 29.6.1973. [Para 15] [378-C-F]

1.3. In terms of Rule 3 of the 1955 Rules, only the Director was competent to make appointments on the posts to which those rules were applicable with the exception that Divisional Inspector/Inspectorass of School or the Principals of Government Colleges could make temporary or officiating appointments on certain posts for a maximum period of three months. After the Subordinate Services Selection Board was constituted

vide Notification dated 28.1.1970, the Director could make appointment only on the recommendation of the Board unless the State Government was to issue notification under proviso to Clause 6 of Notification dated 29.6.1973. In terms of Rule 8 of the 1955 Rules, every person appointed by direct recruitment was required to be placed on probation for a period of one year. The respondents were neither appointed by the Director on the recommendations of the Board nor they were placed on probation. As a matter of fact, they were appointed on purely ad hoc basis without following the procedure prescribed for regular appointment. Therefore, the mere fact that the ad hoc appointments of the respondents were preceded by sending requisitions to the Employment Exchanges and recommendations by the District Selection Committee cannot lead to an inference that they were appointed on regular basis. [Para 15] [378-F-H; 379-A-C]

1.4. The High Court overlooked the fact that the respondents were neither appointed by the competent authority on the recommendations made by the Board nor they were placed on probation. Therefore, the conclusion recorded by the High Court that the respondents' initial appointments were regular and, therefore, ad hoc service was liable to be counted for the purpose of fixation of seniority is legally unsustainable. [Para 16] [379-E-F]

1.5. Further, in terms of Rule 9 of the 1955 Rules, the seniority *inter se* of members of the service holding the same class of posts and in the same/identical grades of pay is required to be determined by the dates of their confirmation. Rule 11 of the 1998 Rules lays down that seniority inter se of members of the service shall be determined by the length of continuous service on any post. The respondents were appointed on purely ad hoc basis for six months and they continued to serve as ad

hoc Masters, Physical Training Instructor and Hindi Teacher till the regularization of their service w.e.f. 1.10.2003. Therefore, their seniority could not be fixed either under Rule 9 of the 1955 Rules or Rule 11 of the 1998 Rules by counting their service from the date of initial appointments. [Para 17] [379-G-H; 380-A-B]

2. In cases where recruitment and conditions of service including seniority are regulated by the law enacted by Parliament or the State Legislature or the rules framed under Article 309 of the Constitution, the general proposition laid down in any judgment cannot be applied *de hors* the relevant statutory provisions and dispute relating to seniority has to be resolved keeping in view such provisions. No proposition of law laid down in any judgment that a person who is appointed on purely ad hoc basis for a fixed period by an authority other than the one who is competent to make regular appointment to the service and such appointment is not made by the specified recruiting agency is entitled to have his ad hoc service counted for the purpose of fixation of seniority. Therefore, the respondents, who were appointed as Masters in different subjects, Physical Training Instructor and Hindi Teacher on purely ad hoc basis without following the procedure prescribed under the 1955 Rules are not entitled to have their seniority fixed on the basis of total length of service. As a corollary to this, it is held that the direction given by the High Court for refixation of the respondents' seniority by counting the ad hoc service cannot be approved. [Paras 18, 24] [380-C-D; 387-A-D]

Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others **(1990) 2 SCC 715: 1990 (2) SCR 900;** *State of West Bengal v. Aghore Nath* **(1993) 3 SCC 371: 1993 (2) SCR 919;** *M.K. Shanmugan v. U.O.I.* **(2000) 4 SCC 476: 2000 (3) SCR 554;** *State of Haryana v. Haryana Veterinary & AHTS Association and another* **(2000)**

8 SCC 4: 2000 (3) Suppl. SCR 322 and *Dr.Chandra Prakash v. State of U.P.* **(2002) 10 SCC 710: 2002 (4) Suppl. SCR 574 – referred to.**

Rudra Kumar Sain and others v. Union of India & others **(2000) 8 SCC 25: 2000 (2) Suppl. SCR 573 and** *S. Sumyan and others v. Limi Niri & others* **(2010) 6 SCC 791: 2010 (4) SCR 829 – cited.**

Case Law Reference:

1990 (2) SCR 900	**referred to**	**Paras 5,7, 14,19**
2002 (4) Suppl. SCR 574	**referred to**	**Paras 7,9, 14,23**
1993 (2) SCR 919	**referred to**	**Paras 9, 20**
2000 (3) SCR 554	**referred to**	**Paras 9, 21**
2000 (2) Suppl. SCR 573	**cited**	**Para 9**
2010 (4) SCR 829	**cited**	**Para 9**
2000 (3) Suppl. SCR 322	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5947 of 2012.

From the Judgment & Order dated 18.12.2008 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 2409 of 2008.

Neeraj K. Jain, Anubha Agarwal, N.N.S. Rana, Pratham Kant, Naresh Bakshi for the Appellants.

P.S. Patwalia, Rajat Singh, A. Venayagam Balan, Ajay Singh Chauhan for the Respondents.

The Judgment of the Court was delivered by

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

2. On being selected by the District Level Committee which had considered the candidature of those sponsored by the Employment Exchanges, respondent Nos.1 to 13 were appointed as Masters in the subjects of Science, Maths and Social Studies, respondent No.14 was appointed as Physical Training Instructor and respondent No.15 was appointed as Hindi Teacher purely on ad hoc basis between 1994 and 1996 by the District Education Officers. The relevant portions of one such order issued on 16.10.1995 are reproduced below:

"OFFICE OF THE DISTT. EDUCATION OFFICER, PANIPAT

Order No.E-1/95/3515-65 Dated Panipat 16.10.1995

On the recommendation of the Distt. Level Committee, the following candidates are hereby appointed purely on ad hoc basis as Master/Mistresses in the subject noted against them in the Haryana Education Service Non Gazetted Class II (School cadre) Men/Women branch (as the case may be) w.e.f. the they join their duty in the institution indicated against their names in the grade of Rs.1400-2600 plus usual allowances sanctioned by the Haryana Government from time to time on the following terms and conditions:-

Sl.No	Name and address of the candidate	Place of posting	Remarks
S.S. Master (Male), General Category			
1 to 3	xxxxxx	xxxxxxx	xxxxxxx
S,S. Master (Male) B.C. Category			
1.	xxxxxx	xxxxxxx	xxxxxxx

S,S. Master, S.C. Category (Male) Block A

1.	xxxxxx	xxxxxxx	xxxxxxx

S,S. Master, Block B

2.	xxxxxx	xxxxxxx	xxxxxxx

S,S. Master Male, ESM

1 & 2.	xxxxxx	xxxxxxx	xxxxxxx

S,S. Mistress General Category

1 to 3	xxxxxx	xxxxxxx	xxxxxxx

S,S. Mistress Category Scheduled Caste, Block A.

1.	xxxxxx	xxxxxxx	xxxxxxx

Science Master Male General Category

1.	Vijay Singh s/o Om Parkash V.P.O. Palri (Panipat)	G.S.S.S. Mandi	Against vacancy
2&3	xxxxxxx	xxxxxxx	xxxxxxx

Science Mistress General Category

1 & 2.	xxxxxx	xxxxxxx	xxxxxxx

Math Master General Category Male

1 and 2.	xxxxxx	xxxxxxx	xxxxxxx

Math Mistress General Category

1	xxxxxx	xxxxxxx	xxxxxxx

Terms & Conditions:

1. The above appointments are purely on ad hoc basis for six months or till the candidates are available for regular appointment whichever is earlier. Their services are liable to be terminated without assigning any reason or notice at any time.

2 to 6 xx xx xx xx"

3. In furtherance of the policy decision taken by the State Government in the light of the judgment of the High Court in *Hassan Mohd. v. State of Haryana* 2004 (2) SCT 505, the services of the respondents were regularized w.e.f. 1.10.2003. The opening paragraph and clause 5 of the terms and conditions embodied in order dated 3.8.2004/12.8.2004 passed by the Director, Secondary Education, Haryana for regularization of a number of employees of District Ambala including respondent No.12 Prem Kumar are extracted below:

"OFFICE OF THE DIRECTOR SECONDARY EDUCATION HARYANA

CHANDIGARH

ORDER No. 2/4-2004-E-V (5) DATED CHANDIGARH THE

03.08.2004

In pursuance of the decision contained in the Haryana Govt. letter No.6/9/03-IGS-I dated 03.10.2003, the following Master/Mistress who were appointed on ad hoc/ contractual basis and have completed three years service upto 30.09.2003 and were in service on that date are hereby appointed as officiating Masters/Mistress in HES-III School Cadre (Men's Branch) in the grade of Rs.5500-9000 (pre-revised) plus usual allowances as sanctioned by the Haryana Government from time to time w.e.f.

01.10.2003 and posted at present place against vacant posts as per following terms and conditions:-

Sr. No.	Name of the office and present place of posting	Date of appointment
Sh/Smt. Masters /Mistress Distt. Ambala		
1. to 16. xxxxx	xxxxxx	xxxxx
Sh/Smt. Master/Mistress Distt. Ambala.		
17. to l9 xxxxxxx	xxxxxx	xxxxx
20.	Prem Kumar, GHS Kalpi	01.03.1995
21. to 27. xxxxx	xxxxxx	
Sh/Smt. Science Master /Mistress Distt. Ambala.		
29. to 38. xxxxxxx	xxxxxx	
1 to 4 xx	xx	xx

5. They are put on probation for a period of two years in the first instance from the date he joined his duty. His result will be particularly taken into consideration while assessing his performance, if in the option of the appointing authority his work and conduct has not been found satisfactory during probation period, this period is liable to be extended provided that the total period of probation including extension, if any, shall exceed 3 years or his service will be dispensed with.

6 to 9 xx xx xx"

4. After regularization of their services, the respondents submitted representations through their association and claimed that the period of ad-hoc service should be counted towards seniority because they were recruited on the basis of selection made by the District Selection Committee from

among the candidates sponsored by the Employment Exchanges. The department did not accept their plea and in the provisional gradation list of the Haryana Education Service Class III, their names were shown below those who were appointed on regular basis prior to 1.10.2003.

5. The respondents challenged the provisional gradation list in Civil Writ Petition No.2409/2008 on the ground that the same was discriminatory and prayed that in view of the judgment of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others* (1990) 2 SCC 715, their seniority be fixed by taking into consideration the total length of service including the ad-hoc service, and until then, no one should be promoted to the post of lecturer.

6. In the written statement filed on behalf of the appellants, it was pleaded that the Provisional Gradation List was prepared in accordance with Rule 11 of the Haryana State Education School Cadre (Group 'C') Service Rules, 1998 (for short, 'the 1998 Rules') and the service rendered by the respondents before regularization cannot be taken into consideration for the purpose of fixation of seniority.

7. The Division Bench of the High Court relied upon the judgments in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others* (supra), *Dr.Chandra Prakash v. State of U.P.* (2002) 10 SCC 710, and order dated 4.7.2008 passed in C.W.P.No.7862/2006, *Hanumant Singh vs. State of Haryana and others,* and declared that the seniority of the respondents be fixed by taking into account their ad hoc service and, accordingly, they should be considered for promotion to the posts of lecturer.

8. Shri Neeraj Jain, learned senior counsel for the appellants referred to the provisions of the Punjab Educational Service, Class III, School Cadre Rules, 1955 (for short, 'the 1955 Rules'), as applicable to the State of Haryana, the 1998

Rules, Notification dated 28.1.1970 issued by the Governor of Haryana under Article 309 of the Constitution for creation of the Subordinate Services Selection Board (for short, 'the Board') as also Notification dated 29.6.1973, by which Clause 6 of the earlier notification was substituted, and argued that even though the respondents were appointed as Masters in different subjects and Physical Training Instructor and Hindi Teacher against the sanctioned posts after being sponsored by Employment Exchanges and on being recommended by the District Selection Committee, their seniority cannot be fixed on the basis of total length of service because their appointments were purely ad hoc and were subject to the availability of the candidates selected for regular appointment. Shri Jain pointed out that under the 1955 Rules, the Director of Education and not the District Education Officer was competent to make appointment on the posts of Masters and argued that the services rendered by the respondents on the basis of ad hoc appointments made by the District Education Officers cannot be clubbed with post regularization service for the purpose of determination of seniority. Learned senior counsel further argued that initial appointments of the respondents cannot be treated as regular because the same were not made on the recommendations of the Board constituted vide Notification dated 28.1.1970. Shri Jain pointed out that under the 1998 Rules also the appointing authority for the posts of Masters/ Mistresses is the Joint Director of Schools and not the District Education Officer and argued that the High Court committed serious error by directing fixation of the seniority of the respondents by counting their ad hoc service ignoring that their initial appointments were not made by the competent authority on the recommendations of the Board.

9. Shri P.S. Patwalia, learned senior counsel for the respondents supported the direction given by the High Court and argued that the respondents are entitled to have their seniority fixed on the basis of total length of service because they were initially appointed after following the procedure

prescribed for regular recruitment. Shri Patwalia emphasized that the posts against which the respondents were appointed between 1994 and 1996 were duly sanctioned and the appointments were made by the District Education Officers from among the candidates who were sponsored by the Employment Exchanges and whose names were recommended by the District Selection Committees. Learned senior counsel argued that the use of phrase 'ad hoc' in the orders issued by the District Education Officers is not conclusive and the High Court rightly treated the respondents' initial appointment as regular for the purpose of fixation of seniority. Shri Patwalia relied upon the principles laid down by the Constitution Bench in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others* (supra), and the judgments in *State of West Bengal v. Aghore Nath* (1993) 3 SCC 371, *M.K. Shanmugan v. U.O.I.* (2000) 4 SCC 476, *Rudra Kumar Sain and others v. Union of India & others,* (2000) 8 SCC 25, *Dr. Chandra Prakash v. State of U.P.* (supra) and *S. Sumyan and others v. Limi Niri & others,* (2010) 6 SCC 791, and argued that once the ad hoc appointments of the respondents were regularized, there could be no justification to exclude their past service for the purpose of fixation of seniority.

10. We have considered the respective submissions. Rules 2(a), (e), 3, 8 and 9 of the 1955 Rules, which were applicable to the State of Haryana till the enactment of the 1998 Rules, Rules 6, 10 and 11 of the 1998 Rules and the relevant extracts of Notifications dated 28.1.1970 and 29.6.1973 issued by the Governor of Haryana under Article 309 of the Constitution, which have bearing on the decision of this appeal, are reproduced below:

THE 1955 RULES

"2 (a) "The Director" means the Director of Public Instruction, Punjab for the time being.

(e) "Direct appointment" means an appointment made otherwise with by promotion within the service or by transfer of an official serving in another department of any State in India or the Government of India.

3. Authority competent to make appointment: - All appointments to posts in the service shall be made by the Director except that Divisional Inspector / Inspectorass of School or the Principals of Government Colleges may make any temporary or officiating appointment to a post other than that of the Headmaster or Headmistress or an Assistant District Inspector of Schools i.e., for a period not exceeding three months of any time.

8. Probation: - i) Members of the service, who are recruited directly against permanent vacancies shall be on probation in the first instance for one year.

ii) Approved officiating service shall be reckoned as period spent on probation, but no member who has officiated in any appointment for one year, may claim to be confirmed until he is appointed against a permanent vacancy.

iii) On the completion of the period of probation the Director may confirm the member in his / her appointment or if his / her work or conduct during the period of probation has been in his opinion unsatisfactory, he / she may dispense with his / her service or may extend his / her period of probation by such period as he may think fit, or reverse him / her to his her former post, if he / she has been recruited otherwise than by direct appointment, provided that the total period of probation including extensions, if any, shall not exceed three years.

iv) Services spent on deputation to a corresponding or higher post may be allowed to count towards the period of probation fixed under this rule, if there is a permanent vacancy against which such member can be confirmed.

9. Seniority of members of the services: - The Seniority inter se of members of the services holding the same class of posts and in the same/identical grades of pay shall be determined by the dates of their confirmations in such posts provided that, if two or more members are confirmed in the same class or post and in the same grades of pay on the same date, their seniority shall be determined as follows:-

a) A member appointed by promotion within the service shall be considered senior to member appointed otherwise.

b) A member appointed by transfer from another department of any Government of India shall be senior to a member recruited by direct appointment.

c) In the case of members who are appointed by promotion, seniority shall be determined according to the seniority in the appointment last held.

d) In the case of members who are recruited by transfers from other services or posts in Education Department of Government or any other Department of any government in India, seniority shall be determined according to seniority in the appointments previously held in the cadre of that service.

e) In the case of members who were both or all recruited by direct appointment and shall be determined according to the seniority before appointment and if their appointments were made on the same date, then older members shall be senior to a younger member.

f) In the case of members, who are recruited by transfer from different departments, seniority shall be determined according to the scale pay preference being given to a member who was drawing a higher rate or pay in his previous appointment and if the rate of scale of pay drawn is the same, an older member shall be senior to a younger

one.”

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THE 1998 RULES

“6(1) Appointments to the posts in the Service in case of Middle School Headmaster, Social Studies Master, Science Master, Mathematics Master, Agriculture Master, Commerce Master, Demonstrator in Physical Education (P.T. Master), Home Science Master, Art Master and Music Master shall be made by Joint Director Schools.

(2) Appointments to the posts in the Service in case of Sanskrit Teacher, Hindi Teacher, Punjabi Teacher, Physical Training Instructor, Art and Craft Teacher (Drawing Teacher), Tailoring Teacher and Tabla Player shall be made by the respective District Education Officers of the concerned district.

10 (1) Persons appointed to any post in the Service shall remain on probation for a period of two years, if appointed by direct recruitment, and one year if appointed otherwise, —

Provided that:-

(a) any period, after such appointment, spent on deputation on a corresponding or a higher post shall count towards the period of probation;

(b) any period of work in equivalent or higher rank, prior to appointment to any post in the Service, may, in the case of an appointment by transfer, at the direction of the appointing authority, be allowed to count towards the period of probation fixed under this rule; and

(c) any period of officiating appointment shall be reckoned as period spent on probation, but no person who has so

officiated shall, on the completion of the prescribed period of probation; be entitled to be confirmed, unless he is appointed against a permanent vacancy.

(2) If, in the opinion of the appointing authority, the work or conduct of a person during the period of probation is not satisfactory, it may,

(a) If such person is appointed by direct recruitment, dispense with the services; and

(b) If such person is appointed otherwise, than by direct recruitment, -

(i) revert him to his former post; or

(ii) deal with him in such other manner as the terms and conditions of his previous appointment permit.

(3) On the completion of period of probation of a person, the appointing authority may:-

(a) if his work or conduct has, in its opinion, been satisfactory,-

(i) confirm such person from the date of his appointment, if appointed against a permanent vacancy; or

(ii) confirm such person from the date from which a permanent vacancy occurs, if appointed against a temporary vacancy; or

(iii) declare that he has completed his probation satisfactorily, if there is no permanent vacancy; or

(b) if his work or conduct has, in its opinion, been not satisfactory:-

(i) dispense with his service, if appointed by direct recruitment, if appointed otherwise, revert him to his former

post or deal with him in such other manner as the terms and conditions of his previous appointment permit; or

(ii) extend his period of probation and thereafter pass such order, as it could have passed on the expiry of the first period of probation;

Provided that the total period of probation including extension, if any, shall not exceed three years.

11. Seniority, interse of the members of the service, shall be determined by the length of continuous service on any post in the service Provided that where there are different cadres in the Service, the seniority shall be determined separately for each cadre;

Provided further that in the case of member appointed by direct recruitment, the order of merit determined by the Commission or any other recruiting authority as the case may be, shall not be disturbed in fixing the seniority;

Provided further that in the case of two or more members appointed on the same date, their seniority shall be determined as follows:-

(a) a member appointed by direct recruitment shall be senior to member appointed by promotion or by transfer;

(b) a member appointed by promotion shall be senior to a member appointed by transfer.

(c) in the case of a member appointed by promotion or by transfer, seniority shall be determined according to the seniority of such members in the appointment from which they are promoted or transferred; and

(d) in the case of members appointed by transfer from different cadres, their seniority shall be determined according to pay, preference being given to a member,

who was drawing a higher rate of pay in his previous appointment, and if the rates of pay drawn are also the same, then by the length of their service in the appointments and if the length of such service is also same, the older member shall be senior to the younger member."

NOTIFICATION DATED 28.01.1970

"GENERAL ADMINISTRATION DEPARTMENT

GENERAL SERVICES

NOTIFICATION

The 28th January, 1970

No.523-3GS-70/2068.—In exercise of the powers conferred by Article 309 of the Constitution of India, and in modification of all other rules in this behalf, the Governor of Haryana hereby constitutes, with effect from the date of the publication of this notification, Subordinate Services Selection Board. The constitution of the Board, the terms and conditions of service of the members thereof and its functions shall be as follows:

6. Functions :- All appointments to non-gazetted Class III posts under the Haryana Government, except appointments of officers and employees of the Punjab and Haryana High Court provided for in Article 229 of the Constitution of India, shall be made on the advice of the Board.

Provided that the State Government shall be competent to exclude any such posts from the purview of the Board."

NOTIFICATION DATED 29.06.1973

"PART-III

HARYANA GOVERNMENT

GENERAL ADMINISTRATION DEPARTMENT

Notification

The 29th June, 1973

No. **G.S.R.88/Const./Art.309/73.—** In exercise of the powers conferred by article 309 of the Constitution of India, and all other powers enabling him in this behalf, the Governor of Haryana hereby makes further amendment in the Haryana Government, General Administration Department, General Services, Notification No.523-3GS-70/2068, dated the 28th January, 1970.

In the said notification, for para 6, the following para shall be substituted, namely:-

"6. Functions:- The Board shall be consulted on the following matters:-

(a) appointments to Class III posts under the State Government, except appointments of officers and employees of the Punjab and Haryana High Court provided for in article 229 of the Constitution of India;

(b) promotions and transfers from one service or post to another service or post pertaining to Class III and Class IV posts;

(c) disciplinary matters pertaining to Class III and Class IV Government employees;

(d) methods of recruitment and the principles to be followed in making appointments to Class III and Class IV posts under the State Government; and

(e) appointments to posts carrying an initial pay of not less than one hundred and fifty rupees per mensem and not more than three hundred and fifty rupees per mensem under a Municipal Committee, Notified Area Committee, Town Improvement Trust, Zila Parishad or Panchayat Samiti except appointment of the Excecutive Officer of a Municipal (Executive Officers) Act, 1931, or the Patiala Municipal (Executive Officers) Act, 2003 Bk.:

Provided that it shall not be necessary to consult the Board in respect of such posts and matters as the State Government may by notification, specify."

11. It is not in dispute that till the framing of the 1998 Rules, appointments to the posts of Masters and Teachers were governed by the 1955 Rules. In terms of Rule 3 of the 1955 Rules, all appointments to posts in the service were required to be made by the Director with the exception that the Divisional Inspector/Inspectorass of the School and Principals of Government Colleges could make temporary or officiating appointment to a post other than that of the Headmaster or Headmistress or an Assistant District Inspector of Schools and the tenure of such appointment could not exceed three months. In terms of Rule 8 of the 1955 Rules, a person appointed by direct appointment was required to be placed on probation for one year in the first instance and on completion of the period of probation, the Director could confirm the probationer. If the work or conduct of the probationer was found unsatisfactory, the Director could either terminate his/her service or extend the period of probation upto a maximum period of three years. Clause 2 of Rule 8 postulated counting of officiating service as period spent on probation. The basic criteria for fixation of seniority embodied in Rule 9 was the date of confirmation.

12. Rule 6(1) of the 1998 Rules lays down that the Joint Director, Schools shall be competent to make appointment to the posts of Middle School Headmaster, Social Studies Master, Science Master, Mathematics Master, Agriculture Master,

Commerce Master, Demonstrator in Physical Education (P.T. Master), Home Science Master, Art Master and Music Master. Sub-rule (2) of Rule 6 postulates appointment on the posts of Sanskrit, Hindi and Punjabi Teacher, Physical Training Instructor, Art and Craft Teacher (Drawing Teacher), Tailoring Teacher and Tabla Player by the concerned District Education Officers. Rule 10 of the 1998 Rules is substantially similar to Rule 8 of the 1955 Rules and lays down that any person appointed by direct recruitment shall remain on probation for a period of 2 years which can be extended upto a maximum of three years. On satisfactory completion of the period of probation, the appointing authority could confirm such person from the date of occurrence of permanent vacancy and if there was no such vacancy then grant a declaration that the appointee has satisfactorily completed the period of probation. Rule 11 lays down that seniority inter se of the members of service shall be determined by the length of continuous service. Third proviso to this rule and Clauses (a) to (d) of that proviso regulate the fixation of seniority in different eventualities.

13. An analysis of Notification dated 28.1.1970 shows that the Governor of Haryana had, in exercise of the powers conferred upon him by Article 309, constituted the Board. The primary function of the Board is to give advice in the matter of appointment to all non-Gazetted Class III posts under the State Government. By Notification dated 29.6.1973, the scope of the Board's functions was enlarged and consultation with the Board was made mandatory in the matters of promotion to Class III posts under the State Government; promotions and transfers from one service or post to another service or post pertaining to Class III and Class IV, disciplinary matters pertaining to Class III and Class IV employees, methods of recruitment and the principles to be followed in making appointments to Class III and Class IV posts, etc. By virtue of proviso to the amended Clause 6, the State Government is empowered to issue notification to dispense with the requirement of consultation with the Board in respect of such

posts and matters as may be specified therein.

14. We shall now consider whether the respondents were regularly appointed as Masters, Physical Training Instructor and Hindi Teacher between 1994 and 1996, whether the competent authority should have taken into consideration their total length of service for the purpose of fixation of seniority and whether the High Court rightly applied the ratio of the judgments of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* (supra) and *Dr. Chandra Prakash v. State of U.P.* (supra) for the purpose of directing refixation of the respondents' seniority.

15. A reading of order dated 16.10.1995 issued by District Education Officer, Panipat makes it crystal clear that even though respondent No.1 – Vijay Singh was appointed as Science Master on the recommendations of the District Level Committee, his appointment was purely ad hoc with a tenure of six months or till the availability of a candidate for regular appointment, whichever was earlier. The other respondents were appointed in the same manner with similar stipulation. The reason why the respondents were appointed on purely ad-hoc basis is not far to seek. The concerned District Education Officers did send requisitions to the Employment Exchanges and appointments were made on the recommendations of the District Level Committee but all this was not in consonance with the mandate of the 1955 Rules and Notifications dated 28.1.1970 and 29.6.1973. At the cost of repetition, we deem it proper to mention that in terms of Rule 3 of the 1955 Rules, only the Director was competent to make appointments on the posts to which those rules were applicable with the exception that Divisional Inspector/Inspectorass of School or the Principals of Government Colleges could make temporary or officiating appointments on certain posts for a maximum period of three months. After the Board was constituted vide Notification dated 28.1.1970, the Director could make appointment only on the recommendation of the Board unless the State Government

was to issue notification under proviso to Clause 6 of Notification dated 29.6.1973. In terms of Rule 8 of the 1955 Rules, every person appointed by direct recruitment was required to be placed on probation for a period of one year. The respondents were neither appointed by the Director on the recommendations of the Board nor they were placed on probation. As a matter of fact, they were appointed on purely ad hoc basis without following the procedure prescribed for regular appointment. Therefore, the mere fact that the ad hoc appointments of the respondents were preceded by sending requisitions to the Employment Exchanges and recommendations by the District Selection Committee cannot lead to an inference that they were appointed on regular basis.

16. It was neither the pleaded case of the respondents nor any document was produced before the High Court to show that the State Government had amended the 1955 Rules and empowered the District Education Officer to make appointment on the posts of Masters, Physical Training Instructor and Hindi Teacher or the requirement of consultation with the Board was dispensed with by issuing notification under proviso to Clause 6 of Notification dated 29.6.1973. Unfortunately, the High Court overlooked the fact that the respondents were neither appointed by the competent authority on the recommendations made by the Board nor they were placed on probation. Therefore, the conclusion recorded by the High Court that the respondents' initial appointments were regular and, therefore, ad hoc service was liable to be counted for the purpose of fixation of seniority is legally unsustainable.

17. The issue relating to fixation of seniority deserves to be considered from another angle. In terms of Rule 9 of the 1955 Rules, the seniority inter se of members of the service holding the same class of posts and in the same/identical grades of pay is required to be determined by the dates of their confirmation. Rule 11 of the 1998 Rules lays down that seniority inter se of members of the service shall be determined by the

length of continuous service on any post. The respondents were appointed on purely ad hoc basis for six months and they continued to serve as ad hoc Masters, Physical Training Instructor and Hindi Teacher till the regularization of their service w.e.f. 1.10.2003. Therefore, their seniority could not be fixed either under Rule 9 of the 1955 Rules or Rule 11 of the 1998 Rules by counting their service from the date of initial appointments.

18. Before concluding, we consider it proper to notice the judgments on which reliance has been placed by learned counsel for the respondents. This consideration needs to be prefaced with an observation that the cases in which recruitment and conditions of service including seniority are regulated by the law enacted by Parliament or the State Legislature or the rules framed under Article 309 of the Constitution, the general proposition laid down in any judgment cannot be applied *de hors* the relevant statutory provisions and dispute relating to seniority has to be resolved keeping in view such provisions.

19. In *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & others* (supra), the Constitution Bench considered the dispute of seniority between the direct recruits and the promotees in the light of the provisions contained in the Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1960, the Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1970, the Reorganised Bombay State Overseers and Deputy Engineers Seniority Lists Rules, 1978, the Reorganised Bombay State Assistant Engineers and Executive Engineers Seniority Lists Rules, 1981, the Maharashtra Service of Engineers (Regulation of Seniority and Preparation and Revision of Seniority Lists for Specified Period) Rules, 1982, etc. After examining the relevant rules, the Court culled out the following propositions:

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his

appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rulesare silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

20. In *State of West Bengal v. Aghore Nath* (supra), the three Judge Bench considered an apparent contradiction in conclusions (A) and (B) in the judgment of the Constitution Bench, and observed:

"22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) can not cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed, according to rules. The corollary set out in conclusion (A), then is, that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority. Thus, the corollary in conclusion (A) expressly

excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority."

"25. In our opinion the conclusion (B) was added to cover over a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularization of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial

appointment, and the appointment not-being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

21. In *M.K. Shanmugam v. U.O.I.* (supra), another three Judge Bench referred to the aforementioned two judgments and observed:

"If the adhoc selection is followed by regular selection, then the benefit of ad hoc service is not admissible if ad hoc appointment is in violation of the rules. If the ad hoc appointment has been made as a stopgap arrangement and where there was a procedural irregularity in making appointments according to rules and that irregularity was subsequently rectified, the principle to be applied in that case was stated once again. There is difficulty in the way of the appellants to fight out their case for seniority should be reckoned by reason of the length of the service whether ad hoc or otherwise inasmuch as they had not been recruited regularly. As stated earlier, the appellants were regularly found fit for promotion only in the year 1977 and if that period is reckoned their cases could not be considered as found by the Tribunal. The view expressed by this Court in these cases have been again considered

in the decisions in *Anuradha Bodi (Dr) v. Municipal Corporation of Delhi* (1998) 5 SCC 292, *Keshav Deo v. State of U.P.,* (1999) 1 SCC 280, *Major Yogendra Narain Yadav v. Bindeshwar Prasad,* (1997) 2 SCC 150, *I.K. Sukhija v. Union of India,* (1997) 6 SCC 406, and *Govt. of A.P. v. Y. Sagareswara Rao,* 1995 Supp (1) SCC 16, but all these decisions do not point out that in case the promotions had been made ad hoc and they are subsequently regularized in the service in all the cases, ad hoc service should be reckoned for the purpose of seniority. It is only in those cases where initially they had been recruited even though they have been appointed ad hoc the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stopgap arrangement."

22. In *State of Haryana v. Haryana Veterinary & AHTS Association and another* (2000) 8 SCC 4, the three Judge Bench considered the question whether the ad hoc service rendered by the respondents in the cadre of Assistant Engineers can be added to their regular service for the purpose of higher pay scale. While reversing the judgment of the majority of the Full Bench which had ruled in favour of the writ petitioner and declared that ad hoc service was to be clubbed with the regular service for the purpose of grant of financial benefits, this Court held:

"A combined reading of the aforesaid provisions of the Recruitment Rules puts the controversy beyond any doubt and the only conclusion which could be drawn from the aforesaid Rules is that the services rendered either on an ad hoc basis or as a stopgap arrangement, as in the case in hand from 1980 to 1982 cannot be held to be regular service for getting the benefits of the revised scale of pay or of the selection grade under the government memorandum dated 2-6-1989 and 16-5-1990, and therefore, the majority judgment of the High Court must be held to be contrary to the aforesaid provisions of the

Recruitment Rules, consequently cannot be sustained. The initial letter of appointment dated 6-12-1979 pursuance to which respondent Rakesh Kumar joined as am Assistant Engineer on an ad hoc basis in 1980 was also placed before us. The said appointment letter unequivocally indicates that the offer of appointment as Assistant Engineer was on ad hoc basis and clauses 1 to 4 of the said letter further provides that the appointment will be on an ad hoc basis for a period of 6 months from the date of joining and the salary was a fixed salary of Rs.400 p.m. in the scale of Rs.400 to Rs.1100 and the services were liable to be terminated without any notice and at any time without assigning any reason and that the appointment will not enable the appointee any seniority or any other benefit under the Service Rules for the time being in force and will not count towards increment in the time scale. In view of the aforesaid stipulations in the offer of appointment itself we really fail to understand as to how the aforesaid period of service rendered on ad hoc basis can be held to be service on regular basis. The conclusion of the high Court is contrary to the very terms and conditions stipulated in the offer of appointment and, therefore, the same cannot be sustained."

23. In *Dr. Chandra Prakash v. State of U.P.* (supra), the Court interpreted the U.P. Medical Service (Men's Branch) Rules, 1945, U.P. Medical Services (Men's Branch) (Amendment) Rules, 1981, U.P. Regularisation of Ad Hoc Appointments (on Posts within the Purview of the Public Service Commission) Rules, 1979 and held that the appellants who had been appointed against substantive vacancies and were continuing from 1965-1976 to 1983 and were enjoying all the benefits of regular service are entitled to seniority from the date of initial appointment. The Court also observed that the 'rule of seniority' had been interpreted by the Court for a long period of time and it would not be proper to upset the principles laid down in other judgments.

24. None of the aforesaid judgments can be read as laying down a proposition of law that a person who is appointed on purely ad hoc basis for a fixed period by an authority other than the one who is competent to make regular appointment to the service and such appointment is not made by the specified recruiting agency is entitled to have his ad hoc service counted for the purpose of fixation of seniority. Therefore, the respondents, who were appointed as Masters in different subjects, Physical Training Instructor and Hindi Teacher on purely ad hoc basis without following the procedure prescribed under the 1955 Rules are not entitled to have their seniority fixed on the basis of total length of service. As a corollary to this, we hold that the direction given by the High Court for refixation of the respondents' seniority by counting the ad hoc service cannot be approved.

25. In the result, the appeal is allowed, the impugned order is set aside and the writ petition filed by the respondents is dismissed. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

MANGAL AMUSEMENT PARK (P) LTD. & ANR.
v.
STATE OF MADHYA PRADESH & OTHERS
(Civil Appeal No. 6105 of 2012)

AUGUST 28, 2012

[SURINDER SINGH NIJJAR AND H.L. GOKHALE, JJ.]

Town Planning – Town planning scheme of Indore – Allotment of land – To appellants for establishment of Children's amusement park – Subsequently State Government changing the land-use from 'commercial' to 'regional park' and further directing the Indore Development Authority (IDA) to invite tenders afresh for re-allotment of the land – Three-fold plea of appellants- a) that the document of allotment was a document of lease and not simply a license, and appellants were entitled to renewal thereof, (b) that appellants had made good investment onto the concerned land, and had their legitimate expectations and consequently, respondents were bound by the doctrine of promissory estoppel to renew the allotment, and (c) that the decision to change the land-use was a malafide one for benefit of another party – Held: Not tenable – The document of allotment when read in the entirety makes it clear that IDA retained complete control over the concerned land and the manner in which facilities in the amusement park were to be enjoyed – No exclusive possession was handed over to the appellants – The document merely granted a permission to use the concerned land in a particular manner, without creating any interest therein – Hence, the document was a license, and not a lease – The provision of renewal contained therein cannot be read as laying down a mandatory requirement – In any event, the license had come to an end by efflux of time and thus cannot be renewed – Besides, respondents had valid reasons not to renew the license – Appellants sought to construct an amusement Club and a Banquet Hall which

would have been used by adults and certainly did not fit in the purpose of a Children's Amusement Park – Also, necessary action to establish Children's Amusement Park had not been taken since half of the land had remained undeveloped, and it amounted to violating the conditions of license – Doctrine of promissory estoppel cannot be invoked in such a background – Also, appellants had not joined any of those parties for whose benefit the change of land-use had been allegedly made – In absence of factual basis, the court is precluded from going into the plea of malafides.

Transfer of Property Act, 1882 – s.105 – Lease and license – Distinction between – Held: Lease is not a mere contract but envisages and transfers an interest in the demised property creating a right in favour of the lessee in rem – As against that a license only makes an action lawful which without it would be unlawful, but does not transfer any interest in favour of the licensee in respect of the property – Indian Easements Act, 1882 – s.52.

The Indore Development Authority (IDA) had floated tenders for setting up of an amusement park on a parcel of land owned by it. Under the then subsisting Development Plan, the designated land-use was 'commercial'. The appellants were allotted the said parcel of land for the establishment of a Children's amusement park and were accordingly granted a license by the IDA. Later, respondent nos.1 and 2 i.e. the State and the Town Planning Department proposed to change the user of this parcel of land from 'commercial' to 'regional park'. The appellants raised objections against the proposed modification and sought permission for putting up a banquet hall and an amusement club on the said parcel of land. Vide letter dated 23-9-2003, the State Government declined the permission sought by the appellants and asked IDA to invite tenders afresh for re-allotment of the plot. The State Government also issued notification 19-11-2003 changing the land-use from 'commercial' to 'regional park'.

The appellants filed writ petition challenging the letter dated 23-9-2003 and notification dated 19-11-2003 and raised the following three-fold submissions: (a) the document of allotment of the concerned parcel of land to the appellants was a document of lease and not simply a license, and the appellants were entitled to the renewal thereof, (b) the appellants had made good investment onto the concerned parcel of land, and they had their legitimate expectations and consequently, the respondents were bound by the doctrine of promissory estoppel to renew the allotment, and (c) the decision to change the land-use was a malafide one for the benefit of another party which had its parcel of land in the vicinity, where the land-use was changed from the previous one which was 'regional park', to 'commercial'; and the change of use of the parcel of land allotted to the appellants was effected to set off the resultant reduction in green area, and to justify the change of land-use of the parcel of land allotted to the other party. The writ petition was dismissed by the High Court and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1. Lease is defined in Section 105 of the Transfer of Property Act, 1882 while license is defined under Section 52 of the Indian Easements Act, 1882. From the two definitions it is clear that a lease is not a mere contract but envisages and transfers an interest in the demised property creating a right in favour of the lessee in rem. As against that a license only makes an action lawful which without it would be unlawful, but does not transfer any interest in favour of the licensee in respect of the property. [Para 16] [406-F; 407-B, D-E]

Associated Hotels of India *v.* R.N. Kapoor ***AIR 1959 SC 1262: 1960 SCR 368;*** *Konchanda Ramamurty Subudhi (dead) v. Gopinath Naik and Ors.* **AIR 1968 SC 919: 1968 SCR 559 and** *Capt. B.V. D'Souza v. Antonio Fausto Fernandes* **AIR 1989 SC 1816: 1989 (3) SCR 626 – relied on.**

Errington v. Errington 1952-1 **All ER 149 and** *Cobb v. Lane* **1952-1 All ER 1199 – referred to.**

2.1. In the instant case, on perusal of the document of allotment, the following facts are noticed:- (i) The first clause does provide that the land is given on license initially for a period of 15 years, and clause 8 does lay down that the license may be renewed for a further period of 15 years by enhancing the license fee maximum by 40%, and thereafter at such a percentage as may be decided by the Authority. The document of allotment is called a 'license', and the allottee is called a 'licensee'. In the very first clause, it is stated that the concerned parcel of land is given on license, and clause 4 refers to the amount payable by the licensee as the license fee which is to be paid annually before the first of June. (iii) Clause 11 of the document requires the licensee to provide the specified games and rides in the amusement park. Not only that but clause 10 further requires that the rides, games etc. should be bought from the suppliers manufacturing them in India indigenously. (iv) Clause 7 authorises IDA to regulate the mode of collection of entry fee, and clause 5 provides that the amount equal to 25% of the entry fee will be charged by the IDA in addition to the license fee. Clause 7 further provides that the Authority (i.e IDA) or the officer authorised by the Authority will have the power to examine the accounts of collection of entry fee, as and when deemed fit. [Para 20] [409-H; 410-A-F]

2.2. The concerned document has to be read as a

whole, and when one sees the above clauses together, it becomes clear that IDA retained complete control over the concerned parcel of land. The manner in which the facilities in the amusement park were to be enjoyed was completely controlled by the IDA. The IDA decided as to what games and rides were to be provided. It also laid down as to from which suppliers these games and rides were to be purchased. IDA further regulated the mode of collection of entry fee, and had the right to examine the accounts of collection thereof as and when it deemed fit. Over and above, Clause 14 of the document specifically provided that in the event of violation of any of these terms and conditions on the part of the licensee, the decision of the Chairman of IDA will be final, indicating the right of IDA to terminate the license in the event of such a contingency. When all these clauses are seen together, it becomes clear that there was no exclusive possession handed over to the appellants. Thus, the document of allotment merely granted a permission to use the concerned parcel of land in a particular manner, and without creating any interest therein. Hence, the document will have to read as granting a license, and not a lease. [Para 21] [410-G-H; 411-A-D]

Sudhir Kumar & Ors. vs. Baldev Krishna Thapar & Ors. **1969 (3) SCC 611– cited.**

3. The appellants have tried to make much ado about the stand which the IDA took on earlier occasions in favour of the appellants. However, where different authorities are dealing with a particular subject, it is quite possible that on some occasions, they may take a stand different from each other, though ultimately it is the decision of the competent authority which matters, and it cannot be tainted with mala fides merely on that count. [Para 23] [412-A-C]

Jasbir Singh Chhabra & Ors. v. State of Punjab **2010 (4) SCC 192 – relied on.**

Punjab State Electricity Board Ltd. v. Zora singh and Ors. **2005 (6) SCC 776: 2005 (2) Suppl. SCR 524 – cited.**

4. The High Court held in the impugned judgment that in any case admittedly the license had come to an end by efflux of time in the month of the June 2010, and therefore the validity and legality of the letter/order dated 23.9.2003 had become academic, and it was no longer necessary to examine that issue. No fault can be found with the High Court on that account, since quashing of this letter cannot in any way lead to the renewal of the license which had already expired. Besides, the respondents had valid reasons not to renew the license as indicated in the show cause notice dated 8.1.2007. The construction of Amusement Club or a Banquet Hall (as sought to be done by the appellants) could certainly not be a part of a Children's Amusement Park. The parcel of land was allotted for setting up of a children's park with games and rides as indicated in the document of license. Additionally, what was permitted were the food and beverages centers, kiosks, shops, administrative building and toilets, which would be in furtherance of this objective. The Banquet Hall and an amusement club which would be used by adults would not fit in the purpose of Children's Amusement Park. As stated in clause 8 of the show cause notice, it clearly indicated that the appellants did not want to run the activity related to the Children's amusement park on the land allotted. [Para 24] [412-G-H; 413-A-D]

5. Since the document of allotment was a license and not one creating any interest, the provision of renewal contained therein cannot be read as laying down a mandatory requirement. Besides, clause 14 of the document of license clearly stated that in the event of violation of any of the terms and conditions on the part of the licensee, the decision of the Chairman of IDA was final. Para 7 of the show cause notice in fact stated that

the necessary action to establish the Children's Amusement Park had not been taken since half of the land had remained undeveloped, and it amounted to violating the conditions of license. The doctrine of promissory estoppel can certainly not be permitted to be invoked on such a background. [Para 25 (ii)] [413-H; 414-A-B]

6. The appellants had not joined any of those parties for whose benefit this change had been allegedly made. In the absence of factual basis, the court is precluded from going into the plea of malafides. As far as the land meant for the Children's amusement park is concerned, the same was hardly put to the full use. Inasmuch as this entire parcel of land of about 7 acres was not utilized, and since it was an open parcel of land, there was nothing wrong in the State Government deciding to retain it as an open parcel of land, and to change the land-use thereof from commercial to a regional park. [Para 26 (ii)] [414-G-H; 415-A]

Girias Investment (P) Ltd. vs. State of Karnataka & Ors. **2008 (7) SCC 53: 2008 (4) SCR 948 – relied on.**

Case Law Reference:

1960 SCR 368	relied on	Para 17
1952-1 All ER 149	referred to	Para 18
1952-1 All ER 1199	referred to	Para 18
1968 SCR 559	relied on	Para 18
1989 (3) SCR 626	relied on	Para 18
1969 (3) SCC 611	cited	Para 19
2005 (2) Suppl. SCR 524	cited	Para 22
2010 (4) SCC 192	relied on	Para 23

2008 (4) SCR 948 relied on Para 26

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6105 of 2012.

From the Judgment and Order dated 19.05.2011 of the High Court of Judicature at Jabalpur (Madhya Pradesh) in Writ Petition No. 5698/2008.

Ranjit Kumar, Rahul Kaushik, Rishabh Sancheti Sameer Sodhi, K.L. Yadav for the Appellants.

Vikas Singh, Sanjay Kapur, Anmol Chandan, Ashmi Mohan, Priyanka Das, Vibha Datta Makhija for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave granted.

2. This appeal by special leave seeks to challenge the judgment and order dated 19.5.2011 rendered by a Division Bench of the Madhya Pradesh High Court dismissing the Writ Petition bearing No.5698/2008 filed by the appellants herein. The said petition sought to challenge the change of land-use from 'commercial' to a 'regional park' of a parcel of land which had been allotted to the appellants in the town planning scheme of Indore, and also the decision of the State Government that the concerned land be utilized only after inviting fresh tenders.

3. The first appellant herein is a Company registered under the provisions of the Companies Act, 1956, and the second appellant is its Managing Director. The respondent No.1 to this appeal is the State of Madhya Pradesh through its Principal Secretary, Department of Housing and Environment, Bhopal, whereas the respondent No.2 is the Director of Town and Country Planning of Madhya Pradesh. The third respondent to this appeal is Indore Development Authority ("IDA" for short) through its Chairman, whereas the fourth respondent is the same Authority through its Chief Executive Officer. Shri Ranjit Kumar, learned senior counsel has appeared for the appellants. Shri Vikas Singh, learned senior counsel has appeared for the first two respondents, and Ms. Vibha Datta-Makhija, learned counsel has appeared for respondent no.3 and 4.

Facts leading to this appeal:-

4. During November 1991 to February 1992, IDA floated tenders through advertisements for setting up of an amusement park on a parcel of land owned by it situated in village Bhamori-Dubey. The concerned land admeasured about seven acres comprising of survey nos. 91 part, 92/1, 93/1, 93/2, 94/1, 94/2, 95/1, 95/2, 96/1, 96/2, 152, 155 part, 157, 159, 160, 162, 163, 164 part, 165 part and 166 part and was situated within Scheme No.54. There is no dispute that under the then subsisting Development Plan the designated land-use of these survey nos. was 'commercial'. It is the case of the appellants that though they applied in pursuance to the advertisement, and though the appellants were the most eligible, IDA arbitrarily delayed the acceptance of their tender. This led the appellants to file an earlier writ petition in the High Court of Madhya Pradesh bearing M.P. No.313/1992 which was allowed by the High Court. Consequently, the appellants were allotted this parcel of land for the establishment of a Children's amusement park.

5. Accordingly, IDA granted a license to the appellants, the terms and conditions of which were as follows:-

LICENSE
(FOR AMUSEMENT CENTRE)
Dated 6.5.1994

This license is granted to Shri Ramesh Mangal son of Shri Manikchand Mangal age 48 years, resident of 8/2, New Palasia, Indore, Managing Director, M/s Mangal Amusement Park Pvt. Ltd., Indore, by the Indore

Development Authority Indore (M.P.). Terms and conditions of this license shall be as follows:-

TERMS AND CONDITIONS:-

The land measuring 7 acres is given to M/s Mangal Amusement Park Pvt. Ltd. (hereinafter called the 'Licensee vide letter No.4179 dated 4.4.1994 on license by the Indore Development Authority initially for a period of 15 years. The licensee will have to develop inside infrastructure such as path-ways, roads, boundary walls, land installation of rides and games etc. at his own cost as approved by the Authority. Construction of Food & Beverage's Centres, Kiosks, Shops, Administrative building, toilet shall also be permissible as per requirement.

2. The period of license shall commence from the date of activation of the park or 18 months from the date of giving possession, whichever is earlier.

3. The period of completion of the project shall be 24 months (inclusive of Monsoon season) from the date of handing over the possession of the said land. Failing which, the license may be terminated, forfeiting the Earnest Money and other payments, if any, by the Authority.

4. The advance license fee shall be payable annually before first of June. In case, the licensee fails to pay the fee on or before the due date, an interest at the rate of 18% per annum shall be charged for period defaulted. The interest shall be calculated on the license fee itself for full calendar month.

5. In addition to the license fee, an amount equal to 25% of the entry fee will be charged by the I.D.A. and has to be paid by the licensee by 10th of next month.

6. Earnest Money of Rs.1,00,000/- has been kept with

I.D.A. and no interest shall be given on the amount of Earnest Money. This amount shall be adjusted towards license fee 1,81,000.00 (Rs. One Lac eighty thousand only) per year on commission of the project.

7. The Authority or an officer authorized in this behalf shall have the power to examine the accounts of collection of entry fee, as and when deemed fit. The Authority may further regulate the mode of collection of entry fee. The duty of collection of entry fee will rest on the licensee himself.

8. The license may be renewed for further period of 15 years by enhancing the license fee, maximum by 40% and thereafter at such a percentage as may be decided by the Authority.

9. Bank Guarantee of Rs.5,00,000/- (Rs. Five lacs only) given by the licensee shall be redeemed after three complete years from the date of activation of the amusement park.

10. The rides, games etc. should be bought from the suppliers manufacturing these in India indigenously.

11. At least one roller coaster, one ferries wheel and bay train, one set of merry cups, one Columbus and one telecombat must be erected with other rides.

12. The complete amusement centre shall be operated and managed by the licensee himself at his own cost and responsibilities.

13. In the event of any increase or decrease in the area on physical measurement, the license fee shall be subject to the increase or decrease proportionately.

14. In the event of violation of any of the terms and conditions mentioned hereinabove, on the part of the licensee, the decision of the Chairman, Indore

Development Authority shall be final.

15. Land for which licnese is granted is marked in green colour in……. plan.

SIGNATURE OF LICENSEE"

6. It is the case of the appellants that they submitted the plans, maps and drawings for necessary construction, and thereafter started using the concerned parcel of land as amusement park.

7. It so transpired that sometime in December 1999, respondent nos.1 and 2 i.e. the State and the Town Planning Dept. initiated the process of modification of the Development Plan. In that process it was proposed to change the user of this parcel of land from 'commercial' to 'regional park' (i.e. a green area). The Chairman of IDA however, wrote in that context to the respondent nos.1 and 2 on 7.12.1999 that such a change was not desirable, since the use of the concerned land was already secured for a specified purpose in the master plan. The State Govt. however proceeded to issue a notification on 9.3.2001 under Section 23-A (2) of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (M.P. Act for short) proposing the change of the land-use from 'commercial' to 'regional park', and inviting objections thereto. The appellants did raise objections against the proposed modification which were heard by the Principal Secretary to the Govt. of Madhya Pradesh on 23.8.2001.

8. It is the case of the appellants that they wanted to put up a banquet hall and an amusement club on this parcel of land, and therefore sought the requisite permission from IDA. IDA in fact passed a resolution bearing No. 133 on 8.5.2003 recommending grant of such permission though subject to the conditions mentioned therein. The Chief Executive Officer of IDA accordingly wrote to the Principal Secretary of the Madhya Pradesh Govt. on 27.5.2003 for grant of this permission, and

consequently for the increase in the license fee. The State Govt. however wrote back on 23.9.2003 declining the request, and asking IDA to invite the tenders afresh for the re-allotment of the plot (the appellants however contend that there is a contrary note on the files of the respondents dated 29.9.2003 recommending the proposed use). That apart, ultimately the Madhya Pradesh Govt. issued the notification approving the change in the land-use from 'commercial' to a 'regional park' on 19.11.2003. It is this letter dated 23.9.2003 and notification dated 19.11.2003 which were challenged by the appellants by filing Writ Petition No.5698/2008 in the High Court of Madhya Pradesh.

9. This letter dated 23.9.2003 reads as follows:-

M.P. Government
Housing and Environment Department
Ministry

Letter No.H-3-107/3/32 Bhopal Date 23.09.2003

To,

The Chief Executive Officer
Indore Development Authority
Indore, M.P.

Sub: Regarding grant of permission to Mangal Amusement Park Pvt. Ltd. for the construction of Amusement Club, Banquet Hall on the land allotted under plan No.54 of the Indore Development Authority.

Ref: Your letter No.6314 dated 23.05.03.

Please take reference of the letter referred above, by which Authority had sought permission from Govt. for proposal on land allotted by Authority on lease 1994.

2. It has been established from the documents made available by the Authority that proceedings by the Authority have not been in accordance with the rules and there has been lack of transparency. Therefore, it is not possible to give permission on this proposal of Authority.

3. It is directed to Authority that it utilize the land in question only after issuing fresh notification inviting tenders.

Sd/-
Illegible
23.09.03
(C.C. Padiyar)
Under Secretary
M.P. Govt. Housing and Environmental Department"

10. The notification dated 19.11.2003 reads as follows:-

"HOUSING & ENVIRONMENT DEPARTMENT

Vallabh Bhawan, Bhopal.

Bhopal dated 19th November, 2003.

No.F-3-47-0000-32 – The State Government vide its Notification No.F-3-47-2000-32 dated 9th March, 2001 issued under Section 23(A) (2) of the Madhya Pradesh Urban and Rural Act, 1973 (Act No.23/1973) had proposed certain modifications in public interests. Thereafter notices to the above effect were also published in 2 leading newspapers on 15th ad 16th March, 2001. Through said notice, Objections were invited from the aggrieved persons and ultimately 4 objections were received jointly and individually. Thereafter objectors of the said objections were heard on 3.8.2001 and 23.8.2001 and their objections were considered and were finally rejected. Thereafter Department sought an opinion from the

Municipal Corporation of Indore on the proposed modification and the Municipal Corporation has granted its No Objection vide letter dated 1st June, 2001.

(2) In the premises aforesaid, State Government hereby confirms modification of the following lands of Village Bhamori Dubey, Indore, as described in Schedule 'A' hereunder, according to user prescribed in the Indore Development scheme, 1991. It is further informed that this modification will be an integrated part of the Approved Indore Development Scheme, 1991 as well as Draft Development Scheme, 2011.

SCHEDULE 'A'

Land use modification of 18.222 Hectares and 17.931 Hectares situated in Village Bhamori Dubey under Indore Development Scheme, 1991-

Sr. No.	Survey No.	Area (In Hect).	Land user prescribed in the Indore Development Scheme	Change land use
(1)	(2)	(3)	(4)	(5)
1.	257 & 259	9.134	Regional Park	Commercial
2.	258 part 260	0.113 1.000	-- " - -"-	" "
3.	261	1.295	- " -	"
4.	262	1.474	- " -	"
5.	264	0.522	- " -	"
6.	265	2.429	- " -	"
7.	265 part	2.255	- " -	"

		18.222		
8.	91 part	0.713	Regional Park	Commercial
9.	92/1	0.429	- ” -	”
10.	92/2	0.425	- ” -	”
11.	93/1	1.060	- ” -	”
12.	93/2	1.064	- ” -	”
13.	94/1	0.235	- ” -	”
14.	94/2	0.235	- ” -	”
15.	95/1	0.219	- ” -	”
16.	95/2	0.223	- ” -	”
17.	96/1	0.117	- ” -	”
18.	96/2	0.117	- ” -	”
19.	152	0.174	- ” -	”
20.	155 part	0.267	- ” -	”
21.	157	0.186	- ” -	”
22.	159	0.344	- ” -	”
23.	160	0.360	- ” -	”
24.	161	0.170	- ” -	”
25.	162	8.259	Commercial	Regional Park
26.	163	1.967	- ” -	”
27.	164 part	0.607	- ” -	”
28.	165 part	0.534	- ” -	”
29.	166 part	0.226	- ” -	”
		17.931		

In the name of and by Order of Governor

Shivanand Dubey,
Deputy Secretary”

11. The appellants point out that thereafter also the stand of IDA was different from that of the concerned department as reflected in the Notesheet of IDA dated 3.2.2005. Yet, ultimately it accepted the view-point of the State Govt., and issued a show cause notice to the appellants on 8.1.2007 alleging various breaches of the terms and conditions of allotment. In para 7 and 8 thereof, it was alleged as follows:-

> “7. You have not taken action to establish Children’s Amusement Park on the land allotted violating conditions of license. Half of the land is still undeveloped, vacant and without any use given after 12 years of allotment.
>
> 8. Application for the construction of Amusement Club, Banquet Hall on the land allotted, given by you establishes that you do not want to run activities relating to Children’s Amusement Park on the land allotted.”

The appellants were, therefore, asked to show cause as to why the license of land allotted to them should not be cancelled.

12. It is the further case of the appellants that although this show cause notice was issued on 8.1.2007, the Chairman of IDA once again wrote to the Govt. on 29.11.2007 asking it to retain the land-use of this particular parcel of land as commercial. The State Govt. however proceeded to bring the modification into force with effect from 1.1.2008. It is at this stage that the above writ petition No. 5698 of 2008 was filed with the following prayers:-

(a) to strike down Section 23-A of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam 1973 (which prayer was however not pressed),

(b) to quash the notification dated 19.11.2003, and

(c) to quash Govt.'s letter dated 23.9.2003 (which prayer was added later on).

13. **Contentions of the rival parties**

The principle submission of the appellants was three-fold:-

(a) the document of allotment of the concerned parcel of land to the appellants was a document of lease and not simply a license, and that the appellants were entitled to the renewal thereof,

(b) the appellants had made good investment onto the concerned parcel of land, and they had their legitimate expectations. Consequently, the respondents were bound by the doctrine of promissory estoppel to renew the allotment,

And

(c) the decision to change the land-use was a malafide one for the benefit of another party which had its parcel of land in the vicinity, where the land-use was changed from the previous one which was 'regional park', to 'commercial'. The change of use of land of the parcel allotted to the appellants was effected to set off the resultant reduction in green area, and to justify the change of land-use of the parcel of land allotted to the other party.

14. The petition was opposed by respondent nos. 1 and 2 on the one hand, and by respondents no.3 and 4 by filing their replies. They contended principally as follows:-

(a) the concerned document of allotment was clearly a document of license, and not that of lease. In any case, by that time the period of license having expired after the lapse of 15 years, the appellants did not have any case for renewal particularly when they had not put to use half of the land for the purpose for which it was allotted, and when in fact they wanted

to use it for another purpose by putting up a banquet hall therein.

(b) Inasmuch as, the document of allotment was a license which was valid only for 15 years, there was no question of the appellants having a legitimate expectation for a renewal beyond 15 years. The respondents had not promised any such renewal to the appellants to enable them to avail of the doctrine of promissory estoppel.

(c) The modification in the development plan was effected after considering all relevant factors and not for obliging anybody. No material in support of their allegation had been produced by the appellants. The change was effected after following the due process of law, viz. inviting suggestions and objections, and hearing the concerned parties. The change cannot be faulted on that count either.

15. The petition was heard by a Division Bench of the Madhya Pradesh High Court which dismissed the same by its judgment and order dated 19.5.2011, after hearing the counsel for all the parties. This judgment is under challenge in the present appeal.

16. **Consideration of the rival submissions**

The principle question to be considered is as to whether the document of allotment of land dated 6.5.1994 was in any way a lease or a license. As far as a lease is concerned, Section 105 of the Transfer of Property Act, 1882, defines it as follows:-

> "***105. Lease defined***.- *A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.*

Lessor, lessee, premium and rent defined. – The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

As far as a license is concerned, the same is defined under Section 52 of the Indian Easements Act, 1882, as follows:-

*"**52. "License" defined. -** Where one person grants to another, or to a definite number of other persons, a right to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."*

From these two definitions it is clear that a lease is not a mere contract but envisages and transfers an interest in the demised property creating a right in favour of the lessee in rem. As against that a license only makes an action lawful which without it would be unlawful, but does not transfer any interest in favour of the licensee in respect of the property.

17. The issue concerning the distinction between lease and license came up for consideration before this court in *Associated Hotels of India vs. R.N. Kapoor* reported in AIR 1959 SC 1262. In para 27 of his judgment, Subba Rao,J. (as he then was) observed therein as follows with respect to lease:-

27. *There is a marked distinction between a lease and a license. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer*

of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor....."

Thereafter, the learned Judge referred to the definition of license, then observed as follows:-

"*Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred."*

18. Subba Rao, J., thereafter referred to the judgments of Court of Appeal in *Errington V. Errington,* 1952-1 All ER 149, and *Cobb V. Lane,* 1952-1 All ER 1199, and then observed as follows:-

"*The following propositions may, therefore, be taken as well-established : (1) To ascertain whether a document creates a license or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - whether they intended to create a lease or a license; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered*

to be a tenant; but circumstances may be established which negative the intention to create a lease."

These propositions have been quoted with approval subsequently by a bench of three Judges in *Konchanda Ramamurty Subudhi (dead) V. Gopinath Naik and Ors.* reported in AIR 1968 SC 919, and in *Capt. B.V. D'Souza V. Antonio Fausto Fernandes* reported in AIR 1989 SC 1816.

19. (i) Having seen this legal position, we may now examine the submissions of the rival parties. It was submitted by Shri Ranjit Kumar, learned senior counsel that, it has to be noted that though the document of allotment states that the license is granted initially for a period of 15 years, clause 8 thereof adds that it may be renewed for a further period of 15 years by enhancing the license fee maximum by 40%, and thereafter at such a percentage as may be decided by the authority. This indicated the permission to the allottee to remain on the concerned parcel of land for a period of 30 years and more, and should therefore be construed as creating an interest in the parcel of land. Therefore, in his submission the document of allotment created a lease, and renewal thereof was a matter of formality, and the IDA was bound to renew the document. He referred to the judgment of this Court in *Sudhir Kumar & Ors. vs. Baldev Krishna Thapar & Ors.* reported in 1969 (3) SCC 611 to submit that a lessor cannot withhold his consent for renewal unreasonably.

(ii) Shri Vikas Singh, learned senior counsel appearing for IDA and Ms. Vibha Datta-Makhija, learned counsel for the State Govt. submitted on the other hand that the possession of the allottee was merely a permissive one, and that it was not exclusive to warrant an inference of creation of an interest. In their view, the document of allotment when read in the entirety makes it very clear that it was a license and not a lease.

20. In the instant case, if we peruse the document of allotment, the following facts are noticed:-

(i) The first clause does provide that the land is given on license initially for a period of 15 years, and clause 8 does lay down that the license may be renewed for a further period of 15 years by enhancing the license fee maximum by 40%, and thereafter at such a percentage as may be decided by the Authority. We must, however, as well note the other provisions in the document of allotment and their effect.

(ii) In the instant case, the document of allotment is called a 'license', and the allottee is called a 'licensee'. In the very first clause, it is stated that the concerned parcel of land is given on license, and clause 4 refers to the amount payable by the licensee as the license fee which is to be paid annually before the first of June.

(iii) Clause 11 of the document requires the licensee to provide the specified games and rides in the amusement park. Not only that but clause 10 further requires that the rides, games etc. should be bought from the suppliers manufacturing them in India indigenously.

(iv) Clause 7 authorises IDA to regulate the mode of collection of entry fee, and clause 5 provides that the amount equal to 25% of the entry fee will be charged by the IDA in addition to the license fee. Clause 7 further provides that the Authority (i.e IDA) or the officer authorised by the Authority will have the power to examine the accounts of collection of entry fee, as and when deemed fit.

21. It must also be noted that the concerned document has to be read as a whole, and when we see the above clauses together, it becomes clear that IDA retained complete control over the concerned parcel of land. The manner in which the facilities in the amusement park were to be enjoyed was completely controlled by the IDA. The IDA decided as to what

games and rides were to be provided. It also laid down as to from which suppliers these games and rides were to be purchased. IDA further regulated the mode of collection of entry fee, and had the right to examine the accounts of collection thereof as and when it deemed fit. Over and above, Clause 14 of the document specifically provided that in the event of violation of any of these terms and conditions on the part of the licensee, the decision of the Chairman of IDA will be final, indicating the right of IDA to terminate the license in the event of such a contingency. Obviously when all these clauses are seen together, it becomes clear that there was no exclusive possession handed over to the appellants. Thus, the document of allotment merely granted a permission to use the concerned parcel of land in a particular manner, and without creating any interest therein. Hence, if we apply the tests which have been laid down by this court way back in the year 1959 (and followed subsequently) the document will have to read as granting a license, and not a lease.

22. The appellants had challenged the legality of the letter/order dated 23.9.2003 issued by the State Government to the IDA. That letter/order while declining the proposal of IDA to permit the amusement club and Banquet Hall proposed by the appellant, directed the IDA to utilize the land in question after issuing fresh notification inviting tenders. It was submitted that the IDA was in fact, favourably inclined to consider the proposal of the appellants, and the said letter/order indicated mala fides on the part of the State Govt. It was further submitted that IDA was a body corporate under Section 39 of the M.P. Act, and though section 73 empowers the State Government to give directions in matters of policy, this power cannot be exercised to give the directions of the kind contained in the letter dated 23.9.2003. In this connection it was contended that assuming that the letter may not be found to be vitiated by reason of malice on fact, but still it can be held to be invalid if the same had been issued for unauthorized purpose as it would amount to malice in law. Reliance was placed in this behalf on the

proposition in paragraph 40 of the judgment of this Court in *Punjab State Electricity Board Ltd. Vs. Zora singh and Ors.* Reported in 2005 (6) SCC 776.

23. In our view, the appellants have tried to make much ado about the stand which the IDA took on earlier occasions in favour of the appellants. One has to recognise that where different authorities are dealing with a particular subject, it is quite possible that on some occasions, they may take a stand different from each other, though ultimately it is the decision of the competent authority which matters, and it cannot be tainted with mala fides merely on that count. The following observations of this Court in para 35 of *Jasbir Singh Chhabra & Ors. vs. State of Punjab* reported in 2010 (4) SCC 192 are instructive in this behalf:-

> "***35.*** *It must always be remembered that in a democratic polity like ours, the functions of the Government are carried out by different individuals at different levels. The issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record notings on the files favouring a particular person or group of persons. Someone may suggest a particular line of action, which may not be conducive to public interest and others may suggest adoption of a different mode in larger public interest. However, the final decision is required to be taken by the designated authority keeping in view the larger public interest. The notings recorded in the files cannot be made basis for recording a finding that the ultimate decision taken by the Government is tainted by malafides or is influenced by extraneous considerations……"*

24. The High Court has held in para 23 of the impugned judgment that in any case admittedly the license had come to an end by efflux of time in the month of the June 2010, and therefore the validity and legality of the letter/order dated

23.9.2003 had become academic, and it was no longer necessary to examine that issue. We cannot find fault with the High Court on that account, since quashing of this letter cannot in any way lead to the renewal of the license which had already expired. Besides, the respondents had valid reasons not to renew the license as indicated in the show cause notice dated 8.1.2007. The construction of Amusement Club or a Banquet Hall could certainly not be a part of a Children's Amusement Park. The parcel of land was allotted for setting up of a children's park with games and rides as indicated in the document of license. Additionally, what was permitted were the food and beverages centers, kiosks, shops, administrative building and toilets, which would be in furtherance of this objective. The Banquet Hall and an amusement club which would be used by adults would not fit in the purpose of Children's Amusement Park. As stated in clause 8 of the show cause notice, it clearly indicated that the appellants did not want to run the activity related to the Children's amusement park on the land allotted.

25. (i) It was submitted on behalf of the appellants that they had made good investment in the concerned parcel of land with legitimate expectations, and, therefore, the respondents were estopped from discontinuing their allotment on the basis of the doctrine of promissory estoppel. This submission was disputed by Shri Vikas Singh, learned senior counsel appearing for IDA. He ,firstly, pointed out that more than half of the land remained un-utilised even 12 years after the allotment, and, in fact, the park was not functioning for quite sometime. The games and rides which were placed on this parcel of land were in the nature of fixtures, and not permanent additions as such, and could be removed therefrom when the appellants were required to vacate.

(ii) Having noted these submissions we are of the view that since the document of allotment was a license and not one creating any interest, the provision of renewal contained therein

cannot be read as laying down a mandatory requirement. Besides, as stated above, clause 14 of the document of license clearly stated that in the event of violation of any of the terms and conditions on the part of the licensee, the decision of the Chairman of IDA was final. Para 7 of the show cause notice in fact stated that the necessary action to establish the Children's Amusement Park had not been taken since half of the land had remained undeveloped, and it amounted to violating the conditions of license. The doctrine of promissory estoppel can certainly not be permitted to be invoked on such a background.

26.(i) The appellants had made one more prayer namely to quash and set aside the notification dated 19.11.2003. Section 23-A of the M.P. Act permits the modification of the provisions in the development plan by following the due procedure of law as laid down therein. In the instant case, a notification had been issued earlier on 9.3.2001 inviting the objections to the proposed modification. The appellants were heard with respect to these objections, and thereafter the notification dated 19.11.2003 had been issued approving the proposed modification. It was contended on behalf of the appellants that the modification was a motivated one. The appellants submitted that under the modification, a parcel of land in nearby vicinity which was earlier reserved for a green area, was now being permitted for a commercial use, whereas the user of the land which was marked for the Children's Amusement Park, was being changed to a regional park. This was with a view to accommodate the constructions which had come up on the other parcel of land in the vicinity.

(ii) In this connection we must note that the appellants had not joined any of those parties for whose benefit this change had been allegedly made. As held in *Girias Investment (P) Ltd. vs. State of Karnataka & Ors.* reported in 2008 (7) SCC 53, in the absence of factual basis, the court is precluded from going into the plea of malafides. As far as the land meant for the Children's amusement park is concerned, the same was hardly

put to the full use. In as much as this entire parcel of land of about 7 acres was not utilized, and since it was an open parcel of land, there was nothing wrong in the State Government deciding to retain it as an open parcel of land, and to change the land-use thereof from commercial to a regional park. The notification cannot be faulted on that count either.

27. In the circumstances, we do not find any error in the impugned judgment of the High Court. The appeal is therefore dismissed. Parties will bear their own costs.

B.B.B. Appeal dismissed.

KRISHI UPAJ MANDI SAMITI, NARSINGHPUR

v.

M/S. SHIV SHAKTI KHANSARI UDYOG AND OTHERS

(Civil Appeal No. 6186 of 2012 etc.)

AUGUST 30, 2012

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

Madhya Pradesh Krishi Upaj Mandi Adhiniyam,1972 – ss.19, 31 r/w s.32 and 36 – Transactions involving purchase of sugarcane by sugar factories operating in market areas of the State – Levy of market fee – Validity – Applicability of the 1972 Mandi Adhiniyam – Respondents operating sugar factories in different market areas of the State – Notices issued by appellant-Market Committees requiring the respondents to take licence under the 1972 Mandi Adhiniyam and pay market fee on purchase of sugarcane from Cane Growers / Cane Growers Cooperative Societies – Quashed by High Court – Justification of – Held: Justified – The entire field of sale and purchase of sugarcane is covered by the 1958 Sugarcane Act and the Sugarcane Control Order, which are special legislations – The 1972 Mandi Adhiniyam on the other hand generally deals with the sale and purchase of agricultural produce specified in the Schedule appended to the Adhiniyam – Even though the 1972 Mandi Adhiniyam is a subsequent legislation, the general provisions contained in the said Adhiniyam cannot be invoked for compelling the occupier of a factory engaged in the manufacture of sugar to take licence under s.31 r/w s.32 and pay market fee in terms of s.19 because the same are in direct conflict with the provisions contained in the 1958 Sugarcane Act and the Sugarcane Control Order – Plea of appellant that the provisions of the Sugarcane Control Order cannot prevail over the 1972 Mandi Adhiniyam because the latter was enforced after receiving Presidential assent cannot be accepted since

the State Government had not reserved the Adhiniyam for Presidential assent on the ground of any repugnancy between the provisions thereof and the Sugarcane Control Order – The State Government could not have even thought of any repugnancy between these statutes because at the relevant time, sugarcane was not treated as an agricultural produce and was not included in the Schedule appended to the 1972 Mandi Adhiniyam – Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958 – ss. 12,15,16, 19,20,21 and 22 – Sugarcane (Control) Order – Clauses 3,4,5,5A and 6 – Essential Commodities Act, 1955 – s.3.

Constitution of India, 1950 – Article 254(2) – Presidential assent under – Nature and scope of – Discussed.

The respondents were operating sugar factories in different market areas of the State of Madhya Pradesh and purchasing sugarcane from Cane Growers and Cane Growers' Cooperative Societies. They filed writ petitions for quashing the notices issued by the appellant-Market Committees requiring them to take licence under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 [for short 'the Market Act'] and to pay market fee on the purchase of sugarcane. It was pleaded on their behalf that the provisions of the Market Act were not applicable to the transactions exclusively governed by the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958 [for short, 'the Sugarcane Act'] and the Sugarcane (Control) Order [for short, 'the Control Order'] issued by the Central Government under Section 3 of the Essential Commodities Act, 1955. The appellants contested the writ petitions pleading that there is no conflict between the Market Act on the one hand and the Sugarcane Act and the Control Order on the other because the two sets of legislations operate in different fields and in view of the section 19 of the Market Act, the respondents were bound to pay market fee on the

purchase of Sugarcane within the market areas.

The High Court by the impugned order held that transactions involving the sale and purchase of sugarcane were governed by Sections 12, 15, 16, 19, 20, 21 and 22 of the Sugarcane Act and Clauses 3, 4, 5, 5A and 6 of the Control Order, which are in the nature of special legislations vis-à-vis the Market Act and, as such, market fee could not be levied by the Market Committees.

In the instant appeals filed by the State of Madhya Pradesh and the Market Committees, the question which arose for consideration was whether the provisions of the Market Act were applicable to the transactions involving the purchase of sugarcane by the factories operating in the market areas of the State and whether market fee could be levied on such transactions.

Dismissing the appeals, the Court

HELD: 1. The High Court did not commit any error by quashing the notices issued by appellant - Market Committees to the respondents requiring them to take licence under the Market Act and pay market fee on the purchase of sugarcane from Cane Growers/Cane Growers Cooperative Societies. [Para 28] [479-C-D]

2.1. An analysis of the provisions of the Sugarcane Act and the Control Order alongwith the Market Act brings to fore the conflict between the three statutes insofar as they relate to the transactions involving sale of sugarcane by Cane Growers / Cane Growers' Co-operative Societies to the occupiers of factories. While the Sugarcane Act and the Rules framed thereunder constitute a complete code for regulating the supply of sugarcane by Cane Growers and Cane Growers' Co-operative Societies to the occupiers of the factories at the purchasing centres established and maintained by them

and payment of price without delay, the Market Act regulates sale and purchase of notified agricultural produce in the market yards specified for the particular produce or at other places provided in the bye-laws and mandates that the price of the notified agricultural produce should be settled by tender bid or open auction system. (Sugarcane was included in the Schedule w.e.f. 7-6-1979 by M.P. Act No.18/1997). The Control Order not only lays down the mechanism for determination of the minimum price of sugarcane payable by the producers of sugar or their agents for the sugarcane purchased by them, but also prescribes the mode of payment of the price. The Sugarcane Act and the Rules framed thereunder also prescribe the mode of payment of the price by the occupier of the factory. Likewise, the Market Act contains provisions for payment of the price of the notified agricultural produce brought into the market yard for sale. It is thus evident that so far as sugarcane is concerned, there is direct conflict between the provisions of the Sugarcane Act and the Market Act both, in matters relating to sale and purchase of sugarcane, and, payment of price. Likewise, there is conflict between the Control Order and the Market Act in the matter of determination of price of the sugarcane and mode of payment. [Para 17] [456-H; 457-A-F]

2.2. Even though the Market Act is a subsequent legislation and one of its objectives is to regulate buying and selling of agricultural produce including sugarcane, the general provisions contained therein cannot prevail over the Sugarcane Act and the Control Order, which are special legislations exclusively dealing with issues relating to increase in the production of sugarcane, supply of sugarcane by Cane Growers/Cane Growers Cooperative Societies to the factories from any reserved or assigned area or otherwise and payment of the price of cane by the occupier of the factory. [Para 18] [459-F-H]

2.3. Though, there is no significant difference in the Control Order and the Market Act insofar as the mode of payment of the price of sugarcane is concerned, but the mechanism enshrined in the two statutes for determination of price is vastly different. The Control Order envisages fixation of the minimum price of sugarcane by the Central Government after considering the factors enumerated in Clause 3 and consulting such authorities, bodies or associations as it may think fit and the producer of sugar is bound to pay at least that price to Cane Growers/Cane Growers Cooperative Societies. As against this, the Market Act postulates determination of the price of the notified agricultural produce (sugarcane is only one of such produce) brought into the market yard for sale under Section 36(3) by tender bid or open auction. In that exercise, the State Government/the concerned Market Committee does not have any role to play. Such price cannot be less than the support price declared by the State Government. This difference also indicates that the Control Order is a special legislation vis-à-vis the Market Act. [Para 19] [460-A-D]

2.4. The entire field of the sale and purchase of sugarcane is covered by the Sugarcane Act and the Control Order, which are special legislations and the provisions contained in the Market Act, which generally deal with sale and purchase of agricultural produce specified in the Schedule cannot be invoked for compelling the occupier of a factory engaged in the manufacture of sugar to take licence under Section 31 read with Section 32 and pay market fee in terms of Section 19 thereof because the same are in direct conflict with the provisions contained in the Sugarcane Act and the Control Order. [Para 22] [468-B-D]

Belsund Sugar Co. Ltd. v. State of Bihar **(1999) 9 SCC 620: 1999 (1) Suppl. SCR 146** and *H.S. Jayanna and others*

v. State of Karnataka **(2002) 4 SCC 125: 2002 (2) SCR 261 – referred to.**

Krishi Upaj Mandi Samiti v. Orient Paper and Industries Ltd. **(1995) 1 SCC 655: 1994 (5) Suppl. SCR 392;** *Basantlal Banarsilal v. Bansilal Dagdulal* **AIR 1955 Bom. 35;** *Tika Ramji v. State of U.P.* **AIR 1956 SC 676: 1956 SCR 393;** *Kailash Nath v. State of U.P.* **AIR 1957 SC 790;** *Basantlal Banarsilal v. Bansilal Dagdulal* **AIR 1961 SC 823: 1967 SCR 38;** *Janardan Pillai v. Union of India* **(1981) 2 SCC 45: 1981 (2) SCR 676;** *M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar* **1983 (4) SCC 45: 1983 (3) SCR 130;** *Bharat Shivram Singh and others v. State of Gujarat and others* **(1986) 4 SCC 51: 1986 (3) SCR 602;** *P.N. Krishnalal v. Govt. of Kerala* **1995 (Supp.) 2 SCC 187: 1994 (5) Suppl. SCR 526;** *Subhash Ramkumar Bind Alias Vakil and another v. State of Maharashtra* **(2003) 1 SCC 506: 2002 (4) Suppl. SCR 65;** *Dharappa v. Bijapur Co-operative Milk Producers Societies Union Limited* **(2007) 9 SCC 109: 2007 (5) SCR 729 and** *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited and others* **(2009) 5 SCC 342: 2009 (3) SCR 668 – cited.**

3.1. The argument of the appellants that the provisions of the Control Order cannot prevail over the Market Act because the same was enforced after receiving Presidential assent merits rejection for the following reasons: (i) In the counter filed before the High Court, no such plea was raised and no document was produced to show that the Market Act was reserved for Presidential Assent on the ground that the provisions contained therein are in conflict with those contained in the Control Order. (ii) It was not argued before the High Court that the President had been apprised of the conflict between the Control Order and the Market Act and he accorded assent after considering this fact. (iii) From the summary prepared for consideration of the President, it

is clear that the State Government had not reserved the Market Act for Presidential assent on the ground of any repugnancy between the provisions of that Act and the Control Order. As a matter of fact, the State Government could not have even thought of any repugnancy between these statutes because at the relevant time, sugarcane was not treated as an agricultural produce and was not included in the Schedule appended to the Market Act. [Paras 23, 24] [468-E-H; 471-C-D]

3.2. The assent of the President under Article 254(2) of the Constitution is not an empty formality and the President has to be apprised of the reason why his assent was being sought. If the assent is sought for a specific purpose, the efficacy of assent would be limited to that purpose and cannot be extended beyond it. Consequently, Article 254(2) of the Constitution is not available to the appellants for seeking a declaration that the Market Act would prevail over the Control Order and that transactions involving the purchase of sugarcane by the factories operating in the market areas would be governed by the provisions contained in the Market Act. [Paras 25, 28] [471-F-G; 479-B-C]

Gram Panchayat of Village Jamalpur v. Malwinder Singh and others **1985 (3) SCC 661: 1985 (2) Suppl. SCR 28 and** *Kaiser-I-Hind Private Limited and another v. National Textile Corporation (Maharashtra North) Ltd. and others* **(2002) 8 SCC 182: 2002 (2) Suppl. SCR 555 – followed.**

Case Law Reference:

1994 (5) Suppl. SCR 392	**cited**	**Para 7**
AIR 1955 Bom. 35	**cited**	**Para 7**
1956 SCR 393	**cited**	**Para 7**
AIR 1957 SC 790	**cited**	**Para 7**

1967 SCR 38	**cited**	**Para 7**
1981 (2) SCR 676	**cited**	**Para 7**
1983 (3) SCR 130	**cited**	**Para 7**
1986 (3) SCR 602	**cited**	**Para 7**
1994 (5) Suppl. SCR 526	**cited**	**Para 7**
2002 (4) Suppl. SCR 65	**cited**	**Para 7**
2007 (5) SCR 729	**cited**	**Para 7**
2009 (3) SCR 668	**cited**	**Para 7**
1999 (1) Suppl. SCR 146	**referred to**	**Para 20**
2002 (2) SCR 261	**referred to**	**Para 21**
2002 (2) Suppl. SCR 555	**followed**	**Para 26**
1985 (2) Suppl. SCR 28	**followed**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6186 of 2012.

From the Judgment & Order dated 6.7.2006 of the High Court of Madhya Pradesh at Jabalpur in Civil Misc. Writ Petition No. 3928 of 2006.

WITH

C.A. No. 6187, 6188, 6189, 6190, 6191, 6192, 6193, 6194, 6195, 6196, 6197, 6198, 6199 and 6200 of 2012.

Prashant Kumar, Anurag Sharma, Ashiesh Kumar, B.S. Banthia for the Appellant.

A.K. Sanghi, Jayant Bhushan, Saket Singh, Niranjana Singh, Ankur Saijal, Bina Gupta, Pragati Neekhra, Surynarayana Singh, S.S. Khanduja, B.K. Satija, S.K. Verma, G. Prakash for the Respondent.

The Judgment of the Court was delivered by

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

2. The questions which arise for consideration in these appeals filed by the State of Madhya Pradesh and the Market Committees against the orders passed by the Division Benches of the Madhya Pradesh High Court are whether the provisions of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (hereinafter described as, 'the Market Act') are applicable to the transactions involving the purchase of sugarcane by the factories operating in the market areas of the State and whether market fee can be levied on such transactions.

3. The contesting respondents are operating sugar factories in different market areas of the State and have been purchasing sugarcane from Cane Growers and Cane Growers' Co-operative Societies. Thus, they are covered by the general sweep of the Market Act because sugarcane is a notified agricultural produce and by virtue of Section 19, the Market Committees are empowered to levy market fee on the transactions involving purchase of sugarcane.

4. The respondents filed writ petitions for quashing the notices issued by the Market Committees requiring them to take licence under the Market Act and to pay market fee on the purchase of sugarcane, by asserting that the provisions of the Market Act are not applicable to the transactions which are exclusively governed by the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958 (for short, 'the Sugarcane Act') and the Sugarcane (Control) Order (for short, 'the Control Order') issued by the Central Government under Section 3 of the Essential Commodities Act, 1955 (for short, 'the EC Act').

5. The appellants contested the writ petitions and pleaded that there is no conflict between the Market Act on the one hand

and the Sugarcane Act and the Control Order on the other because the two sets of legislations operate in different fields and in view of Section 19 of the Market Act, the respondents are bound to pay market fee on the purchase of sugarcane within the market areas.

6. The Division Bench of the High Court referred to the provisions of the Market Act, the Sugarcane Act and the Control Order and held that the transactions involving the sale and purchase of sugarcane are governed by Sections 12, 15, 16, 19, 20, 21 and 22 of the Sugarcane Act and Clauses (3), (4), (5), (5A) and (6) of the Control Order, which are in the nature of special legislations vis-à-vis the Market Act and, as such, market fee cannot be levied by the Market Committees. The reasons assigned by the High Court for arriving at this conclusion are contained in paragraph 17 of order dated 6.7.2006 passed in Writ Petition No. 391/1995 and batch, which is extracted below:

> "17. Sub-section (1) of Section 36 quoted above clearly provides that all notified agricultural produce brought into the market for sale shall be brought into market yard/yards specified for such produce and shall not, subject to the provisions of sub-section (2), be sold at any other place outside such yard. Sub-section (3) of Section 36 further provides that the price of the notified agricultural produce brought into the market yard for sale shall be settled by tender bid or open auction system and no deduction shall be made from the agreed price on any account whatsoever. Sub-section (4) of Section 36 of the Market Act further provides that weighment or measurement of all the notified agricultural produce so purchased shall be done by a licensed weighman in the market yard or any other place specified by the market committee for the purpose. Sub section (1) of Section 37 of the Market Act states that any person who buys notified agricultural produce in the market area shall execute an agreement in triplicate in such form as may be prescribed, in favour of the seller. Sub-section (2) of Section 37 provides for payment of price of agricultural produce brought in the market yard on the same day to the seller at the market yard and additional payment at the rate of one percent, per day of the total price of the agricultural produce payable to the seller within five days. These provisions of Sections 36 and 37 of the Market Act are in direct conflict with the provisions of Clauses (3), (4), (5), (5A) and (6) of the Control Order made by the Central Government under Section 3 of the Essential Commodities Act, 1955 discussed above. Similarly these provisions of the Market Act are in direct conflict with the provisions of Sections 12, 15, 16, 19, 20, 21 and 22 of the Sugarcane Act made by the State Legislature of Madhya Pradesh, discussed above. In view of such conflict, either, the aforesaid provisions of the Market Act apply to the transactions of buying and selling of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers cooperative societies, or the provisions of the Control Order made by the Central Government and the aforesaid provisions of the Sugarcane Act made by the State Government apply to such transactions of buying and selling between the occupiers or owners of sugar factories and the sugarcane growers or sugarcane growers cooperative societies. The Control Order made by the Central Government and the Sugarcane Act made by the State Legislature being a Special Order and Special Act relating to supply and purchase of sugarcane will apply to transactions of sale and purchase of sugarcane between the occupiers of the factory and the sugarcane growers or sugarcane growers cooperative societies and the provisions of the Market Act being a General Act with regard to agricultural produce will stand excluded and will not apply to such transactions of buying and selling of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers cooperative societies."

7. Shri Vivek Tankha, learned senior counsel appearing for the Market Committees and Shri B.S. Banthia, learned counsel appearing for the State argued that the object of the Sugarcane Act and the Control Order is to regulate the supply and purchase of sugarcane and to ensure that price determined by the competent authority is paid to the Cane Growers without delay, but these enactments have nothing to do with the levy of market fee on transactions involving the purchase of sugarcane by the factories within the market areas and the High Court committed serious error by declaring that the provisions of the Sugarcane Act and the Control Order would prevail vis-à-vis those contained in the Market Act. The learned counsel further argued that the ratio of the judgment in *Belsund Sugar Co. Ltd. v. State of Bihar* (1999) 9 SCC 620, on which reliance has been placed by the High Court, has no bearing on the interpretation of the provisions of the Sugarcane Act and the Market Act because there is significant difference between the Bihar Acts and the Madhya Pradesh Acts. Shri Tankha emphasized that the Market Act and the Sugarcane Act operate in different fields and even if there appears some conflict between the two enactments, the provisions contained in the Market Act would prevail because the Sugarcane Act does not provide for levy of market fee on the purchase of sugarcane by the factories. Learned senior counsel relied upon the judgment in *Krishi Upaj Mandi Samiti v. Orient Paper and Industries Ltd.* (1995) 1 SCC 655 and argued that the sugarcane factories are liable to pay market fee on the purchase of sugarcane which takes place within the market areas because they are benefitted by the development works undertaken by the Market Committees and the Madhya Pradesh Agricultural Marketing Board. Shri Tankha also relied upon Article 254 of the Constitution and argued that even though the Control Order has been framed under a Central legislation, the provisions contained therein cannot override the Market Act which was enforced after receiving Presidential assent. In support of this argument, Shri Tankha relied upon the judgments in *Basantlal Banarsilal v. Bansilal Dagdulal* AIR 1955 Bom. 35, *Tika Ramji v. State of U.P.* AIR 1956 SC 676 = 1956 SCR 393, *Kailash Nath v. State of U.P.* AIR 1957 SC 790, *Basantlal Banarsilal v. Bansilal Dagdulal* AIR 1961 SC 823, *Janardan Pillai v. Union of India* (1981) 2 SCC 45, *M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar* 1983 (4) SCC 45, *Gram Panchayat of Village Jamalpur v. Malwinder Singh and others* 1985 (3) SCC 661, *Bharat Shivram Singh and others v. State of Gujarat and others* (1986) 4 SCC 51, *Krishi Upaj Mandi Samiti and others v. Orient Paper and Industries* (supra), *P.N. Krishnalal v. Govt. of Kerala* 1995 (Supp.) 2 SCC 187, *H.S. Jayanna and others v. State of Karnataka* (2002) 4 SCC 125, *Kaiser-I-Hind Private Limited and another v. National Textile Corporation (Maharashtra North) Ltd. and others* (2002) 8 SCC 182, *Subhash Ramkumar Bind Alias Vakil and another v. State of Maharashtra* (2003) 1 SCC 506, *Dharappa v. Bijapur Co-operative Milk Producers Societies Union Limited* (2007) 9 SCC 109 and *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited and others* (2009) 5 SCC 342.

8. Shri Jayant Bhushan and Shri A.K. Sanghi, Senior Advocates and Ms. Pragati Neekhra, learned counsel appearing for the respondents supported the impugned orders and argued that being a special legislation, which covers all aspects of the supply and purchase of sugarcane including the payment of price to Cane Growers, the Sugarcane Act will prevail over the Market Act, which generally empowers the market committees to levy market fee on the sale and purchase of notified agricultural produce. More so, because the procedure prescribed under Section 36 of the Market Act for the purchase of agricultural produce within the market yard or market proper is in direct conflict with the provisions of the Sugarcane Act which postulate the purchase of sugarcane by the factories at an identified place or at the factory gate. Learned senior counsel then argued that the sugar factories cannot be burdened with the liability of paying market fee on the purchase of sugarcane because the same is not taken into

consideration while fixing the price of sugar under Clause 3 of the Control Order. Shri Bhushan submitted that the Court should not entertain the argument made by Shri Tankha with reference to Article 254 of the Constitution because no such argument was raised before the High Court and no document has been produced before this Court to show that Presidential assent was obtained for amendment in the Market Act with specific reference to the Sugarcane Act.

9. For deciding whether there is any conflict between the Sugarcane Act and the Control Order on the one hand and the Market Act on the other, it will be useful to notice the relevant statutory provisions:

The Sugarcane Act

10. The Sugarcane Act was enacted by the State legislature in the backdrop of inadequate supply of sugarcane to the factories and the difficulties faced by the cultivators in selling their produce and getting the price. Section 2 of the Act contains definitions of various terms. Section 3 mandates the State Government to establish Sugarcane Board for the State. In terms of Section 4, the Sugarcane Board is required to advise the State Government on matters pertaining to the regulation of supply and purchase of cane for sugar factories; the varieties of cane which are suitable for use in sugar factories; the maintenance of healthy relations between occupiers, managers of factories, Cane-growers' Co-operative Societies, Cane Development Council and purchasing agents and such other matters as may be prescribed. Section 5 provides for establishment of a Cane Development Council, whose functions are to consider and approve the programme for development of the zone; to advise regarding the ways and means for the execution of the development plan in all its essentials such as cane varieties, cane-seed, sowing programme, fertilizers and manures; to undertake the development of irrigation and other agricultural facilities in the zone; etc. Section 8 lays down that there shall be a fund at the

disposal of the Council to meet the expenses required to be incurred for the discharge of duties and performance of its functions under the Act. The fund shall consist of the grants made by the Indian Central Sugarcane Committee and the State Government, sums received by the Council by way of commission under Section 21 and any other sum which may be credited to the fund under the general or special order of the State Government. Section 12 empowers the Cane Commissioner to call upon the occupier to furnish an estimate of the quantity of cane which will be required by the factory during the crushing season. The Cane Commissioner is obliged to examine every such estimate and publish the same with modification, if any. Section 13 casts a duty on the occupier to maintain a register of all such Cane Growers and Cane-Growers' Co-operative Societies which are required to sell cane to the factory. Section 14 empowers the State Government to make provision for survey of an area proposed to be reserved or assigned for supply of cane to a factory. Section 15 postulates declaration of reserved area and Section 16 provides for declaration of an assigned area. Under Section 19, the State Government has the power to issue an order for regulating the distribution, sale or purchase of cane in any reserved or assigned area and purchase of cane in any area other than the reserved or assigned area. Section 20 deals with the payment of price. Section 21 provides for payment, by the occupier, of a commission for every one maund of cane purchased by the factory. Section 22 gives power to the State Government to declare varieties of cane which are unsuitable for use in the factories. Chapter IV contains miscellaneous provisions including Section 30 under which the State Government is empowered to make rules for giving effect to the provisions of the Act. For the sake of reference, Sections 5, 6, 8, 15, 16, 19, 20 and 21 of the Sugarcane Act are reproduced below:

"**5. The Cane Development Council**.— (1) There shall be established, by notification for the reserved area of a

factory a Cane Development Council which shall be a body corporate by the name of such area or such other name as the State Government may notify in this behalf having perpetual succession, and subject to such restrictions or qualifications as may be imposed under this Act or any other enactment, vested with the capacity of suing and being sued in its corporate name, of acquiring, holding, administering and transferring property both movable and immovable, and of entering into contracts :

Provided that where the Cane Commissioner so directs, the Council may be established for a larger or smaller area than the reserved area of a factory.

(2) The area for which a Council is established shall be called a zone.

(3) to (6) xxxx xxxx xxxx

6. Functions of the Council.— (1) Functions of the Council shall be—

(a) to consider and approve the programme of development for the zone;

(b) to devise ways and means for the execution of the development plan in all its essentials such as cane varieties, cane-seed, sowing programme, fertilizers and manures;

(c) to undertake the development of irrigation and other agricultural facilities in the zone;

(d) to take necessary steps for the prevention and control of diseases and pests and to render all possible help in the soil extension work;

(e) to impart technical training to cultivators in matters relating to the production of cane;

(f) to administer the funds at its disposal for the execution of the development scheme subject to such conditions as may be prescribed; and

(g) to perform other prescribed functions pertaining and conducive to the general development of the zone.

(2) The State Government may at any time direct the Cane Commissioner to convene a joint meeting of two or more councils. Every such meeting shall be presided over by such person as may be nominated in that behalf by the State Government.

8. Council Fund.— (1) There shall be a fund at the disposal of the Council to meet the charges in connection with the discharge of its duties and performance of its functions under this Act.

(2) The fund of the Council shall consist of—

(a) grants, if any, made by the Indian Central Sugarcane Committee;

(b) grants, if any, made by the State Government;

(c) sums received by the Council by way of commission under Section 21; and

(d) any other sums which may be credited to it under the general or special orders of the State Government.

15. Declaration of reserved area. - Without prejudice to any order under clause (d) of sub-section (2) of Section 19, the Cane Commissioner may, after consulting in the prescribed manner, the occupier and Cane-growers' Co-operative Society, if any, in any area to be reserved for a

factory reserve such area for such factory and thereupon occupier thereof shall subject to provisions of Section 22 be liable to purchase all cane grown in such area which is offered for sale to the factory.

16. Declaration of assigned area.- Without prejudice to any order under clause (d) of sub-section (2) of Section 19, the Cane Commissioner may after consulting in the manner prescribed, the occupier and Cane-growers' Co-operative Society, if any, in any area to be assigned, assign such area for the purpose of the supply of cane to a factory in accordance with the provisions of Section 19 during any crushing season; and thereupon the occupier thereof shall subject to the provisions of Section 22 be liable to purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

19. Regulation of purchase and supply of cane in the reserved and assigned areas.- (1) The State Government may, for maintaining supplies, by order regulate—

(a) distribution, sale or purchase of cane in any reserved orassigned area; and

(b) purchase of cane in any area other than a reserved or assigned area.

(2) Without prejudice to the generality of the foregoing powers such order may provide for—

(a) the quantity of cane to be supplied by each Cane-groweror Cane-growers' Co-operative Society in such area to the factory for which the area has been so reserved or assigned;

(b) the manner in which cane grown in the reserved area orthe assigned area shall be purchased by the

factory for which the area has been so reserved or assigned and the circumstances in which the cane grown by a cane-grower shall not be purchased except through a Cane-growers' Co-operative Society;

(c) the form and terms and conditions of the agreement to beexecuted by the occupier of the factory for which an areais reserved or assigned for the purchase of cane offered for sale:

(d) the circumstances under which permission may be granted—

(i) for the purchase of cane grown in reserved or assigned area by a purchasing agent or any person other than the factory for which area has been reserved or assigned; and

(ii) for the sale of cane grown in a reserved or assigned area to any other person or factory other than the factory for which the area is reserved or assigned;

(e) such incidental and consequential matters as may appearto be necessary or desirable for this purpose.

20. Payment of cane price.- (1) The occupier shall make suitable provision to the satisfaction of the Collector for the payment of the price of cane.

(2) Upon the delivery of cane, the occupier shall, subject to the deductions specified in sub-section (2-a) be liable to pay immediately the price of the cane so supplied, together with all other sums connected therewith and where the supplies have been made through a purchasing agent, the purchasing agent shall similarly be liable in addition to the occupier.

(2-a) Where a Cane-grower or a Cane-growers' Co-operative Society, as the case may be, to whom price is payable under sub-section (1) has borrowed a loan for cane development from any agency notified by the State Government in this behalf, the occupier or the purchasing agent, as the case may be, shall be, on being authorised by that agency so to do, entitled to deduct from the price so payable, such amount as may be prescribed, towards the recovery of such loan and pay the same to the agency concerned forthwith.

(3) Where the person liable under sub-section (2) is in default in making the payment of the price for a period exceeding fourteen days from the date of delivery he shall also pay interest at the rate of 14-1/2 per cent, per annum from the said date of delivery upto the date of payment but the Cane Commissioner may, in any case, direct with the approval of the State Government that no interest shall be paid or be paid at such reduced rate as he may fix.

(4) The Cane Commissioner shall forward to the Collector a certificate under his signature specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier and the Collector, on receipt of such certificate, shall proceed to recover from such occupier the amount specified therein as if it were an arrear of land revenue together with further interest up to the date of recovery."

21. Commission on purchase of cane.— (1) There shall be paid by the occupier a commission for every one maund of cane purchased by the factory—

(a) where the purchase is made through a Cane-growers' Co-operative Society, the commission shall be payable to the Cane-growers' Co-operative Society and the Council insuch proportion as the State Government may declare;and

(b) where the purchase is made directly from the Cane-grower, the commission shall be payable to the Council.

(2) The commission payable under clauses (a) and (b) of sub-section (1) shall be at such rates as may be prescribed provided, however, that the rate fixed under clause (b) shall not exceed the rate at which the commission may be payable to the Council under clause (a).

(3) The provisions relating to payment, interest and recovery, including recovery as arrears of land revenue, applicable to price of cane shall mutatis mutandis apply to payment and recovery of commission under sub-section (1)."

11. In exercise of the power vested in it under Section 30 of the Sugarcane Act, the State Government framed the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Rules, 1959 (for short, 'the Rules'). Rules 2(f), 35, 36, 40, 41 and 43, which have bearing on these appeals, read as under:

"2(f) 'Purchasing Center' means any place at which cane is purchased, delivered, weighed or paid for and includes such portion of the premises of the factory as is used for any of these purposes.

35. At any purchasing centre adequate facilities for weighment shall be provided to the satisfaction of the Cane Commissioner by the occupier of a factory to avoid congestion and undue delay in weighment. Cane carts and trucks shall not be kept waiting for more than ten hours without adequate reasons.

Explanation.- A cart shall not be deemed to have been kept waiting unduly if the supplier of cane, having received instructions in writing to deliver cane on a certain day,

ignores such instructions or where the practice of issuing written instructions is in force, brings cane without receiving such instructions.

36. The occupier of a factory shall — (a) provide, metalled approaches from the public roads to the parking ground at the factory premises, from the parking ground to the cane carrier of factory, and metalled exits from the cane carrier to public roads, up to such distances as may be directed by the Cane Commissioner and keep the same in a proper state of repairs;

(b) provide to the satisfaction of the Cane Commissioner reasonable space with metalled tracks separated by railings or walls and properly lighted, for parking of carts waiting for weighment and keep the same in a proper state of hygienic cleanliness;

(c) provide shelter and drinking water facilities for both cartmen and bullocks at the factory gate and drinking water facilities at all purchasing centres as directed by the Cane Commissioner; and

(d) provide such other facilities as may be directed by the Cane Commissioner from time to time.

40. Payments of the price of cane shall be made on the recorded weight of the cane at the purchasing centre. The price shall be calculated to the nearest Naya Paisa.

41. Payments for cane shall be made only to the Cane-grower or his representative duly authorised by him in writing to receive payment or to a Cane-Growers' Co-operative Society.

43. The occupier of a factory or a purchasing agent shall not make any deduction from the amount due for cane sold to him by a Cane-grower or Cane-grower's Co-operative Society:

Provide that recovery of the dues of a Cane-growers' Co-operative Society may be made by deduction form the price payable for cane."

The Control Order

12. In exercise of the power vested in it under Section 3 of the EC Act, the Central Government framed the Control Order, the relevant provisions of which are reproduced below:

"2(g) 'price' means the price or the minimum price fixed by the Central Government, from time to time, for sugarcane delivered—

(i) to a sugar factory at the gate of the factory or at a sugar-cane purchasing centre;

(ii) to a khandsari unit;

3. Minimum price of sugarcane payable by producer of sugar.—(1) The Central Government may, after consultation with such authorities, bodies or associations as it may deem fit, by notification in the Official Gazette, from time to time, fix the minimum price of sugarcane to be paid by producers of sugar or their agents for the sugarcane purchased by them, having regard to—

(a) the cost of production of sugarcane;

(b) the return to the grower from alternative crops and the general trend of prices of agricultural commodities;

(c) the availability of sugar to the consumer at a fair price;

(d) the price at which sugar produced from sugarcane is sold by producers of sugar; and

(e) the recovery of sugar from sugarcane:

Provided that the Central Government or, with the approval

of the Central Government, the State Government, may, in such circumstances and subject to such conditions as specified in Clause 3-A, allow a suitable rebate in the price so fixed.

Explanation.—(1) Different prices may be fixed for different areas or different qualities or varieties of sugarcane.

(2) No person shall sell or agree to sell sugarcane to a producer of sugar or his agent, and no such producer or agent shall purchase or agree to purchase sugarcane, at a price lower than that fixed under sub-clause (1).

(3) Where a producer of sugar purchases any sugarcane from a grower of sugarcane or from a sugarcane growers' co-operative society, the producer shall, unless there is an agreement in writing to the contrary between the parties, pay within fourteen days from the date of delivery of the sugarcane to the seller or tender to him the price of the cane sold at the rate agreed to between the producer and the sugarcane grower or sugarcane growers' co-operative society or that fixed under sub-clause (1), as the case may be, either at the gate of the factory or at the cane collection centre or transfer or deposit the necessary amount in the bank account of the seller or the co-operative society, as the case may be.

(3-A) Where a producer of sugar or his agent fails to make payment for the sugarcane purchased within 14 days of the date of delivery, he shall pay interest on the amount due at the rate of 15 per cent per annum for the period of such delay beyond 14 days. Where payment of interest on delayed payment is made to a cane growers' society, the society shall pass on the interest to the cane growers concerned after deducting administrative charges, if any, permitted by the rules of the said society.

(4) to (6) xxxx xxxx xxxx

(7) In case, the price of the sugarcane remains unpaid on the last day of the sugar year in which cane supply was made to the factory on account of the suppliers of cane not coming forward with their claims therefor or for any other reason it shall be deposited by the producer of sugar with the Collector of the district in which the factory is situated, within three months of the close of the sugar year. The Collector shall pay, out of the amount so deposited, all claims, considered payable by him and preferred before him within three years of the close of the sugar year in which the cane was supplied to the factory. The amount still remaining undisbursed with the Collector, after meeting the claims from the suppliers, shall be credited by him to the Consolidated Fund of the State, immediately after the expiry of the time limit of 3 years within which claims therefor could be preferred by the suppliers. The State Government shall, as far as possible, utilise such amounts, for development of sugarcane in the State."

The Market Act

13. Initially, the State Legislature had enacted the Madhya Pradesh Agricultural Markets Act, 1960. After noticing certain defects in the scheme of that Act and with a view to ensure efficient functioning of the Market Committees which would benefit agriculturists and traders, a committee of the members of the State Legislature was formed in 1965. The recommendation made by the Committee for enactment of a new legislation was accepted by the State Government. Accordingly, the Market Act was enacted for better regulation of buying and selling of agricultural produce and for the establishment and proper administration of markets of agricultural produce in the State. The relevant provisions of the Market Act read as under:

"**2. Definitions.-** (1) In this Act, unless the context otherwise requires,

(a) "agricultural produce" means all produce of agriculture, horticulture, animal husbandry, apiculture, pisciculture, or forest as specified in the Schedule;

(b) to (f) xxxx xxxx xxxx

(g) "Market" means a market established under Section 4;

(h) "market area" means the area for which a market is established under Section 4;

(i) "market committee" means a committee constituted under Section 11;

(j) xxxx xxxx xxxx

(k) "market proper" in relation to a market yard means an area declared to be a market proper under clause (b) of sub-section (2) of Section 5;

(l) "market yard or sub-market yard" in relation to a market area means a specified place declared to be a market yard or sub-market yard under clause (a) of sub-section (2) of Section 5;

(m) to (p) xxxx xxxx xxxx

3. Notification of intention of regulating marketing of notified agricultural produce in specified area.—(1) Upon a representation made by local authority or by the growers of any agricultural produce within the area for which a market is proposed to be established or otherwise, the State Government may, by notification, and in such other manner as may be prescribed, declare its intention to establish a market for regulating the purchase and sale of agricultural produce in such area as may be specified in the notification.

(2) A notification under sub-section (1) shall state that any objection or suggestion which may be received by the State Government within a period of not less than one month to be specified in the notification shall be considered by the State Government.

4. Establishment of market and of regulation of marketing of notified agricultural produce therein.- After the expiry of the period specified in the notification issued under Section 3 and after considering such objections and suggestions, as may be received before such expiry and making such inquiry, if any, as may be necessary, the State Government may, by another notification, establish a market for the area specified in the notification under Section 3 or any portion thereof for the purpose of this Act in respect of the agricultural produce specified in the Schedule and the market so established shall be known by the name as may be specified in that notification.

5. Market yard and market proper.- (l)(a) In every market area,—

(i) there shall be a market yard; and

(ii) there may be more than one sub-market yards;

(b) for every market yard or sub-market yard there shall be a market proper.

(2) The State Government shall, as soon as may be, after the issue of notification under Section 4, by notification,—

(a) declare any specified place including any structure, enclosure, open place, or locality in the market area to be a market yard or sub-market yard, as the case may be; and

(b) declare in relation to such market yard or sub-market

yard as the case may be, any specified area in the market area to be a market proper.

7. Establishment of Market Committee and its incorporation.-

(1) For every market area, there shall be a Market Committee having jurisdiction over the entire market area.

(2) Every Market Committee shall be a body corporate by the name specified in the notification under Section 4. It shall have perpetual succession and a common seal and may sue and be sued in its corporate name and shall subject to such restrictions as are imposed by or under this Act, be competent to contract and to acquire, hold, lease, sell or otherwise transfer any property and to do all other things necessary for the purposes of this Act:

Provided that no immovable property shall be acquired without the prior permission of the Managing Director in writing;

Provided further that no immovable property shall be transferred by way of sale, lease or otherwise in a manner other than the manner prescribed in the rules made by the State Government for the purpose.

(3) Notwithstanding anything contained in any enactment for the time being in force, every Market Committee shall, for all purposes, be deemed to be a local authority.

19. Power to levy market fee.- (1) Every Market Committee shall levy market fee,—

(i) on the sale of notified agricultural produce whether brought from within the State or from outside the Stateinto the market area; and

(ii) on the notified agricultural produce whether brought

from within the State or from outside the State into themarket areas and used for processing;

at such rates as may be fixed by the State Government from time to time subject to a minimum rate of fifty paise and a maximum of two rupees for every one hundred rupees of the price in the manner prescribed:

Provided that no Market Committee other than the one in whose market area the notified agricultural produce is brought for sale or processing by an agriculturist or trader, as the case may be, for the first time shall levy such market fee.

(2) The market fees shall be payable by the buyer of the notified agricultural produce and shall not be deducted from the price payable to the seller:

Provided that where the buyer of a notified agricultural produce cannot be identified, all the fees shall be payable by the person who may have sold or brought the produce for sale in the market area:

Provided further that in case of commercial transaction between traders in the market area, the market fees shall be collected and paid by the seller:

Provided also that no fees shall be levied upto 31st March, 1990 on such agricultural produce as may be specified by the State Government by notification in this behalf if such produce has been sold outside the market yard or sub-market yard by an agriculturist to a co-operative society of which he is a member:

Provided also that for the agricultural produce brought in the market area for commercial transaction or for processing the market fee shall be deposited by the buyer or processor as the case may be, in the Market Committee office within fourteen days if the buyer or

processor has not submitted the permit issued under sub-section (6) of Section 19.

(3) to (5) xxxx xxxx xxxx

(6) No notified agricultural produce shall be removed out of the market yard, market proper or the market area as the case may be, except in accordance with a permit issued by the Market Committee, in such form and in such manner as may be prescribed by the bye-laws:

Provided that if any person removes or transports the processed product of notified agricultural produce from the market yard, market proper or the market area, as the case may be, such person shall carry with him the bill or cash memorandum issued under Section 43 of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (No. 5 of 1995).

(7) xxxx xxxx xxxx

31. Regulation of persons operating in market area.- No person shall, in respect of any notified agricultural produce, operate in the market area as commission agent, trader, broker, weighman, hammal, surveyor, warehouseman, owner or occupier of processing or pressing factories or such other market functionary except in accordance with the provisions of this Act and the rules and bye-laws made thereunder.

32. Power to grant licences.- (1) Every person specified in Section 31 who desires to operate in the market area shall apply to the Market Committee for grant of a licence or renewal thereof in such manner and within such period as may be prescribed by bye-laws.

(2) to (5) xxxx xxxx xxxx

36. Sale of notified agricultural produce in markets.- (1) All notified agricultural produce brought into the market proper for sale shall, subject to the provisions of sub-section (2), be sold in the market yard/yards specified for such produce or at such other place as provided in the bye-laws:

Provided that it shall not be necessary to bring agricultural produce under contract farming, in the market yard and it shall be sold at any other place to the person agreed to purchase the same under agreement.

(2) Such notified agricultural produce as may be purchased by the licensed traders from outside the market area in the course of commercial transaction may be brought and sold anywhere in market area in accordance with the provisions of the bye-laws.

(3) The price of the notified agricultural produce brought into the market yard for sale shall be settled by tender bid or open auction system and no deduction shall be made from the agreed price on any account whatsoever:

Provided that in the market yard the price of such notified agricultural produce of which support price has been declared by the State Government, shall not be settled below the price so declared and no bid shall be permitted to start, in the market yard, below the rate so fixed.

(4) Weighment or measurement of all the notified agricultural produce so purchased shall be done by such person and by such procedure as may be provided in the bye-laws or any other place specified by the Market Committee for the purpose:

Provided that the weighment, measurement or counting as the case may be, of Plantain, Papaya or any other perishable agricultural produce as may be specified by the State Government, by notification, shall be done by a licensed weighman in the place where such produce has been grown.

37. Conditions of buying and selling.- (1) Any person who buys notified agricultural produce in the market area shall execute an agreement in triplicate in such form as may be prescribed, in favour of the seller. One copy of the agreement shall be kept by the buyer, one copy shall be supplied to the seller and the remaining copy shall be kept in the record of the Market Committee.

(2) (a) The price of the agricultural produce bought in the market yard shall be paid on the same day to the seller at the market yard;

(b) In the case purchaser does not make payment under clause (a), he shall be liable to make additional payment at the rate of one percent per day of the total price of the agricultural produce payable to the seller within five days;

(c) In case the purchaser does not make payment with additional payment to the seller under clauses (a) and (b) above within five days from the day of such purchase, his licence shall be deemed to have been cancelled on the sixth day and he or his relative shall not be granted any licence under this Act for a period of one year from the date of such cancellation.

Explanation.- For the purpose of this clause "relative" means the relative as specified in the explanation in clause (a) of subsection (1) of Section 11.

(3) No wholesale transaction of notified agricultural produce shall be entered into directly by licensed traders with producers of such produce except in the market yards or such other place as provided in the bye-laws.

(4) to (5) xxxx xxxx xxxx

38. Market Committee Fund.- (1) All moneys received by a Market Committee shall be paid into a fund to be called,

"The Market Committee Fund" and all expenditure incurred by the Market Committee under or for the purposes of this Act shall be defrayed out of the said fund. Any surplus remaining with the Market Committee after such expenditure has been met, shall be invested in such manner as may be prescribed:

Provided that all such sums of money received by the Market Committee as security deposit, contributions to Provident Fund or for payment in respect of any notified agricultural produce, or charges payable to weighman, hammal and other functionaries shall not form part of Market Committee Fund but shall be accounted for separately.

(2) xxxx xxxx xxxx

39. Application of Market Committee Fund.- Subject to the provisions of Section 38, the Market Committee Fund may be expended for the following purposes only, namely,-

(i) the acquisition of a site or sites for the market yards;

(ii) the maintenance and improvement of the market yards;

(iii) the construction and repairs of buildings necessary for the purposes of the market and for convenience orsafety of the persons using the market yard;

(iv) the maintenance of standard weights and measures;

(v) xxxx xxxx xxxx

(vi) the payment of interest on the loans that may be raised for the purpose of the market and provisions of sinkingfund in respect of such loans;

(vii) the collection and dissemination or information relating to crops statistics and marketing of agriculturalproduce;

(viii) (a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(c) contribution to State Marketing Development Fund;

(d) meeting any expenditure for carrying out order of the State Government and any other work entrusted to Market Committee under any other Act;

(e) contribution to any scheme for increasing agricultural production and scientific storage;

(f) for development of market area in the manner prescribed;

(g) to educate or promote and undertake sale of agricultural inputs, for increasing production, with the prior sanctionof Managing Director;

(gg) to undertake development of Haat Bazars for marketing of agricultural produce;

(h) xxxx xxxx xxxx

(ix) any other purpose whereon the expenditure of the Market Committee Fund is in the public interest, subject to the prior sanction of the State Government.

43. State Marketing Development Fund.-(l) Every Market Committee shall pay on the 10th day of every month to the Board at such percentage of its gross receipts comprising of licence fees and market fees as the State Government may, by notification, declare from time to time. The amount so paid and collected shall be called "Madhya Pradesh State Marketing Development Fund".

(2) to (7) xxxx xxxx xxxx

44. Purposes for which Madhya Pradesh State Marketing Development Fund shall be expended.- The Madhya Pradesh State Marketing Development Fund shall be utilised by the Board for the following purposes, namely,-

(i) market survey and research, grading and standardizationof agricultural produce and other allied subjects;

(ii) propaganda and publicity and extension serviceson the matters relating to general improvement of conditions of buying and selling of agricultural produces;

(iii) (a) construction of minimum infrastructure as prescribed by the Board in the market yard or sub-market yard established for the first time and for giving grant to the extent of two lakh rupees to defray the establishment expenses;

(b) giving aid to financially weak Market Committees the State in the form of loans and or grants;

(c) loans to any Market Committee for development of market yard and/or sub-market yard, construction of cold storage, godown or warehouses, distribution of plant protection equipments and other purpose as may be considered desirable;

(iv) acquisition or constructions or hiring by lease or otherwise of buildings or land for performing the duties of the Board;

(v) xxxx xxxxxxxx

(vi) xxxx xxxx xxxx

(vii) better control of Market Committee;

(viii) xxxx xxxx xxxx

(ix) imparting education in regulated marketing of agricultural produce;

(x) training the agriculturists, officers and staff of the Market Committees;

(x-a) provision of technical assistance to the Market Committees in the preparation of site plans and estimates of construction and in the preparation of project reports or master plans for development of market yard;

(x-b) xxxx xxxx xxxx

(x-c) marketing the sale of agricultural inputs for increasing agricultural production in the market areas;

(x-d) development of Haat Bazars for marketing of agricultural produce and construction of infrastructure for facilitating the flow of notified agricultural produce in the market area;

(x-e) xxxx xxxx xxxx

(x-f) xxxx xxxx xxxx

(x-g) development of testing and communication infrastructure relevant to agriculture and allied sectors.

(xi) any other purposes of general interest to regulate marketing of agricultural produce."

Analysis

14. The primary object of the Sugarcane Act is to ensure adequate supply of cane to the factories and timely payment of price to the cultivators. The Act contains comprehensive provisions for making available sugarcane to the factories and

protection of the rights of Cane Growers to get adequate remuneration for their labour. Under Section 15, the Commissioner is empowered to declare any area to be reserved for any particular factory and once such declaration is made, the occupier of the factory is bound to purchase cane grown in that area which is offered for sale to the factory. Likewise, under Section 16, the Commissioner can make a declaration that any area shall be an assigned area for the purpose of supply of cane to a factory and, in that event, the factory is required to purchase the specified quantity of cane grown in that area. For achieving the object of maintaining supplies, the State Government can pass an order under Section 19 for regulating distribution, sale or purchase of cane in any reserved or assigned area; and purchase of cane in any area other than a reserved or assigned area. In such an order, the State Government can specify the quantity of cane to be supplied by each Cane Grower or Cane-Growers' Co-operative Society to the factory for which the particular area has been reserved or assigned, the manner of purchase by the factory, details of the sale agreements and grant of permission for sale and purchase. Section 20 mandates that payment for the cane shall be made by the occupier immediately upon delivery and only such deductions as authorised in lieu of loans can be made. The Development Council established under Section 5(1) has been assigned various functions enumerated in Section 6 for ensuring proper development of the zone. The Development Council is required to devise ways and means for the execution of the development plan which includes cane varieties, cane-seed, sowing programme, fertilizer and manure; development of irrigation and other agricultural facilities; prevention and control of diseases and pests, soil extension work and training to cultivators in matters relating to the production of sugarcane. One of the components of the fund required for the Council is the commission received by it under Section 21 from the occupiers of the factory for every maund of cane purchased. The rules framed under Section 30 of the Sugarcane Act help in achieving the objectives of the Act. Rule

35 mandates the occupier to provide facilities for weighment at the purchasing centre so that there is no congestion and undue delay in weighment. Rule 36 requires that the occupier should provide metalled approaches and exits to the parking area in the factory and shelter and drinking water at the purchasing centres. Rules 40, 41 and 43 ensure payment of the price of cane by the occupier to the factory or the purchasing agent without any deduction.

15. The Control Order deals with the fixation of minimum price of sugarcane to Cane Growers or Cane Growers' Co-operative Societies. Clause 3(1) of the Control Order empowers the Central Government to fix the minimum price of sugarcane to be paid by the producers of sugar or their agents for the sugarcane purchased by them. For this purpose, the Central Government is required to take into account the cost of production of sugarcane; return to the grower from alternative crop and the general trend of prices of agricultural commodities; the availability of sugar to the consumers at a fair price; the price at which sugar is sold by producers of sugar; and the recovery of sugar from sugarcane. Clause 3(2) mandates that no person shall sell or agree to sell sugarcane and no producer or his agent shall purchase or agree to purchase sugarcane at a price lower than the minimum price. Clauses 3(3) and (3-A) mandate payment of the price of cane within 14 days from the date of delivery and levy interest at the rate of 15% per annum for the period of delay beyond 14 days.

16. The Market Act was enacted to regulate the transactions involving the sale and purchase of agricultural produce with the aim of preventing exploitation of the agriculturists and the establishment and proper administration of markets of agricultural produce in the State. Section 4 read with Section 3 provides for the establishment of a market for the area specified in the notification issued under Section 3 for regulating the purchase and sale of agricultural produce in such area. Once a market is established for the particular area, the

prohibition contained in Section 6(a) and (b) against the setting up, establishment, continuance or use of any place in the market area for the marketing of any notified agricultural produce comes into play and no person can use any place in the market area for the marketing of the notified agricultural produce or operate in the market area as a market functionary. Proviso to this section carves out certain exceptions regarding the sale or purchase of agricultural produce not exceeding four quintals at a time for domestic consumption, etc. Section 5(1)(a) read with Section 5(2) lays down that in every market area there shall be a market yard and there may be more than one sub-market yards. Section 5(1)(b) read with Section 5(2) declares that for every market yard or sub-market yard there shall be a market proper. In terms of Section 7(1), a Market Committee is required to be established for every market area. Section 7(2) declares that every Market Committee shall be a body corporate. Section 7(3) contains a deeming provision by which every Market Committee is treated as a local authority. Section 17 specifies the powers and duties of a Market Committee. Section 19(1) casts a duty upon every Market Committee to levy market fee on the sale of notified agricultural produce whether brought from within the State or from outside the State into the market area and on the notified agricultural produce whether brought from within the State or from outside the State into the market area and used for processing. Under Section 19(2), the market fee is payable by the buyer of such produce and is not to be deducted from the price payable to the seller. It is only if the buyer of the produce cannot be identified that all fees are payable by the seller or by the person who brought the produce for sale in the market area, provided further that in case of a commercial transaction between traders in the market area, the market fees are to be collected and paid by the seller. Section 19(6) provides that no notified agricultural produce shall be removed out of the market yard, market proper or the market area except in accordance with a permit issued by the Market Committee. Section 32 empowers the Market Committee to grant licence to any person who desires to

operate in the market area. Section 36(1) provides that all notified produce brought into the market proper for sale shall be sold in the market yard/yards specified for such produce. Proviso to this Section, which was added by MP Act No. 15 of 2003, carves out an exception in respect of agricultural produce under contract farming and lays down that it shall not be necessary to bring such produce in the market yard and it can be sold at any other place to the person who has agreed to purchase the same under an agreement. Section 36(2) carves out another exception and lays down that the produce purchased from outside the market area by licenced traders in the course of a commercial transaction may be bought and sold anywhere in the market area in accordance with the bye-laws. Section 36(3) lays down that the price of the notified agricultural produce brought into the market yard for sale shall be settled by tender bid or open auction system and no deduction shall be made from the agreed price on any account whatsoever. Proviso to this sub-section lays down that where support price of any notified agricultural produce has been declared by the State Government, the price shall not be settled below the support price and no bid shall be permitted below such price. Section 36(4) provides for weighment or measurement of the notified agricultural produce purchased under other sub-sections of this section. Section 37(1) mandates execution of an agreement by any person who buys agricultural produce in the market area. In terms of Section 37(2)(a), the price of the agricultural produce bought in the market yard is required to be paid on the same day to the seller at the market yard. If the purchaser fails to make payment in accordance with Section 37(2)(a), then he has to make additional payment at the rate of 1% per day of the total price of the agricultural produce. In case of further delay of more than 5 days, his licence stands cancelled with a bar on grant of further licence to him or his relative. Section 38(1) provides that all monies received by a Market Committee including market fee shall be paid into "the Market Committee Fund", which is to be utilized for the purposes specified in Section 39 which

include, the acquisition of a site or sites for the market yards; the maintenance and improvement of the market yards; the construction and repairs of buildings of the market; the maintenance of standard weights and measures; contribution to any scheme for increasing agricultural production and scientific storage; development of market area in the manner prescribed and development of Haat Bazars for agricultural produce. In terms of Section 43(1), every Market Committee is required to pay to the State Agricultural Marketing Board a specified percentage of its gross receipts comprising of licence fee or market fee, as may be notified by the State Government. This amount is called Madhya Pradesh State Marketing Development Fund and is to be used for the purposes specified in Section 44, which include, market survey and research, grading and standardization of agricultural produce and other allied subjects; construction of minimum infrastructure in the market yard or sub-market yard established for the first time; grant of loan to Market Committees for development of market yard/sub-market yard; construction of cold storage, godown or warehouses, distribution of plant protection equipments; acquisition or construction or hiring by lease or otherwise of buildings or land for the Board; imparting education in regulated marketing of agricultural produce; training the agriculturists, officers and staff of the Market Committees; provision of technical assistance to the Market Committees in the preparation of site plans and estimates of construction and in the preparation of project reports/master plan for development of market yard; development of Haat Bazars for marketing of agricultural produce; construction of infrastructure for facilitating the flow of notified agricultural produce in the market area; and development of testing and communication infrastructure relevant to agricultural and allied sectors.

17. The above analysis of the provisions of the Sugarcane Act and the Control Order along with the Market Act brings to fore the conflict between the three statutes insofar as they relate to the transactions involving sale of sugarcane by Cane

Growers / Cane Growers' Co-operative Societies to the occupiers of factories. While the Sugarcane Act and the Rules framed thereunder constitute a complete code for regulating the supply of sugarcane by Cane Growers and Cane Growers' Co-operative Societies to the occupiers of the factories at the purchasing centres established and maintained by them and payment of price without delay, the Market Act regulates sale and purchase of notified agricultural produce in the market yards specified for the particular produce or at other places provided in the bye-laws and mandates that the price of the notified agricultural produce should be settled by tender bid or open auction system. (Sugarcane was included in the Schedule w.e.f. 7.6.1979 by M.P.Act No.18/1997). The Control Order not only lays down the mechanism for determination of the minimum price of sugarcane payable by the producers of sugar or their agents for the sugarcane purchased by them, but also prescribes the mode of payment of the price. The Sugarcane Act and the Rules framed thereunder also prescribe the mode of payment of the price by the occupier of the factory. Likewise, the Market Act contains provisions for payment of the price of the notified agricultural produce brought into the market yard for sale. It is thus evident that so far as sugarcane is concerned, there is direct conflict between the provisions of the Sugarcane Act and the Market Act both, in matters relating to sale and purchase of sugarcane, and, payment of price. Likewise, there is conflict between the Control Order and the Market Act in the matter of determination of price of the sugarcane and mode of payment.

18. The argument of Shri Tankha and Shri Banthia that the Sugarcane Act and the Control Order are silent on the issue of levy of market fee on transactions involving the purchase of sugarcane by the factories within the market areas and, therefore, the provisions contained in Sections 19 and 36 of the Market Act would prevail and the High Court committed an error by applying the ratio of the judgment in *Belsund Sugar Co. Ltd. v. State of Bihar* (supra) sounds attractive, but we have

not felt persuaded to agree with them because the Sugarcane Act is a special statute enacted for regulating the supply and purchase of sugarcane to the factories and covers the entire spectrum of the transactions involving sale and purchase of sugarcane. The Sugarcane Act and the Rules framed thereunder cast a duty on the occupier of the factory to provide amenities and facilities for supply of cane at the purchasing centres from factory premises and pay the price of cane without any tangible delay. The occupier is also obliged to pay commission under Section 21 which becomes part of the Council Fund and is utilised for overall development of the production of sugarcane by providing better varieties of seeds, fertilizers and manures, devising appropriate sowing programme, improving irrigation and other facilities and taking steps for prevention and control of diseases and pesticides. The Council Fund is also to be invested for imparting technical training to cultivators in matters relating to the production of cane. The mechanism for fixing the minimum price of cane is contained in Clause 3 of the Control Order and the mode of payment of the price is contained both in the Sugarcane Act and the Control Order. The Market Act contains a comprehensive mechanism for establishment of market area and Market Committee having jurisdiction over such area, market yard/sub-market yard and market proper. Section 19 which obligates every Market Committee to levy market fee, which is payable by the producer on the sale of notified agricultural produce finds place in Chapter IV (Conduct of Business and Powers and Duties of Market Committee). Proviso to sub-section (2) thereof also postulates payment / collection of market fee from the seller in certain contingencies. The sale of notified agricultural produce in the markets is governed by Section 36 which finds place in Chapter VI of the Market Act (Regulation of Trading). That section mandates that all notified agricultural produce brought into the market proper for sale shall be sold in the market yard/yards specified for such produce or at such other places as provided in the bye-laws. Sub-section (3) of Section 36 contains the mechanism for

determination of price on notified agricultural produce brought for sale into the market yard by tender bid or open auction. Section 37(2) provides for payment of price of the agricultural produce on the same day but only in relation to the produce bought in the market yard. These provisions are irreconcilable with those contained in Section 19 read with Sections 15 and 16 of the Sugarcane Act and Clause 3 of the Control Order. Sections 38 and 43 of the Market Act talk of 'Market Committee Fund' and 'State Marketing Development Fund' which are to be used for overall development of market areas. The benefit of development of market areas and other activities undertaken by the Market Committees and the State Marketing Board is available to all the agriculturists who sell their produce in the market yards/sub-market yards and buyers of such produce in accordance with Section 36 of the Market Act and no special facility is provided to the Cane Growers and the occupiers of the factories who purchase sugarcane at the purchasing centres or within the factory premises. Rather, the Development Council constituted under Section 5 of the Sugarcane Act is required to spend funds, which include the commission paid by the occupier for every maund of cane purchased by the factory on overall development of the zone and take measures for improvement of the production of sugarcane by ensuring supply of quality seeds, fertilizer and manure to the Cane Growers and improving the soil quality and irrigation facilities. Therefore, even though the Market Act is a subsequent legislation and one of its objectives is to regulate buying and selling of agricultural produce including sugarcane, the general provisions contained therein cannot prevail over the Sugarcane Act and the Control Order, which are special legislations exclusively dealing with issues relating to increase in the production of sugarcane, supply of sugarcane by Cane Growers/Cane Growers Cooperative Societies to the factories from any reserved or assigned area or otherwise and payment of the price of cane by the occupier of the factory.

19. Though, there is no significant difference in the Control

Order and the Market Act insofar as the mode of payment of the price of sugarcane is concerned, but the mechanism enshrined in the two statutes for determination of price is vastly different. The Control Order envisages fixation of the minimum price of sugarcane by the Central Government after considering the factors enumerated in Clause 3 and consulting such authorities, bodies or associations as it may think fit and the producer of sugar is bound to pay at least that price to Cane Growers/Cane Growers Cooperative Societies. As against this, the Market Act postulates determination of the price of the notified agricultural produce (sugarcane is only one of such produce) brought into the market yard for sale under Section 36(3) by tender bid or open auction. In that exercise, the State Government/the concerned Market Committee does not have any role to play. Of course, such price cannot be less than the support price declared by the State Government. This difference also indicates that the Control Order is a special legislation vis-à-vis the Market Act.

20. We shall now deal with two of the many judgments relied upon by the learned counsel for the parties. In *Belsund Sugar Co. Ltd v. State of Bihar* (supra), the Constitution Bench considered the legality of levy of market fee under the Bihar Agricultural Produce Markets Act, 1960 on the transactions relating to sale and purchase of sugarcane by the sugar factories. The Constitution Bench first considered Entries 26, 27, 28 and 33 of List II of the Seventh Schedule of the Constitution and observed:

> "In the first instance, we shall deal with the transactions of purchase of sugarcane by the sugar factories functioning in the market areas falling within the jurisdiction of respective Market Committees constituted under the Market Act. The Market Act has been enacted by the Bihar Legislature as per the legislative power vested in it by Entries 26, 27 and 28 of List II of the Seventh Schedule of the Constitution. These entries read as under:

"26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.

28. Markets and fairs."

It becomes at once clear that if location of markets and fairs simpliciter and the management and maintenance thereof are only contemplated by the Market Act, then they would fall squarely within the topic of legislative power envisaged by Entry 28 of List II. However, the Market Act, as we will presently show, deals with supply and distribution of goods as well as trade and commerce therein as it seeks to regulate the sale and purchase of agricultural produce to be carried on in the specified markets under the Act. To that extent the provisions of Entry 33 of List III override the legislative powers of the State Legislature in connection with legislations dealing with trade and commerce in, and the production, supply and distribution of, goods. Once we turn to Entry 33 of the Concurrent List, we find that on the topic of trade and commerce in, and the production, supply and distribution of, goods enumerated therein at sub-clause (b), we find listed items of foodstuffs, including edible oilseeds and oils. Thus to the extent to which the Market Act seeks to regulate the transactions of sale and purchase of sugarcane and sugar which are foodstuffs and trade and commerce therein, it has to be held that the Market Act being enacted under the topics of legislative powers under Entries 26, 27 and 28 of List II will be subject to any other legislation under Entry 33 of the Concurrent List. As it will be seen hereinafter, the Bihar Legislature itself has enacted the Sugarcane Act in exercise of its legislative powers under Entry 33 of the Concurrent List and, therefore, the field covered by the Sugarcane Act would

obviously remain exclusively governed by the Sugarcane Act and to the extent the latter Act carves out an independent field for its operation, the sweep of the general field covered by the Market Act which covers all types of agricultural produce, would pro tanto get excluded qua sugarcane and the products prepared out of it."

The Constitution Bench then took congnizance of the fact that the Bihar Sugarcane Act, 1981 was a later enactment, referred to the provisions of that Act and proceeded to observe:

"The aforesaid provisions of the Sugarcane Act leave no room for doubt that the Bihar Legislature in its wisdom has enacted a special machinery for regulating the purchase and sale of sugarcane to be supplied to sugar factories for manufacturing sugar out of the sugarcane produced for them in the reserved area. The relevant provisions of the Act project a well-knit and exhaustive machinery for regulating the production, purchase and sale of sugarcane for being supplied as appropriate raw material to the factories manufacturing sugar and molasses out of them.

The aforesaid provisions, therefore, clearly indicate that the need for regulating the purchase, sale, storage and processing of sugarcane, being an "agricultural produce", is completely met by the comprehensive machinery provided by the Sugarcane Act enacted by the very same legislature which enacted the general Act being the Market Act.

Once that conclusion is reached, it becomes obvious that the Market Act which is an enabling Act empowering the State authorities to extend the regulatory net of the said Act to notified agricultural produce as per Section 3(1) will get its general sweep curtailed to the extent the special Act being the Sugarcane Act enacted by the very same legislature carves out a special field and provides special machinery for regulating the purchase and sale of the

specified "agricultural produce", namely, sugarcane. It has also to be kept in view that the very heart of the Market Act is Section 15 of the Act which reads as under:

"15. Sale of agricultural produce.—(1) No agricultural produce specified in notification under sub-section (1) of Section 4, shall be made, bought or sold by any person at any place within the market area other than the relevant principal market yard or sub-market yard or yards established therein, except such quantity as may on this behalf be prescribed for retail sale or personal consumption.

(2) The sale and purchase of such agricultural produce in such areas shall notwithstanding anything contained in any law be made by means of open auction or tender system except in cases of such class or description of produce as may be exempted by the Board."

It is this section which enables the Market Committee concerned to monitor and regulate the sale and purchase of the agricultural commodity which is covered by the protective umbrella of the Act. Once such an agricultural produce is brought for sale in the market yard or sub-market yard, the sale is to be effected by auction or by inviting tenders. Such a scheme is in direct conflict with the scheme of the Sugarcane Act wherein there is no question of a sugar factory being called upon to enter into a public auction for purchasing sugarcane which is specially earmarked for it out of the reserved area. In fact, the provisions of the Sugarcane Act and the provisions of the Market Act, especially Section 15 read with Section 3(1), cannot harmoniously coexist."

After further discussion, the Court observed:

"It must, therefore, be held that the entire machinery of the Market Act cannot apply to the transactions of purchase of sugarcane by the appellant Sugar Factories as they are fully covered by the special provisions of the Sugarcane Act. It is also necessary to note that if both these Acts are treated to be simultaneously applying to cover sale and purchase of sugarcane, the possibility of a clear conflict of decisions of officers and authorities acting under the Sugarcane Act on the one hand and the Market Act on the other would arise. These authorities acting under both the State Acts, dealing with the same subject-matter and covering the same transactions may come to independent diverse conclusions and none of them being subordinate to the other may create a situation wherein there may be a head-on collision between the decisions and the orders of these authorities acting on their own in the hierarchy of the respective statutory provisions. For example, the Marketing Inspector may find that weighment of sugarcane was not proper at a given point of time, while the Cane Officer may find to the contrary. In the hierarchy of proceedings under the Market Act the Market Committee may take one decision with respect to the same subject-matter, for which the Collector exercising appellate powers under the Sugarcane Act may take a contrary decision. This would create an irreconcilable conflict of decisions with consequential confusion. So far as the buyers and sellers of "agricultural produce — sugarcane" are concerned, it is of no avail to contend as submitted by learned counsel for the respondents that for avoiding such conflicts, Section 15 is dispensed with by the State in exercise of its power under Section 42 of the Market Act, whether such an exemption can be granted by the State under Section 42 or not is not a relevant consideration for deciding the moot question whether the statutory scheme of the Market Act can harmoniously coexist with the statutory scheme of the Sugarcane Act as enacted by the very same legislature. It is possible to visualise that the State authorities may not exercise powers under Section

42 of the Act. In such an eventuality, the Sugarcane Act would not countenance a public auction of sugarcane to be supplied by the cane-grower to the earmarked factory for which sugarcane is grown in the reserved area. On the other hand, the Market Act would require the very same sugarcane to be brought to the market yard for being sold at the public auction to the highest bidder who may not be the sugar factory itself. Thus what is reserved for the sugar factory by way of raw material by the Sugarcane Act would get dereserved by the sweep of Section 15 of the Market Act. To avoid such a head-on conflict, it has to be held that the Market Act is a general Act covering all types of agricultural produce listed in the Schedule to the Act, but out of the listed items if any of the "agricultural produce" like sugarcane is made the subject-matter of a special enactment laying down an independent exclusive machinery for regulating sale, purchase and storage of such a commodity under a special Act, then the special Act would prevail over the general Act for that commodity and by necessary implication will take the said commodity out of the sweep of the general Act. Therefore, learned counsel for the appellants are right when they submit that because of the Sugarcane Act the regulation of sale and purchase of sugarcane has to be carried out exclusively under the Sugarcane Act and the said transactions would be out of the general sweep of the Market Act. None of its machinery would be available to regulate these transactions."

The Constitution Bench also considered the provisions of the Control Order and observed:

"It has to be appreciated that the aforesaid provisions of the Sugarcane (Control) Order operate in the same field in which the Bihar legislative enactment, namely, the Sugarcane Act operates and both of them are complementary to each other. When taken together, they

wholly occupy the field of regulation of price of sugarcane and also the mode and manner in which sugarcane has to be supplied and distributed to the earmarked sugar factories and thus lay down a comprehensive scheme of regulating purchase and sale of sugarcane to be supplied by sugarcane-growers to the earmarked sugar factories. It is, however, true that a comprehensive procedure or machinery for enforcing these provisions is found in greater detail in the Sugarcane Act of the Bihar Legislature. But on a combined operation of both these provisions, it becomes at once clear that the general provisions of the Market Act so far as the regulation of sale and purchase of sugarcane is concerned get obviously excluded and superseded by these special provisions."

21. In *H.S. Jayanna v. State of Karnataka* (supra), the appellants had challenged the levy of market fee on rice by the Marketing Committees constituted under the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 on the ground that the provisions of the Act are repugnant to those contained in the Karnataka Rice Procurement (Levy) Order, 1984 framed under the Essential Commodities Act. The learned Single Judge allowed the writ petitions filed by the appellants but his order was reversed by the Division Bench. Before this Court, reliance was placed on the judgment in *Belsund Sugar Co. Ltd. v. State of Bihar* (supra) in support of the argument that the provisions of the State Act were inconsistent with those contained in the Control Order. The two Judge Bench extensively referred to the findings and conclusions recorded in *Belsund Sugar Co. Ltd.* case (supra) and proceeded to observe:

"We have no hesitation in concluding that the entire field of regulating the purchase and sale of paddy or the rice produced out of paddy is not covered under the Control Order. The provisions of the Marketing Act do not trench up the field covered by the Control Order. There is no

inconsistency between the Control Order and the Marketing Act. They do not cover the same field and therefore the question of any inconsistency, repugnancy or the Marketing Act being ineffectual in terms of Section 6 of the Essential Commodities Act in view of the Control Order issued under Section 3 of the Essential Commodities Act would not arise. The Control Order deals with the compulsory acquisition of 1/3rd of rice of each variety produced by a miller at a purchase price fixed by the Government. It requires the miller to supply to the Government or its purchase agent and deliver the procured rice at a notified place. *It does not deal with the sale and purchase of the remaining 2/3rd rice except that the miller is not permitted to remove the stock of rice from the mill premises without delivery of rice to the Government or its purchase agent and without obtaining a release certificate required to be taken under clause 8 of the said Order. It does not deal with the marketing or the facilities to be provided to the grower, seller and purchaser of paddy in the market area or to the seller or purchaser of rice. The Control Order is thus limited in operation.* The Marketing Act provides for the regulation of marketing of agricultural produce (which rice is) and the establishment and administration of markets for agricultural produce and matters connected therewith in the State of Karnataka. *The Marketing Act deals with the entire gamut of marketing of agricultural produce starting from the establishment of the Market Committees, markets, declaration of market area, market yard, market sub-yard, regulation of marketing of specified agricultural produce therein and for obtaining a licence under the Act, the process of appointing/electing the Market Committees, the powers and duties of the Market Committee [Section 63(1)], the facilities to be provided by the Market Committee [Section 63(2)] and the levy of market fee (Section 65).* The Marketing Act does not deal with any of the provisions made in the Control Order. *The Control Order and the Marketing Act do deal*

with the same subject but do not cover the same field. There is no conflict between them. They do not occupy the same field."

(emphasis supplied)

22. In our view, the above extracted observations do not help the appellants. Rather, they support the conclusion recorded by us that the entire field of the sale and purchase of sugarcane is covered by the Sugarcane Act and the Control Order, which are special legislations and the provisions contained in the Market Act, which generally deal with sale and purchase of agricultural produce specified in the Schedule cannot be invoked for compelling the occupier of a factory engaged in the manufacture of sugar to take licence under Section 31 read with Section 32 and pay market fee in terms of Section 19 thereof because the same are in direct conflict with the provisions contained in the Sugarcane Act and the Control Order.

23. The argument of the learned senior counsel appearing for the appellants that the provisions of the Control Order cannot prevail over the Market Act because the same was enforced after receiving Presidential assent merits rejection. The reasons for this conclusion of ours are:

(i) In the counter filed before the High Court, no such plea was raised and no document was produced to show that the Market Act was reserved for Presidential Assent on the ground that the provisions contained therein are in conflict with those contained in the Control Order.

(ii) It was not argued before the High Court that the President had been apprised of the conflict between the Control Order and the Market Act and he accorded assent after considering this fact.

(iii) It also deserves to be mentioned that during the course

of hearing, this Court had after taking cognizance of the aforesaid argument, directed Shri B. S. Banthia, learned counsel for the State of Madhya Pradesh to produce the record to show as to in what context the Market Act was reserved for Presidential assent. After the judgment was reserved, Shri Banthia handed over an envelope containing File No.17/62/73-Judicial of the Ministry of Home Affairs, perusal of which reveals that the request of the State Government for Presidential assent was processed by the Ministry of Home Affairs. In the first instance, the Departments of Agriculture, Food and Internal Trade as also the Planning Commission were asked to offer their comments. The Department of Agriculture conveyed no-objection but wanted its suggestions to be incorporated in the Bill. The others did not offer any comment. Thereafter, the Joint Secretary (Home) recorded a note that the suggestions given by the Agriculture Department will be sent to the State Government for consideration. He also prepared the following summary for consideration of the President:

"S U M M A R Y

The Madhya Pradesh Krishi Upaj Mandi Vidheyak, 1972.

The Madhya Pradesh Agricultural Produce Markets Act, 1960 has been in force in the State since October, 1960. During the operation of the Act for the last twelve years, the number of agricultural market committees has risen from 87 to 230. The working of the Act has revealed certain shortcomings and it was considered desirable by the State Government to review the Act in order to ensure efficient working of the market committees to the best advantage of the agriculturists as well as traders. A committee was constituted by the State Government for the purpose and the committee recommended revision of the Act of 1960. Hence the State Government have got passed the present Bill.

2. The salient feature of the Bill are as follows:

(i) Establishment of markets for the specified areas and of regulation of marketing of notified agricultural produce therein.

(ii) Establishment of market committee for every market area and constitution of State Marketing Service to secure efficient administration of market committees.

(iii) Constitution of the Madhya Pradesh State Agricultural Marketing Board at the State level to coordinate the work of market committees in the State and to advise the State Government.

(iv) Election of Chairman of market committee from amongst the representatives of agriculturists.

(v) Provision for deterrent punishment for resorting to trade malpractices by market functionaries in the market area.

3. Having regard to the provisions of article 31(3), 254(2) and 304 of the Constitution of India, the Governor of Madhya Pradesh has reserved the Bill for the consideration and assent of the President.

4. The Department of Agriculture, Department of Food, Planning Commission and the Department of Internal Trade who were consulted have no objection to the assent of the President being given to the Bill. The Department of Agriculture have, however, suggested that the details of the composition of the State Marketing Board, which have not been given in the Bill, should be specified in the Bill. This suggestion will be communicated to the State Government. The Ministry of Law who were consulted do not see any objection to the assent of the President being given to the Bill from the legal and constitutional point of view.

Accordingly, if the Minister approves, the Bill may be recommended to the President for his assent.

(Sd/-)
(P.P. Nayyar)
Joint Secretary."

24. From the summary reproduced hereinabove, it is clear that the State Government had not reserved the Market Act for Presidential assent on the ground of any repugnancy between the provisions of that Act and the Control Order. As a matter of fact, the State Government could not have even thought of any repugnancy between these statutes because at the relevant time, sugarcane was not treated as an agricultural produce and was not included in the Schedule appended to the Market Act.

25. The nature and scope of Presidential assent under Article 254(2) of the Constitution was considered by the Constitution Bench in *Gram Panchayat of Village Jamalpur v. Malwinder Singh* (supra). In that case, it was argued that the President's assent to Section 3(a) of the Punjab Village Common Lands (Regulation) Act, 1953 would give it precedence over the Administration of Evacuee Property Act, 1950, which was enacted by Parliament. The Constitution Bench held that the assent of the President under Article 254(2) of the Constitution is not an empty formality and the President has to be apprised of the reason why his assent was being sought. The Constitution Bench further held that if the assent is sought for a specific purpose, the efficacy of assent would be limited to that purpose and cannot be extended beyond it. The relevant observations made on this issue are contained in Para 12, which is extracted below:

"12. The Punjab Act of 1953 was reserved for consideration of the President and received his assent on December 26, 1953. Prima facie, by reason of the assent of the President, the Punjab Act would prevail in the State of Punjab over the Act of the Parliament and the Panchayats would be at liberty to deal with the Shamlat-deh lands according to the relevant Rules or bye-laws governing the matter, including the evacuee interest therein. But, there is a complication of some nicety arising out of the fact that the Punjab Act was reserved for the assent of the President, though for the specific and limited purpose of Articles 31 and 31-A of the Constitution. Article 31, which was deleted by the Constitution (Forty-fourth Amendment) Act, 1978 provided for compulsory acquisition of property. Clause (3) of that article provided that, no law referred to in clause (2), made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent. Article 31-A confers protection upon laws falling within clauses (a) to (e) of that article, provided that such laws, if made by a State Legislature, have received the assent of the President. Clause (a) of Article 31-A comprehends laws of agrarian reform. Since the Punjab Act of 1953 extinguished all private interests in Shamlat-deh lands and vested those lands in the Village Panchayats and since, the Act was a measure of agrarian reform, it was reserved for the consideration of the President. *The judgment of the High Court shows that the hearing of the writ petitions was adjourned to enable the State Government to place material before the Court showing the purpose for which the Punjab Act of 1953 was forwarded to the President for his assent. The record shows, and it was not disputed either before us or in the High Court, that the Act was not reserved for the assent of the President on the ground that it was repugnant to an earlier Act passed by the Parliament, namely, the Central Act of 1950. In these circumstances, we agree with the High Court that the Punjab Act of 1953 cannot be said to have been reserved for the assent of the President within the meaning of clause (2) of Article 254 of the Constitution insofar as its repugnancy with the Central Act of 1950 is concerned. 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. Not only was the President not apprised in the instant case that his assent was sought because of the repugnancy between the State Act and the pre-existing Central Act on the vesting of evacuee properties but, his assent was sought for a different, specific purpose altogether. Therefore, that assent cannot avail the State Government for the purpose of according precedence to the law made by the State Legislature, namely, the Punjab Act of 1953, over the law made by the Parliament, even within the jurisdiction of the State."

(emphasis supplied)

26. The proposition laid down in Gram Panchayat of *Village Jamalpur v. Malwinder Singh* (supra) was considered by another Constitution Bench in *Kaiser-I-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd.* (supra). Speaking for the majority of the Court, Shah, J. observed:

"In view of the aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State Legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of the Concurrent List and that it contains provision or provisions repugnant to the law made by Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed

State law and the earlier law made by Parliament and the necessity of having such a law, in the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a State. The word "consideration" would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent. This aspect is further reaffirmed by use of the word "assent" in clause (2), which implies knowledge of the President to the repugnancy between the State law and the earlier law made by Parliament on the same subject-matter and the reasons for grant of such assent. The word "assent" would mean in the context as an expressed agreement of mind to what is proposed by the State."

(emphasis supplied)

Shah, J. then referred to various meanings of the word "assent" and observed:

"Applying the aforesaid meaning of the word "assent" and from the phraseology used in clause (2), the object of Article 254(2) appears that even though the law made by Parliament would have supremacy, after considering the situation prevailing in the State and after considering the repugnancy between the State legislation and the earlier law made by Parliament, the President may give his assent to the law made by the State Legislature. This would require application of mind to both the laws and the repugnancy as well as the peculiar requirement of the State to have such a law, which is repugnant to the law made by Parliament. The word "assent" is used purposefully indicating affirmative action of the proposal made by the State for having law repugnant to the earlier law made by Parliament. It would amount to accepting or conceding and concurring to the demand made by the State for such law. This cannot be done without consideration of the relevant

material. Hence, the phrase used is "reserved for consideration", which under the Constitution cannot be an idle formality but would require serious consideration on the material placed before the President. The "consideration" could only be to the proposal made by the State.

It is true that the President's assent as notified in the Act nowhere mentions that assent was obtained qua repugnancy between the State legislation and specified certain law or laws of Parliament. But from this, it also cannot be inferred that as the President has given assent, all earlier law/laws on the subject would not prevail in the State. As discussed above before grant of the assent, consideration of the reasons for having such law is necessary and the consideration would mean consideration of the proposal made by the State for the law enacted despite it being repugnant to the earlier law made by Parliament on the same subject. If the proposal made by the State is limited qua the repugnancy of the State law and law or laws specified in the said proposal, then it cannot be said that the assent was granted qua the repugnancy between the State law and other laws for which no assent was sought for. Take for illustration — that a particular provision, namely, Section 3 of the State law is repugnant to enactment A made by Parliament; other provision, namely, Section 4 is repugnant to some provisions of enactment B made by Parliament and Sections 5 and 6 are repugnant to some provisions of enactment C and the State submits proposal seeking "assent" mentioning repugnancy between the State law and provisions of enactments A and B without mentioning anything with regard to enactment C. In this set of circumstances, if the assent of the President is obtained, the State law with regard to enactments A and B would prevail but with regard to C, there is no proposal and hence there is no "consideration" or "assent". Proposal by the

State pointing out repugnancy between the State law and of the law enacted by Parliament is a sine qua non for "consideration" and "assent". If there is no proposal, no question of "consideration" or "assent" arises. For finding out whether "assent" given by the President is restricted or unrestricted, the letter written or the proposal made by the State Government for obtaining "assent" is required to be looked into."

27. In his concurring judgment, Doraiswamy Raju, J. made the following observations:

"The assent of the President envisaged under Article 254(2) is neither an idle or empty formality, nor an automatic event, necessitated or to be given for the mere asking, in whatever form or manner and whether specific, vague, general or indefinite — in the terms sought for to claim that once sought and obtained as well as published, a curtain or veil is drawn, to preclude any probe or contention for consideration that what was sought and obtained was not really what should and ought to have been, to claim the protection envisaged under clause (2) in respect of a particular State law vis-à-vis or with reference to any particular or specified law on the same subject made by Parliament or an existing law, in force. The repugnancy envisaged under clause (1) or enabled under clause (2) to get excepted from under the protective coverage of the assent obtained from the President, is such that there is a legislation or legislative provision(s), covering and operating on the same field or identical subject-matter made by both the Union and the State, both of them being competent to enact in respect of the same subject-matter or legislative field, but the legislation by Parliament has come to occupy the entire field. Necessarily, in the quasi-federal structure adopted for the nation, predominance is given to the law made by Parliament and in such circumstances only the State law

which secured the assent of the President under clause (2) of Article 254 comes to be protected, subject of course to the powers of Parliament under the proviso to the said clause. Therefore, the President has to be apprised of the reasons at least as to why his assent is being sought, the need or necessity and the justification or otherwise for claiming predominance for the State law concerned. This itself would postulate an obligation, inherent in the scheme underlying as well as the very purpose and object of seeking the assent under clause (2) of Article 254, to enumerate or specify and illustrate the particular Central law or provision with reference to which the predominance is desired. The absence of any standardized or stipulated form in which it is to be sought for, should not detract the State concerned, to disown its obligation to be precise and specific in the extent of protection sought having regard to the serious consequences which thereby inevitably follow i.e. the substitution of the Union law in force by the State law, in the territorial limits of the State concerned, with drastic alteration or change in the rights of citizen, which it may, thereby bring about.

The mere forwarding of a copy of the Bill may obviate, if at all, only the need to refer to each one of the provisions therein in detail in the requisition sent or the letter forwarding it, but not obliterate the necessity to point out specifically the particular Central law or provisions with reference to which, the predominance is claimed or purported to be claimed. The deliberate use of the word "consideration" in clause (2) of Article 254, in my view, not only connotes that there should be an active application of mind, but also postulates a deliberate and careful thought process before taking a decision to accord or not to accord the assent sought for. If the object of referring the State law for consideration is to have the repugnancy resolved by securing predominance to the State law, the

President has to necessarily consider the nature and extent of repugnancy, the feasibility, practicalities and desirabilities involved therein, though may not be obliged to write a judgment in the same manner, the courts of law do, before arriving at a conclusion to grant or refuse to grant or even grant partially, if the repugnancy is with reference to more than one law in force made by Parliament. Protection cannot be claimed for the State law, when questioned before courts, taking cover under the assent, merely asserting that it was in general form, irrespective of the actual fact whether the State claimed for such protection against a specific law or the attention of the President was invited to at least an apprehended repugnancy vis-à-vis the particular Central law. In the teeth of innumerable Central laws enacted and in force on concurrent subjects enumerated in List III of the Seventh Schedule to the Constitution, and the hoard of provisions contained therein, artificial assumptions based on some supposed knowledge of all those provisions and the presumed regularity of official acts, cannot be blown out of proportion, to do away with an essential exercise, to make the "assent" meaningful, as if they are empty formalities, except at the risk of rendering Article 254 itself a dead letter or merely otiose. The significant and serious alteration in or modification of the rights of parties, both individuals or institutions resulting from the "assent" cannot be overlooked or lightly brushed aside as of no significance, whatsoever. In a federal structure, peculiar to the one adopted by our Constitution it would become necessary for the President to be apprised of the reason as to why and for what special reason or object and purpose, predominance for the State law over the Central law is sought, deviating from the law in force made by Parliament for the entire country, including that part of the State."

(emphasis supplied)

28. In view of the aforesaid judgments of the Constitution Benches, we hold that Article 254(2) of the Constitution is not available to the appellants for seeking a declaration that the Market Act would prevail over the Control Order and that transactions involving the purchase of sugarcane by the factories operating in the market areas would be governed by the provisions contained in the Market Act. As a corollary, we hold that the High Court did not commit any error by quashing the notices issued by appellant - Market Committees to the respondents requiring them to take licence under the Market Act and pay market fee on the purchase of sugarcane from Cane Growers/Cane Growers Cooperative Societies.

29. In the result, the appeals are dismissed. The parties are left to bear their own costs.

B.B.B. Appeals dismissed.

MOHD. HUSSAIN @ JULFIKAR ALI
v.
THE STATE (GOVT. OF NCT) DELHI
(Criminal Appeal No. 1091 of 2006)

AUGUST 31, 2012

[R.M. LODHA, ANIL R. DAVE AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Code of Criminal Procedure, 1973 – s. 386 – Power of appellate court to order retrial – Held: The appellate court hearing criminal appeal has power to order retrial u/s. 386(b) – But such power should be exercised in exceptional and rare cases when such course becomes indispensable to avert failure of justice – Exercise of such power depends on facts and circumstances of the case – The present case is of extremely serious and exceptional nature, where retrial of the accused is indispensable – The matter requires to be remanded for a de novo trial.

Administration of Criminal Justice:

Speedy trial – Right of accused – Held: Such right of the accused must be weighed alongwith the nature and gravity of crime, persons involved, social impact and social needs – Deprivation of such right per se does not prejudice the accused – Constitution of India, 1950 – Article 21.

'Fair trial' and 'Speedy trial' – Difference between.

Words and Phrases:

'Retrial' – Meaning of

The appellant-accused was prosecuted u/ss. 302/307 IPC and s. 3 and in the alternative s. 4 of Explosive Substances Act. The allegation against the accused was

that he had planted a bomb in a bus, explosion of which resulted in 4 deaths and injuries to 24 persons.

Trial court convicted the accused u/s. 302/307 IPC r/w.s. 3 of the Act and sentenced him to death. The conviction and sentence was confirmed by the High Court.

In appeal to this Court, the two judges of the Division Bench were of the opinion that the appellant-accused was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of Cr.P.C, because he was denied right of presentation by counsel in the trial. However, they differed on the point whether the matter required to be remanded for a *de novo* trial in the facts and circumstances of the case. Therefore, the matter was referred to the three judges Bench to decide the point.

Answering the reference, the Court

HELD: 1.1. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 Cr.P.C . Though such power exists, it should not be exercised in a routine manner. A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) Cr.P.C. will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must

closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked. [Para 42] [509-D-H; 510-A]

1.2. In the present case, the incident is of the year 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus stand. The moment the bus stopped, an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Section 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of Explosive Substances Act. It is true that the appellant has been in jail since 09.03.1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case. But these factors are not sufficient for appellant's acquittal and dismissal of indictment. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged, are important factors that need to be kept in mind, though it is a fact that in the first instance, the accused has been denied due process. [Para 43] [510-C-H; 511-A]

1.3. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that

has shaken the public and resulted in death of four persons in a public transport bus can not be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice. Thus, it is held that the matter requires to be remanded for *de novo* trial. [Paras 43 and 46] [511-A-C-F]

Gopi Chand v. Delhi Administration **AIR 1959 SC 609: 1959 Suppl. SCR 87 – followed.**

Tyron Nazareth v. State of Goa **1994 Supp (3) SCC 321;** *S. Guin andOrs. v. Grindlays Bank Ltd.* **(1986) 1 SCC 654: 1985 (3) Suppl. SCR 818 ;** *State of M.P. v. Bhooraji and Ors.* **(2001) 7 SCC 679: 2001 (2) Suppl. SCR 128;** *Zahira Habibulla H. Sheikh andAnr. v. State of Gujarat and Ors.* **(2004) 4 SCC 158: 2004 (3) SCR 1050 – relied on.**

Kartar Singh v. State of Punjab **(1994) 3 SCC 569: 1994 (2) SCR 375 ;** *Satyajit Banerjee and Ors v. State of West Bengal and Ors.* **(2005) 1 SCC 115: 2004 (6) Suppl. SCR 294 – referred to.**

2. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to 'speedy trial' and the accused's right of 'fair trial'. Unlike the accused's right of 'fair trial', deprivation of the right to 'speedy trial' does not *per se* prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be

seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former, the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused, in the facts and circumstances of the case and exigencies of situation, tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered. [Para 41] [508-F-H; 509-A-D]

Machander v. State of Hyderabad **(1955) 2 SCR 524;** *Abdul Rehman Antulay and Ors. v. R.S.Nayak and Anr.* **(1992) 1 SCC 225: 1991 (3) Suppl. SCR 325 ;** *Hussainara Khatoon and Ors. (I) v. Home Secretary, State of Bihar* **(1980) 1 SCC 81: 1979 (3) SCR 169;** *Hussainara Khatoon and Ors. (III) v. Home Secretary, State of Bihar, Patna* **(1980) 1 SCC 93;** *Hussainara Khatoon and Ors. (IV) v. Home Secretary, State of Bihar, Patna* **(1980) 1 SCC 98: 1979 (3) SCR 532 ;** *Raghubir Singh and Ors. v. State of Bihar* **(1986) 4 SCC 481: 1986 (3) SCR 802 ;** *State of Punjab v. Ajaib Singh* **(1995) 2 SCC 486: 1995 (1) SCR 496 ;** *Hussainara Khatoon and Ors. (VII) v. Home Secretary, Bihar and Ors.* **(1995) 5 SCC 326;** *Phoolan Devi v. State of M.P. and Ors.* **(1996) 11 SCC 19: 1996 (9) Suppl. SCR 233 ;** *Raj Deo Sharma (I) v. State of Bihar* **(1998) 7 SCC 507: 1998 (2) Suppl. SCR 130 ;** *Raj Deo Sharma (II) v. State of Bihar* **(1999) 7 SCC 604: 1999**

(3) Suppl. SCR 124; *P. Ramachandra Rao v. State of Karnataka* **(2002) 4 SCC 578;** "*Common Cause", A Registered Society (I) v. Union of India and Ors.* **(1996) 6SCC 775: 1996 (9) Suppl. SCR 296;** "*Common Cause", A Registered Society (II) v. Union of India* **(1996) 4 SCC 33: 1996 (2) Suppl. SCR 196 – referred to.**

Case Law Reference:

(1955) 2 SCR 524	**Referred to**	**Para 20**
1959 Suppl. SCR 87	**Followed**	**Para 21**
1994 Supp (3) SCC 321	**Relied on**	**Para 22**
1985 (3) Suppl. SCR 818	**Referred to**	**Para 22**
1991 (3) Suppl. SCR 325	**Referred to**	**Para 23**
1979 (3) SCR 169	**Referred to**	**Para 24**
(1980) 1 SCC 93	**Referred to**	**Para 24**
1979 (3) SCR 532	**Referred to**	**Para 24**
1986 (3) SCR 802	**Referred to**	**Para 24**
1994 (2) SCR 375	**Referred to**	**Para 24**
1995 (1) SCR 496	**Referred to**	**Para 25**
(1995) 5 SCC 326	**Referred to**	**Para 26**
1996 (9) Suppl. SCR 233	**Referred to**	**Para 27**
1998 (2) Suppl. SCR 130	**Referred to**	**Para 28**
1999 (3) Suppl. SCR 124	**Referred to**	**Para 29**
2001 (2) Suppl. SCR 128	**Relied on**	**Para 29**
(2002) 4 SCC 578	**Referred to**	**Para 30**
1996 (9) Suppl. SCR 296	**Referred to**	**Para 34**

1996 (2) Suppl. SCR 196	**Referred to**	**Para 34**
2004 (3) SCR 1050	**Relied on**	**Para 34**
2004 (6) Suppl. SCR 294	**Referred to**	**Para 36**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1091 of 2006.

From the Judgment & Order dated 4.8.2006 of the High Court of Delhi at New Delhi in Criminal Appeal No. 41/05.

Md. Mobin Akhtar, H.A. Siddiqui, Arun Kumar Beriwal for the Appellant.

P.P. Malhotra, ASG, J.S. Atri, Rahul Kaushik, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. We are called upon to decide in this appeal the issue on reference by a two-Judge Bench, whether the matter requires to be remanded for a *de novo* trial in accordance with law or not?

2. The above question arises in this way. On 30.12.1997 at about 6.20 p.m. one Blueline Bus No. DL-1P-3088 carrying passengers on its route to Nangloi from Ajmeri Gate stopped at Rampura Bus Stand at Rohtak Road for passengers to disembark. The moment the bus stopped, an explosion took place inside the bus. The incident resulted in death of four persons and injury to twenty-four persons. The FIR of the incident was registered and investigation into the crime commenced. On completion of investigation, the police filed a charge-sheet against four accused persons – one of them being the present appellant, a national of Pakistan – for the commission of offences under Sections 302/307/120-B of Indian Penal Code (for short, 'IPC') and Sections 3 and 4 of the Explosive Substances Act, 1908 (for short, 'ES Act'). The appellant and the other three accused were committed to the

Court of Session by the concerned Magistrate. The three accused other than the appellant were discharged by the Additional Sessions Judge, Delhi. The appellant was charged under Sections 302/307 IPC and Section 3 and, in the alternative, under Section 4(b) of the ES Act.

3. The appellant pleaded not guilty to the charges framed against him and claimed to be tried.

4. Sixty-five witnesses were examined by the prosecution. On conclusion of the prosecution evidence, the statement of the appellant under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'Code') was recorded. The Additional Sessions Judge vide his judgment dated 26.10.2004 held that the prosecution had been successful in proving beyond reasonable doubt that the appellant had planted a bomb in Bus No. DL-1P-3088 on 30.12.1997 with intention to cause death and the bomb exploded in which four persons died and twenty-four persons sustained injuries. The Additional Sessions Judge found the appellant guilty and convicted him under Sections 302/307 IPC read with Section 3 of the ES Act. On the point of sentence, the matter was kept for 3.11.2004. On that date, after hearing the additional public prosecutor and the defence counsel, the Additional Sessions Judge awarded death sentence to the appellant under Section 302 IPC and also awarded to him imprisonment for life for the offences under Section 307 IPC and Section 3 of the ES Act. Fine and default sentence were also ordered and it was directed that sentence of death shall not be executed unless the same was confirmed by the High Court.

5. Aggrieved by his conviction and sentence, the appellant preferred an appeal before the Delhi High Court. The reference was also made to the Delhi High Court for confirmation of death sentence. The death reference and the criminal appeal were heard together by the Delhi High Court. Vide judgment dated 4.8.2006, the Division Bench of Delhi High Court confirmed the

death sentence imposed on the appellant under Section 302 IPC. The other sentences imposed on the appellant were also maintained.

6. It is from the judgment of the Delhi High Court dated 4.8.2006 that the appellant preferred the present appeal before this Court.

7. The criminal appeal came up for hearing before the Bench of H.L. Dattu and C.K. Prasad, JJ. In his judgment, H.L. Dattu, J. thought it fit to deal with the issue whether the appellant was denied due process of law and whether the conduct of trial was contrary to the procedure prescribed under the provisions of the Code and, in particular, that he was not given a fair and impartial trial and was denied the right of the counsel before discussing the merits of the appeal. The proceedings of the trial court were then noticed and discussed elaborately. H.L. Dattu, J. observed as follows:

> "In the present case, not only was the accused denied the assistance of a counsel during the trial but such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings, the necessity of counsel was so vital and imperative that the

failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 CrPC.

After carefully going through the entire records of the trial court, I am convinced that the appellant-accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would be simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to."

8. H.L. Dattu, J. recorded his conclusions thus:

"In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the trial court with a specific direction that the trial court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case.

In view of the above, I allow the appeal and set aside the conviction and sentence imposed by the Additional Sessions Judge in Sessions Case No. 122 of 1998 dated 3-11-2004 and the judgment and order passed by the High Court in *State* v. *Mohd. Hussain* dated 4-8-2006 and remand the case to the trial court for fresh disposal in accordance with law and in the light of the observations made by me as above. Since the incident is of the year 1997, I direct the trial court to conclude the trial as expeditiously as possible at any rate within an outer limit of three months from the date of communication of this order and report the same to this Court."

9. C.K. Prasad, J. concurred with the view of H.L. Dattu, J. that the conviction and sentence of the appellant deserved to be set aside as he was not given the assistance of a lawyer to defend himself during trial. C.K. Prasad, J., however, was not persuaded to remand the matter to the trial court for fresh trial of the appellant for the following reasons:

"I have given my most anxious consideration to this aspect of the matter and have no courage to direct for his de novo trial at such a distance of time. For an occurrence of 1997, the appellant was arrested in 1998 and since then he is in judicial custody. The charge against him was framed on 18-2-1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud my reason. After all, we are proud to be a democratic country and governed by rule of law.

The appellant must be seeing the hangman's noose in his dreams and dying every moment while awake from the day he was awarded the sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time-limit is not countenanced but in the facts of the present case I am of the opinion that after such a distance of time it shall be travesty of justice to direct for the appellant's de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Hence, any time-limit to conclude the trial would not be pragmatic.

Accordingly, I am of the opinion that the conviction and sentence of the appellant is vitiated, not on merit but on the ground that his trial was not fair and just.

The appellant admittedly is a Pakistani, he has

admitted this during the trial and in the statement under Section 313 of the Code of Criminal Procedure. I have found his conviction and sentence illegal and the natural consequence of that would be his release from the prison but in the facts and circumstances of the case, I direct that he be deported to his country in accordance with law, and till then he shall remain in jail custody."

10. We have heard Mr. Md. Mobin Akhtar, learned counsel for the appellant and Mr. P.P. Malhotra, learned Additional Solicitor General for the respondent.

11. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Speedy justice and fair trial to a person accused of a crime are integral part of Article 21; these are imperatives of the dispensation of justice. In every criminal trial, the procedure prescribed in the Code has to be followed, the laws of evidence have to be adhered to and an effective opportunity to the accused to defend himself must be given. If an accused remains unrepresented by a lawyer, the trial court has a duty to ensure that he is provided with proper legal aid.

12. Article 22(1) of the Constitution provides that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

13. Article 39A of the Constitution, inter-alia, articulates the policy that the State shall provide free legal aid by a suitable legislation or schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

14. Section 303 of the Code confers a right upon any person accused of an offence before a criminal court to be defended by a pleader of his choice.

15. Section 304 of the Code mandates legal aid to accused at State's expense in a trial before the Court of Session where the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader.

16. The two-Judge Bench that heard the criminal appeal, was unanimous that the appellant was denied the assistance of a counsel in substantial and meaningful manner in the course of trial although necessity of counsel was vital and imperative and that resulted in denial of due process of law. In their separate judgments, the learned Judges agreed that the appellant has been put to prejudice rendering the impugned judgments unsustainable in law. They, however, differed on the course to be adopted after it was held that the conviction and sentence awarded to the appellant by the trial court and confirmed by the High Court were vitiated. As noted above, H.L. Dattu, J. ordered the matter to be remanded to the trial court for fresh disposal in accordance with law after providing to the appellant the assistance of the counsel before the commencement of the trial till its conclusion if the accused was unable to engage a counsel of his own choice. On the other hand, C.K. Prasad, J. for the reasons indicated by him held that the incident occurred in 1997; the appellant was awarded the sentence of death more than seven years ago and at such distance of time it shall be travesty of justice to direct for the appellant's *de novo* trial.

17. Section 386 of the Code sets out the powers of the appellate court. To the extent it is relevant, it reads as under :

"S. 386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) xxx xxx xxx

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

xxx xxx xxx"

18. Section 311 of the Code empowers a criminal court to summon any person as a witness though not summoned as a witness or recall and re-examine any person already examined at any stage of any enquiry, trial or other proceeding and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

19. If the appellate court in an appeal from a conviction under Section 386 orders the accused to be re-tried, on the matter being remanded to the trial court and on re-trial of the accused, such trial court retains the power under Section 311 of the Code unless ordered otherwise by the appellate court.

20. In *Machander v. State of Hyderabad*[1], it has been stated by this Court that while it is incumbent on the court to see that no guilty person escapes but the court also has to see that justice is not delayed and the accused persons are not indefinitely harassed. The court further stated that the scale must be held even between the prosecution and the accused.

21. In *Gopi Chand v. Delhi Administration*[2], a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of

1. (1955) 2 SCR 524.
2. AIR 1959 SC 609.

conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Criminal Procedure Code, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; the trial of the three cases against the appellant was vitiated and the orders of conviction and sentence were rendered invalid. The Court, accordingly, set aside the orders of conviction and sentence. While dealing with the question as to what final order should be passed in the appeals, the Constitution Bench held as under:

"29. ……The offences with which the appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible."

22. A two-Judge Bench of this Court in *Tyron Nazareth v. State of Goa*[3], after holding that the conviction of the appellant was vitiated as he was not provided with legal aid in the course of trial, ordered retrial. The brief order reads as follows:

"2. We have heard the learned counsel for the State. We have also perused the decisions of this Court in *Khatri (II)*

3. 1994 Supp (3) SCC 321.

v. State of Bihar [(1981) 1 SCC 627] and *Sukh Das v. Union Territory of Arunachal Pradesh [(1986) 2 SCC 401]*. We find that the appellant was not assisted by any lawyer and perhaps he was not aware of the fact that the minimum sentence provided under the statute was 10 years' rigorous imprisonment and a fine of Rs 1 lakh. We are, therefore, of the opinion that in the circumstances the matter should go back to the tribunal. The appellant if not represented by a lawyer may make a request to the court to provide him with a lawyer under Section 304 of the Criminal Procedure Code or under any other legal aid scheme and the court may proceed with the trial afresh after recording a plea on the charges. The appeal is allowed accordingly. The order of conviction and sentence passed by the Special Court and confirmed by the High Court are set aside and a de novo trial is ordered hereby."

23. This Court in *S. Guin & Ors. v. Grindlays Bank Ltd*[4]. was concerned with the case where the trial court acquitted the appellants of the offence punishable under Section 341 of the IPC read with Section 36-AD of Banking Regulation Act, 1949. The charge against the appellants was that they had obstructed the officers of the bank, without reasonable cause, from entering the premises of a branch of the bank and also obstructed the transaction of normal banking business. Against their acquittal, an appeal was preferred before the High Court which allowed it after a period of six years and remanded the case for retrial. It was from the order of remand for re-trial that the matter reached this Court. This Court while setting aside the order of remand in paragraph 3 of the Report held as under :

"**3.** After going through the judgment of the magistrate and of the High Court we feel that whatever might have been the error committed by the Magistrate, in the circumstances of the case, it was not just and proper for the High Court to have remanded the case for fresh trial, when the order

4. (1988) 1 SCC 654.

of acquittal had been passed nearly six years before the judgment of the High Court. The pendency of the criminal appeal for six years before the High Court is itself a regrettable feature of this case. In addition to it, the order directing retrial has resulted in serious prejudice to the appellants. We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 482, Criminal Procedure Code even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process ……."

24. The Constitution Bench of this Court in *Abdul Rehman Antulay and others v. R.S. Nayak and another*[5] considered right of an accused to speedy trial in light of Article 21 of the Constitution and various provisions of the Code. The Constitution Bench also extensively referred to the earlier decisions of this Court in *Hussainara Khatoon and others (I) v. Home Secretary, State of Bihar*[6]*, Hussainara Khatoon and others (III) v. Home Secretary, State of Bihar,Patna*[7]*, Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar,Patna*[8] *and Raghubir Singh & others v. State of Bihar*[9] and noted that the provisions of the Code are consistent with the constitutional guarantee of speedy trial emanating from Article 21. In paragraph 86 of the Report, the Court framed guidelines. Sub-paragraphs (9) and (10) thereof read as under:

"86(9). Ordinarily speaking, where the court comes to the

5. (1992) 1 SCC 225.
6. (1980) 1 SCC 81.
7. (1980) 1 SCC 93.
8. (1980) 1 SCC 98.
9. (1986) 4 SCC 481.

conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.

(10). It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial."

25. In *Kartar Singh v. State of Punjab*[10], it was stated by this Court that no doubt liberty of a citizen must be zealously safeguarded by the courts but nonetheless the courts while dispensing justice should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution. In that case, the Court was dealing with a case under the TADA Act.

10. (1994) 3 SCC 569.

26. In *State of Punjab v. Ajaib Singh*[11], a two-Judge Bench of this Court was concerned with the question whether the order of acquittal passed by the High Court of Punjab and Haryana was liable to interference under Article 136 of the Constitution. That was a case where the respondent was tried along with other two accused persons for the offences under Section 302 IPC and Section 27 of the Arms Act. While one of the accused was acquitted and the other was convicted for a smaller offence and given probation, insofar as respondent was concerned, he was convicted under Section 302 IPC and sentenced to undergo life imprisonment. He was also convicted under Section 27 of the Arms Act and given two years' rigorous imprisonment. The High Court held that the act of the respondent was covered within clauses first and secondly in Section 100 of the IPC and, therefore, he was entitled to acquittal. While maintaining the order of acquittal the Court did notice the time lag of more than 18 years from the date of incident and nearly 15 years from the date of acquittal and hearing.

27. In *Hussainara Khatoon and others (VII) v. Home Secretary, Bihar & Others.*[12], a three-Judge Bench of this Court while dealing with the rights of under-trial prisoners observed that sympathy for the under-trials who were in jail for long terms on account of pendency of cases had to be balanced having regard to the impact of crime on society and the fact situation.

28. *Phoolan Devi v. State of M.P. and others*[13], was concerned with the release of the petitioner on the ground that her right to speedy trial had been violated and her continued custody was without any lawful authority. The Court observed that by lapse of several years since the commencement of prosecution, it cannot be said that for that reason alone the continuance of prosecution would violate the petitioner's right

11. (1995) 2 SCC 486.

12. (1995) 5 SCC 326.

13. (1996) 11 SCC 19.

to speedy trial.

29. In *Raj Deo Sharma (I) v. State of Bihar*[14], the matter reached this Court at the instance of an accused charged with offences under Sections 5(2) and 5(1)(e) of the Prevention of Corruption Act, 1947. He was aggrieved by the order of the High Court whereby his prayer for quashing the prosecution against him on the ground of violation of right to speedy trial was rejected. In that case, a three-Judge Bench of this Court issued certain directions supplemental to the propositions laid down in *Abdul Rehman Antulay*[5]*. Raj Deo Sharma (I)*[14] came up for consideration once again in *Raj Deo Sharma (II) v. State of Bihar*[15]*.* In his dissenting judgment, M.B. Shah, J. held that prescribing time-limit would be against the decisions rendered in *Abdul Rehman Antulay*[5] and *Kartar Singh*[10].

30. In *State of M.P. v. Bhooraji and others*[16], this Court was concerned with the question whether retrial was inevitable although the trial proceedings in the case had already undergone over a period of nine years. That was a case where the incident happened on 26.8.1991 in which one person was murdered and three others were wounded. Eleven persons were charge-sheeted by the police in respect of the said incident for various offences including Section 302 read with Section 149 IPC and Section 3(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act'). The Additional Sessions Judge, Dhar (M.P.) (Specified Court) on conclusion of trial that took about five years convicted all the eleven accused persons under Sections 148, 323, 302/149 IPC and sentenced them to various punishments including imprisonment for life. The convicted persons filed appeal before the High Court of Madhya Pradesh. During the pendency of the appeal before the High Court, this Court in a decision given in *Gangula Ashok v. State of A.P.* [(2000) 2 SCC 504] held that committal proceedings were necessary for a Specified Court under the SC/ST Act to take cognizance of the offences to be tried. In light of the decision of this Court in *Gangula Ashok,* the convicts made an application before the High Court in the pending appeal seeking quashment of the trial proceedings on the ground that the trial was without jurisdiction inasmuch as the Specified Court of Session did not acquire jurisdiction to take cognizance of and try the case, in the absence of it being committed by a Magistrate. The Division Bench of the High Court upheld the contention raised by the convicted persons and ordered the quashment of the trial proceedings and the trial court was directed to return the charge-sheet and the connected papers to the prosecution for resubmission to the Magistrate for further proceedings in accordance with law. It was against the judgment of the High Court that the State of Madhya Pradesh came up in appeal by special leave.

31. While dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, "a *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert 'a failure of justice'. Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial". The Court went on to say further as follows :

> "8…….This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be

14. (1998) 7 SCC 507.

15. (1999) 7 SCC 604.

16. (2001) 7 SCC 679.

a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation".

32. In *Bhooraji*[16], the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465(1). After noticing the above provisions, the Court observed in paragraphs 15, 16 and 17 of the Report as follows :

"15**.** A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16**.** What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani v. State of Karnataka* [(2001) 2 SCC 577] thus: (SCC p. 585, para 23)

"*23*. We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment* [(1977) 1 All ER 813]. The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

17**.** It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?"

33. Finally this Court concluded that High Court should have dealt with the appeal on merits on the basis of the evidence already on record and to facilitate the said course, the judgment of the High Court impugned in the appeal was set aside and matter was sent back to the High Court for disposal of the appeal afresh on merits in accordance with law.

34. *P. Ramachandra Rao v. State of Karnataka*[17] was

17. (2002) 4 SCC 578.

concerned with the appeals wherein the accused persons indicted of corruption charges were acquitted by the special courts for failure of commencement of trial in spite of lapse of two years from the date of framing of the charges and the High Court allowed the State appeals without noticing the respective accused persons. When the appeals came up for hearing before the Bench of three-Judges, the matters were referred to a Constitution Bench to consider whether time-limit of the nature mentioned in, "*Common Cause", A Registered Society (I) v. Union of India and others*[18], "*Common Cause", A Registered Society (II) v. Union of India*[19]*, Raj Deo Sharma (I)*[14], and *Raj Deo Sharma (II)*[15] can under the law be laid down? Before the Bench of five-Judges, the earlier decision of this Court in *Abdul Rehman Antulay5* was brought to the notice along with the above referred four cases. The five-Judge Bench, accordingly, referred the matter to a Bench of seven-Judges. The Bench of seven-Judges considered the questions: Is it at all necessary to have limitation bars terminating trials and proceedings? Is there no effective mechanism available for achieving the same end? In paragraph 23 (Pg. 600) of the Report, the Bench made the following observations:

> **"**23**.** Bars of limitation, judicially engrafted, are, no doubt, meant to provide a solution to the aforementioned problems. But a solution of this nature gives rise to greater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions. For two reasons we hold such bars of limitation uncalled for and impermissible: first, because it tantamounts to impermissible legislation — an activity beyond the power which the Constitution confers on the judiciary, and secondly, because such bars of limitation fly in the face of law laid down by the Constitution Bench in *A.R. Antulay case* and, therefore, run counter to the

18. (1996) 6 SCC 775.

19. (1996) 4 SCC 33.

doctrine of precedents and their binding efficacy."

35. In paragraph 29 (Pg. 603) of the Report, the seven-Judge Bench held that the period of limitation for conclusion of trial of a criminal case or criminal proceeding in "*Common Cause" (I)*[18], "*Common Cause" (II)*[19], *Raj Deo Sharma (I)*[14], *Raj Deo Sharma (II)15* could not have been prescribed. The Bench concluded, inter alia, as follows :

> "29. …….
>
> (*1*) The dictum in *A.R. Antulay case* is correct and still holds the field.
>
> (*2*) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in *A.R. Antulay case* adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.
>
> (*3*) The guidelines laid down in *A.R. Antulay case* are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.
>
> (*4*) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in *Common Cause (I)*, *Raj Deo Sharma (I)* and *Raj Deo Sharma (II)* could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in *Common Cause case (I)*, *Raj Deo Sharma case (I)* and *(II)*. At the most the periods of time prescribed in

those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in *A.R. Antulay case* and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(*5*) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

xxx xxx xxx"

36. A two-Judge Bench of this Court in *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others*[20], known as the "Best Bakery Case", extensively considered the jurisprudence of fair trial, powers of the criminal court under the Code and the Evidence Act including retrial of a criminal case. The Best Bakery Case was a case of mass killing. The trial court directed acquittal of the accused persons. The State of Gujarat preferred appeal against acquittal and a criminal revision was also filed against acquittal by one of the affected persons. The Gujarat High Court dismissed the criminal appeal and criminal revision upholding acquittal of the accused by the

20. (2004) 4 SCC 158.

trial court. The prayers for adducing additional evidence under Section 391 of the Code and/or for directing retrial were rejected. It is from this order of the Gujarat High Court that the matter reached this Court. In paragraph 33 of the Report (Pg. 183), the Bench observed as follows :

"33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."

37. Then in paragraph 35 of the Report (Pg. 184), the Court observed that in a criminal case the fair trial entails triangulation of interests of the accused, the victim and the society. The Court further observed that "interests of the society are not to be treated completely with disdain and as persona non grata".

38. In *Best Bakery Case*[20], the Court also made the following observations:

"38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality

of the evidence, oral and circumstantial, and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

39. The Bench emphasized that whether a re-trial under Section 386 of the Code or taking up of additional evidence under Section 391 of the Code in a given case is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated.

40. In *Satyajit Banerjee and others v. State of West Bengal and others*[21], a two-Judge Bench of this Court was concerned with an appeal by special leave wherein the accused-appellants were charged for the offences punishable under Section 498-A and 306 of the Indian Penal Code. The trial court acquitted the accused persons. In revision preferred by the complainant, the High Court set aside the order of acquittal and directed a *de novo* trial of the accused. While dealing with the revisional jurisdiction of the High Court in a matter against the order of acquittal, the Court observed that such jurisdiction was exercisable by the High Court only in exceptional cases where the High Court finds defect of

21. (2005) 1 SCC 115.

procedure or manifest error of law resulting in flagrant miscarriage of justice. In the facts of the case, this Court held that the High Court ought not to have directed the trial court to hold the *de novo* trial. With reference to *Best Bakery Case*[20] the Court observed in paragraphs 25 and 26 of the Report (Pgs. 121 and 122) as follows :

"**25.** Since strong reliance has been placed on *Best Bakery case* (*Gujarat riots case*) it is necessary to *record a note of caution*. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused

i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a *de novo* trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

26. The law laid down in *Best Bakery case* in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In *Best Bakery case* the first trial was found to be a farce and is described as "mock trial". Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in *Best Bakery case*."

41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is

in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair

trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

43. Insofar as present case is concerned, it has been concurrently held by the two Judges who heard the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The Judges differed on the course to be followed after holding that the trial against the appellant was flawed. We have to consider now, whether the matter requires to be remanded for a *de novo* trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Section 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of ES Act. It is true that the appellant has been in jail since 09.03.1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for appellant's acquittal and dismissal of indictment. We think not. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been

denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus can not be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice.

44. In order to ensure that retrial of the appellant is not prolonged and is concluded at the earliest, Mr. P. P. Malhotra, Additional Solicitor General submitted that some of the sixty-five witnesses who were earlier examined by the prosecution but who are not necessary could be dropped by the public prosecutor.

45. Mr. Md. Mobin Akhtar submitted before us that he would appear for the accused (appellant) in the trial. In case he does not appear for the appellant or the appellant does not engage the lawyer on his own, we direct that the trial court shall provide an appropriate Advocate to the accused (appellant) immediately.

46. In what we have discussed above we answer the reference by holding that the matter requires to be remanded for a *de novo* trial. The Additional Sessions Judge shall proceed with the trial of the appellant in Sessions Case No. 122 of 1998 from the stage of prosecution evidence and shall further ensure that the trial is concluded as expeditiously as may be possible and in no case later than three months from the date of communication of this order.

K.K.T. Reference answered.

BHAWNA GARG & ANR.
v.
UNIVERSITY OF DELHI & ORS.
(Civil Appeal Nos. 6304-6305 of 2012)

SEPTEMBER 5, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Education/Educational Institutions – Admission – To MBBS course – In three medical colleges – In one of the colleges (LHMC) only female candidates were to be admitted – Admission to be on the basis of Delhi University Medical and Dental Entrance Test (DUMET) – 15% seats to be filled directly on the basis of CBSE examination – 36 seats (30 in the college LHMC and 6 in another) reserved for Nominees of Government (NGOI) – Candidates from NGOI exempted from taking DUMET – Female candidates who cleared DUMET but did not get admission due to their lower merit, filing writ petition challenging the reservation of 30 seats for NGOI, as unconstitutional and as violative of Regulation 5 of MCI Regulations – High Court dismissing the petition – On appeal, held: The reservation of 30 seats for NGOI is not unconstitutional – Exemption from taking DUMET to the NGOI candidates is not ultra vires the MCI Regulations – The validity and constitutionality of the policy of Central Government to reserve some seats on rational basis cannot be questioned – The seats reserved for NGOI constitute separate source and selection on merits is to be confined to each separate source – However, directions for the University to issue instructions in future that candidates failing in DUMET would not be eligible for admission through NGOI quota – Reservation of 30 seats out of 150 seats is excessive – However, Central Government has taken steps to reduce the number to 15 from 30 in phases – Direction to Central Government to relook the extent of seats reserved for NGOI

in view of establishment of Medical Colleges in the States/ UTs for which the seats are allocated from NGOI quota – Direction to the University to give admission on the basis of DUMET, on the vacant seats in NGOI quota – Medical Council of India Regulations on Graduate Medical Education, 1997 – Regulation 5.

The University of Delhi issued Bulletin for admission to undergraduate degree courses including MBBS course for the academic session 2011-12. The Bulletin stated that the MBBS course was conducted in three Government Colleges i.e. Lady Harding Medical College (LHMC), Maulana Azad Medical College (MAMC) and University College of Medical Sciences (UCMS). In LHMC only female candidates were to be admitted. In the three colleges there were 500 seats for MBBS course. 15% of the seats were to be filled up directly on the basis of CBSE examination. 36 seats (30 seats in LHMC and 6 in MAMC) were reserved for Nominees of Government of India (NGOI). The candidates from NGOI quota were exempted from taking the DUMET. All other candidates were to get admission to the course, on the basis of Delhi University Medical and Dental Entrance Test (DUMET). LHMC was to admit only female students.

The appellants had applied as female general category candidates and also cleared the DUMET. As they did not get admission in any of the three colleges, they filed writ petitions before High Court for a direction to quash the Bulletin, insofar as it provided for filling of 30 seats out of 150 seats in the MBBS course in LHMC by NGOI and for a direction to the authorities to fill up the 30 seats from the general category candidates and that they be considered for such admission. The High Court relying on the judgment passed in **Kumari Chitra Ghosh and Anr. vs. Union of India and Ors.* **1969 (2) SCC 228 dismissed the petitions. Hence the present appeals.**

Disposing of the appeals, the Court

HELD: 1. The Central Government reserved 260 seats in the MBBS course for the Central Pool and classified the sources from which admissions were to be made to the 260 seats on geographical and other basis. It has not been shown by the appellants that the classification of the sources from which admissions are to be made has no rational nexus with the objects sought to be achieved by the policy of the Central Government. Hence, the validity and constitutionality of the policy of the Central Government to reserve some seats on geographical and some other rational basis cannot be questioned. However, reservation of as many as 260 seats may not be justifiable in the changed circumstances. The Bulletin insofar as it reserves 30 seats in the MBBS course in LHMC for NGOI is not *ultra vires* the Constitution and in so far it exempts candidates to be admitted to these 30 seats from taking the DUMET is not *ultra vires* the MCI Regulations. [Para 11 & 18] [530-D-F; 538-B-C]

2. The selection of candidates for the seats reserved for NGOI has been done either on the basis of marks in the Joint Entrance Examination or marks in the 10+2 examinations. Regulation 5 of the MCI Regulations provides for determining the merit on the basis of marks obtained in Physics, Chemistry, Biology and English in the qualifying examination where one University/Board/ Examining Body conducts the qualifying examination or on the basis of a competitive entrance examination where more than one University/Board/ Examining Body conducts the qualifying examination. Unless a candidate who had applied to any of the allocated seats and who had not been selected for nomination comes to court and places materials before the court to show that the selection has not been made in accordance with

Regulation 5 of the MCI Regulations or that his merit has been by-passed while making the selection, the court cannot disturb the selection. In the present case, the candidates who had applied for the seats allocated to the beneficiary States/Union Territories/Ministries/Agencies have not approached the court with their grievance that their merit has been bypassed or that the selection has not been made in accordance with Regulation 5 of the MCI Regulations. [Para 14] [533-D-H; 534-A]

3. The appellants, who have not applied for the 30 seats reserved for the NGOI, could not challenge the selection of the candidates to the 30 seats reserved for the NGOI on the ground that merit as provided in Regulation 5 of the MCI Regulations or as laid down in **T.M.A. Pai Foundation has not been considered while making selection for nomination of these reserved seats. [Para 14] [534-B-C]

***Kumari Chitra Ghosh and Anr. v. Union of India and Ors.* 1969(2) SCC 228: 1970 (1) SCR 413 – followed.**

*** T.M.A. Pai Foundation and Ors. vs. State of karanataka and Ors.* **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587 – referred to.**

4. Even if some of the students may have been selected for admission to the seats reserved for NGOI not on merit as determined strictly in accordance with Regulation 5 of the MCI Regulations, the court is not inclined to disturb their admissions in exercise of its power under Article 142 of the Constitution. However, if there are vacant seats in the two Government medical colleges, namely, LHMC or MAMC, for the academic year 2011-2012 out of the quota for NGOI, then the petitioners should be given admission to these vacant seats on the basis of their merit in the DUMET 2011-2012 during the academic year 2012-2013. The provisions of Regulation

5 of the MCI Regulations for selection for admission to the MBBS course solely on the basis of merit have to be followed by the beneficiary States/Union Territories/ Ministries /Agencies, while selecting the students who apply for the seats reserved or allocated for the concerned State/Union Territory/ Ministry/Agency. [Paras 14 and 18] [534-E-G; 538-C-D]

5. The candidates who have applied for the quota for the seats reserved for NGOI, constitute separate sources from which admissions are to be made and the selection on the basis of merit is to be confined to each separate source from which the admissions are to be made and they are not required to take the DUMET. Hence, even if they have failed in DUMET, they are still entitled to be admitted to the seats reserved for NGOI, if they are selected on the basis of merit from amongst all the candidates who have applied from the aforesaid separate sources for admission. [Para 15] [535-B-C]

6. If the candidates who have failed in the DUMET are admitted through a separate source of admission, as in the present case, this may result in lot of heart-burn amongst the students who have cleared the DUMET but have not got the admission to a seat in the MBBS course on account of their lower rank in the merit list. Hence, in future, the Delhi University must stipulate in the Bulletin and the Government of India must issue instructions that candidates who opt to take the DUMET but do not qualify, will not be eligible for admission to the quota reserved for NGOI. This anomaly, however, has been addressed by the MCI by making amendments to the MCI Regulations and by providing therein that from the academic year 2013-2014 every candidate seeking admission to the MBBS course must obtain a minimum marks of 50% in the National Eligibility-cum-Entrance Test in the MBBS course if he is a general category candidate and must

secure a minimum marks of 40% in the National Eligibility-cum-Entrance Test if he is a candidate belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes. From the academic year 2013-2014, therefore, NGOI applying for the reserved seats will have to secure the aforesaid minimum marks in the National Eligibility-cum-Entrance Test for MBBS course. It is directed that with effect from the academic year 2012-2013, no admission will be made to any of the seats reserved for NGOI in LHMC, MAMC and UCMS of any student who has failed in the DUMET. It is further directed that for the academic year 2013-2014 onwards, the candidate applying for seats reserved for NGOI have to obtain the minimum marks in the All India National Eligibility-cum-Entrance Test for admission to the MBBS course as provided in the amended MCI Regulations and the admissions will be made on merit after calling for applicants through advertisement in the newspapers, having wide circulation. [Para 15 and 18] [535-C-H; 538-F-H; 539-A-B]

7. So far as the plea that the reservation of seats for NGOI in LHMC is excessive and when taken together with the quota of seats for SC, ST, OBC and 15% of all-India even exceeds the 50% ceiling of reservation fixed by this Court, is concerned, Government of India by taking steps to reduce the number of seats in phases from 30 to 15 for NGOI in LHMC, has taken care of the grievance that there has been excessive reservation for NGOI in LHMC. That apart, for students of Delhi, UCMS and MAMC are also other institutions where MBBS course can be pursued by the general candidates including general female candidates and the total number of seats in these institutions are 200 and 150 respectively out of which only 6 are reserved for NGOI. [Para 16]. [536-A; 537-C-E]

Indra Sawhney v. Union of India **(1992) Suppl. 3 SCC 217: 1992 (2) Suppl. SCR 454;** *Post Graduate Institute of Medical Education and Research v. Faculty Association* **(1998) 4 SCC 1: 1998 (2) SCR 845 ;** *Union of India v. Ramesh Ram and Ors.* **2010 (7) SCC 234: 2010 (6) SCR 698 ;** *Indian Medical Association v. Union of India* **2010 (7) SCC 179: 2011 (6) SCR 599 – distinguished.**

Mridul Dhar (Minor) and Anr. vs. Union of India and Ors. **(2005) 2 SCC 65: 2005 (1) SCR 380 – referred to.**

8. The High Court was correct in holding that even if there was a justification as offered by the Government of India that many States/Union Territories did not have medical institutions of their own, particularly in North-Eastern States, there has been an overall economic development in the country and a number of State-funded and private medical and other institutions have been established in the meanwhile in the country and, therefore, a re-look by the Government of India at the extent of the seats reserved for the NGOI was necessary. The Central Government should review and find out the number of seats in MBBS course available in the State-funded and the private medical colleges in the States/ Union Territories for which seats are being allocated from the quota for NGOI and decide afresh as to how many seats should be allocated to these States/Union Territories. It is directed that the Central Government will make a review of the government and private medical colleges which have been established in the meanwhile in the States/Union Territories to which seats are being allocated under the quota for NGOI and if they find that additional intake capacity for the MBBS course has been created in these States/Union Territories, the Central Government will take a fresh decision on the number of seats in the MBBS course to be reserved for NGOI for these States with effect from the academic year 2013-2014. [Paras 17 and 18] [537-F-H; 538-A; 539-B-D]

9. It is directed that if there are vacant seats in the quota for NGOI in the LHMC and MAMC for the academic year 2011-2012, the petitioners will be given admission to these vacant seats on the basis of their merit in DUMET 2011-2012, during the academic year 2012-2013. [Para 18] [539-D-E]

Case Law Reference:

1970 (1) SCR 413	**Referred to**	**Para 5**
2002 (3) Suppl. SCR 587	**Referred to**	**Para 6**
2005 (1) SCR 380	**Referred to**	**Para 6**
1970 (1) SCR 413	**Followed**	**Para 14**
1992 (2) Suppl. SCR 454	**Distinguished**	**Para 16**
1998 (2) SCR 845	**Distinguished**	**Para 16**
2010 (6) SCR 698	**Distinguished**	**Para 16**
2011 (6) SCR 599	**Distinguished**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6304-6305 of 2012.

From the Judgment & Order dated 23.12.2011 of the High Court of Delhi at New Delhi in W.P.(C) No. 7103 and 4299 of 2011.

WITH

C.A. No. 6306 of 2012

Indu Malhotra, Mohit Goel, Sidhant Goel, Chinmayee, Mishra Saurabh, Sakesh Kumar, Anuradha Mutatkar for the Appellants.

Siddharth Luthra, ASG, Ashok Bhan, Nidesh Gupta, R.K. Rathore, Sushma Suri, Rekha Pandey, Amit Kumar, Reskha Bakshi, Atul Kumar, Avijit Mani Tripathi, Mohinder Jit Singh, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. These are appeals against the common judgment and order dated 23.12.2011 of the Division Bench of the High Court of Delhi in Writ Petition (C) No.7103 of 2011 and Writ Petition (C) No.4299 of 2011 declining to grant relief to the appellants in the matter of admission to the MBBS course in the medical colleges under Delhi University for the academic session 2011-2012.

3. The facts very briefly are that the Delhi University issued a Bulletin of Information for admissions to the Under-Graduate Degree Courses for the academic session 2011-2012 (for short 'the Bulletin'). Para 2 of the Bulletin dealt with admissions to MBBS course. Para 2.1.1 of the Bulletin stated that the university conducts the MBBS course in three Medical Colleges, namely, Lady Hardinge Medical College (LHMC), Maulana Azad Medical College (MAMC) and University College of Medical Sciences (UCMS). Para 2.1.1 of the Bulletin further stated that only female candidates were to be admitted in LHMC. Para 2.1.2 of the Bulletin stated that candidates for 15% seats were to be selected directly by the Directorate General of Health Sciences (DGHS) based on the result of the examination conducted by the CBSE, New Delhi, as per the directions of this Court. Para 2.1.3 of the Bulletin deals with admissions to seats by Nominees of Government of India (NGOI) and it states that candidates who wish to be considered for admission to this category of seats need not appear in the Delhi University Medical and Dental Entrance Test (DUMET) and they will correspond directly with the authorities listed in Appendix-II to the Bulletin. Para 2.1.6 of the Bulletin furnishes the statement of total number of seats in Under-Graduate Courses for the session 2011-2012. The statement is extracted hereunder:

Name of the Medical College	Seats to be filled in on the basis of DUMET				Seats to be filled in by DGHS	Seats to be filled in by the Gove-rnment of India Nominees	Total Seats
MBBS Course							
	General	SC	ST	OBC	15% Quota	NGOI	
LHMC	55	19	10	14	22	30	150
MAMC	113	25	12	14	30	6	200
UCMS	66	19	9	34	22	Nil	150
Total	234	63	31	62	74	36	500

The aforesaid statement shows that 30 out of 150 seats in LHMC and 6 out of 200 seats in MAMC in the MBBS course are reserved for NGOI. The aforesaid statement further shows that out of a total of 500 MBBS seats in the three government colleges of the university, 36 seats are reserved for NGOI. The Bulletin further provides that besides the 15% seats directly filled up by the DGHS based on the examination conducted by the CBSE, New Delhi, and the NGOI, all other candidates have to appear in the DUMET and will be admitted to the MBBS course on the basis of their merit in the category in which they have applied.

4. The appellants applied as female general category candidates and also took and cleared the DUMET. However, on account of their lower rank in the merit list of candidates who cleared the DUMET, the appellants could not be admitted to any of the seats in the three government medical colleges under the university. Aggrieved, the appellants filed Writ Petition (C) No.7103 of 2011 and Writ Petition (C) No.4299 of 2011 before the High Court of Delhi praying for a direction to quash the Bulletin insofar as it provides for filling up of 30 seats out of the 150 seats in the MBBS course in LHMC by NGOI and praying for a direction to the authorities to fill up these 30 MBBS seats earmarked for the NGOI for the academic session 2011-2012 from the general category candidates and the appellants be considered for such admission to the 30 seats as general category candidates. Before the High Court, the appellants contended that the reservation of as many as 30 seats in the MBBS course in LHMC was violative of Article 14 of the Constitution and that the procedure adopted by the Government of India in nominating the candidates for the 30 seats without holding a common entrance test for determination of their merit was contrary to the Medical Council of India Regulations on Graduate Medical Education, 1997 (for short 'the MCI Regulations').

5. In the impugned judgment and order, the High Court held that in *Kumari Chitra Ghosh & Anr. v. Union of India & Ors*. [1969 (2) SCC 228] a Constitution Bench of this Court has considered the challenge to reservation of seats for certain categories of students on the ground that it is violative of Article 14 of the Constitution and has held the reservation to be constitutionally valid. The High Court further held that even though a sea-change may have taken place since the judgment was delivered by this Court in *Kumari Chitra Ghosh* (supra), it is only for this Court to hold that the ratio of *Kumari Chitra Ghosh* (supra) has become irrelevant. The High Court has also held that as the nominations have already been made by the Government of India to the 30 seats in LHMC in the MBBS course and the nominated students have taken admission and are undergoing the course, it may not be appropriate to disturb their admission. The High Court also found that the appellant had filed the writ petitions in June, 2011 and writ petitions could not be decided by 30th September, 2011 which was the last date within which admissions were to be made to the MBBS course for the academic session 2011-2012 as per the

directions of this Court in *Mridul Dhar (Minor) & Anr. v. Union of India & Ors*. [(2005) 2 SCC 65] and hence no relief could be granted to the appellants after the 30th September, 2011.

6. Ms. Indu Malhotra, learned senior counsel for the appellants, submitted that the Constitution Bench judgment of this Court in *Kumari Chitra Ghosh* (supra) has lost its relevance inasmuch as the entire procedure for medical admissions has undergone a sea-change during the past four decades after the aforesaid judgment was rendered in 1969. She submitted that the MCI Regulations and in particular Regulation 5 thereof mandates that the selection of students to medical colleges shall be based solely on merit of the candidate and for determination of merit the criteria laid down in Regulation 5 of the MCI Regulations has to be adopted uniformly throughout the country. She submitted that Regulation 5(2) of the MCI Regulations provides that in States having more than one University/Board/Examining Body conducting the qualifying examination, a competitive entrance examination should be held so as to achieve a uniform evaluation and Regulation 5(4) of the MCI Regulations provides that a competitive entrance examination is absolutely necessary in the cases of institutions of all-India character. She vehemently argued that there are no exceptions provided in Regulation 5 to holding of a competitive entrance examination and even candidates belonging to the reserved categories including the physically handicapped with 70% disability are required to appear in the competitive entrance examination to secure admission to the medical courses. She argued that the Bulletin, therefore, could not have exempted the NGOI candidates from appearing in the DUMET and in fact the Bulletin by so exempting the NGOI candidates from appearing in the DUMET has clearly violated Regulation 5 of the MCI Regulations and on this ground, Para 2.1.3 of the Bulletin providing that candidates who wish to be considered for admission in the category of NGOI need not appear in the DUMET is *ultra vires* Regulation 5 of the MCI Regulations. She submitted that after the Constitution Bench judgment of this

Court in *Kumari Chitra Ghosh* (supra), the Constitution Bench of this Court in *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors*. [(2002) 8 SCC 481] has also emphasized the need for admissions to professional courses solely on the basis of merit even in private unaided colleges that enjoy maximum autonomy in choosing their candidates for admissions under their fundamental right guaranteed by Article 19(1)(g) of the Constitution. She submitted that in *T.M.A. Pai Foundation* (supra), this Court has also held that the merit of the candidates seeking admission may be determined either through a common entrance test conducted by the University or the Government, followed by counselling. She submitted that LHMC is not a private medical college but a government college and enjoyed much lesser autonomy in matters of admission and admissions to all the 150 seats in LHMC including the 30 seats reserved for NGOI should have only been made on the basis of merit as determined in a competitive entrance examination or a common entrance test. She submitted that contrary to this law which now holds the field, the admission to the seats reserved for the NGOI has been given during the academic session 2011-2012 to four candidates who have even failed in the DUMET examination. She cited a recent judgment of this Court in *Asha vs. Pt. B.D. Sharma University of Health Sciences & Ors.* (Civil Appeal No.5055 of 2012) to the effect that the criteria for selection for admission into MBBS course has to be on merit alone.

7. Ms. Malhotra next submitted that the appellants are not claiming admissions under the quota reserved for NGOI but they are claiming admission to seats in general pool of candidates on the basis of their merit in the competitive examination. In this context, she submitted that the quota reserved for NGOI has been taken out from the seats earmarked for the common pool of seats and if admissions to the NGOI quota are held to be illegal then these seats have to be filled up on the basis of their merit amongst the general category candidates. She further submitted that the quota for NGOI is not a reservation under

Article 15 of the Constitution and yet as many as 30 out of 150 seats in LHMC have been reserved for the NGOI and this quota is as high as 20% of the total seats. According to her, such reservation when considered along with the reservation of seats in favour of SC/ST/OBC candidates exceeds the ceiling of 50% for all reserved category fixed by the Constitution Bench of this Court in *Indira Sawhney v. Union of India* [(1992) Suppl.3 SCC 217] and is unconstitutional. She also relied on the decisions of this Court in *Post Graduate Institute of Medical Education and Research v. Faculty Association* [(1998) 4 SCC 1], *Union of India v. Ramesh Ram & Ors.* [(2010) 7 SCC 234] and *Indian Medical Association vs. Union of India* [(2011) 7 SCC 179].

8. In reply, Mr. Siddharth Luthra, Additional Solicitor General appearing for Union of India, submitted that the Government of India, Ministry of Health and Family Welfare, has issued guidelines for selection of candidates to be nominated for the quota of seats reserved for NGOI and the guidelines would show that the selection is to be based on academic merit of the candidates. These guidelines are contained in the letter dated 09.12.1986 of the Joint Secretary, Ministry of Health and Family Welfare, Government of India, to all the States/Union Territories. He further submitted relying on paragraph 4 of the affidavit of the Union of India filed on 16.07.2012 that the purpose of allotting the seats under the Central Pool Scheme for NGOI is that students from States and Union Territories where there are no adequate medical colleges need support for medical education and wards of Defence/Paramilitary Forces who have sacrificed their lives or have been permanently disabled in war/terrorism also need similar support for medical education. He further submitted that the Central Pool Scheme is run on the basis of voluntary contributions from the States/Union Territories/Ministries/ Agencies for the students nominated by them. He submitted that these seats are only allocated to the beneficiary States/ Union Territories/Ministries/Agencies and the allocation letters sent to the States/Union Territories/Ministries/Agencies like the

Defence Ministry, MHA, MEA and HRD Ministries contain the guidelines indicating the eligibility and the method of selection to be followed at the time of selection of candidates against the Central Pool Schemes. He explained that the beneficiary States/Union Territories/Ministries/Agencies prepare a list of eligible candidates on the basis of either the State Level Entrance Test or on the basis of academic merit and conduct counselling sessions for the available seats of the Central Pool and after the list of candidates is finalized, the States/Union Territories/Ministries/Agencies inform the successful candidates to report to the medical college in question for admission. He submitted that the Central Government, therefore, has actually no role in preparation of merit list of eligible candidates and its role is confined to only allocating the seats to the States/ Union Territories/Ministries/Agencies.

9. Mr. Luthra submitted that the issues raised by the appellants have been considered by the Constitution Bench of this Court in *Kumari Chitra Ghosh* (supra) but decided in favour of the Central Government. He submitted that the Medical Council of India has amended the MCI Regulations by the Regulation on Graduate Medical Education (Amendment 2012) and these amended Regulations will be applicable from the academic year commencing from 2013-2014. He submitted that a reading of these amendments to Regulation 5 of the MCI Regulations would show that in order to be eligible for admission in MBBS course for a particular year, it shall be necessary for a candidate to obtain minimum marks in the National Eligibility-cum-Entrance Test to MBBS course held for that academic year and such minimum marks would be 50% for general candidates and 40% for SC/ST/OBC.

10. We have considered the submissions of the learned counsel for the parties and we find that in *Kumari Chitra Ghosh* (supra) the facts were that in LHMC 23 seats were reserved by the Central Government for students of the following categories:

"(a) Residents of Delhi ……..

(b) (i) Sons/Daughters of Central Government servants posted in Delhi at the time of admission.

(ii) Candidate whose father is dead and is wholly dependent on brother/sister who is a Central Government servant posted in Delhi at the time of admission.

(c) Sons/Daughters of residents of Union Territories specified below including displaced persons registered therein and sponsored by their respective Administration of Territory:

(i)Himachal Pradesh; (ii) Tripura; (iii) Manipur; (iv) Naga Hills; (v) N.E.F.A; (vi) Andaman.

(d) Sons/Daughters of Central Government servants posted in Indian Missions abroad.

(e) Cultural Scholars.

(f) Colombo Plan Scholars.

(g) Thailand Scholars.

(h) Jammu and Kashmir State Scholars."

A candidate seeking admission in any of the reserved seats must have obtained a minimum of 55 per cent aggregate marks in the compulsory subjects. This reservation of 23 seats was challenged before the High Court of Delhi as *inter-alia* violative of Article 14 of the Constitution and the nomination of the candidates to the reserved seats was also challenged as contrary to the rules. The Delhi High Court rejected the challenge and Kumari Chitra Ghosh carried the appeal to this Court. A Constitution Bench of this Court held that the reservation of 23 seats by the Central Government in favour of

specific categories of candidates was constitutionally valid. Paragraph 9 of the judgment of the Constitution Bench of this Court in *Kumari Chitra Ghosh* (supra) is quoted herein below:

"9. It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends *inter-alia* on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is necessary to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification."

Thus, this Court has held in *Kumari Chitra Ghosh* (supra) that it is for the Central Government which bears the financial burden of running the medical college to take a policy decision on the basis of over all assessment and survey of requirements of residents of particular territories and other categories of persons and the sources from which admissions are to be made in the medical college and so long as the sources are properly classified whether on territorial, geographical or other reasonable basis, the Court will not strike down the policy decision of the Central Government on the ground that it is violative of Article 14 of the Constitution.

11. We may now examine the policy decision of the Central Government in reserving the seats in favour of the NGOI. In the affidavit filed on behalf of the Union of India dated 16.07.2012, it is stated that there are a number of States or the Union Territories which do not have medical/dental colleges of their own and the majority of such States are in the North-Eastern Region and in order to meet the requirements of these

States/Union Territories and for some Central Government Ministries/Agencies and to fulfill some national and international obligations, a Central pool of MBBS/BDS seats is being maintained by the Ministry of Health and Family Welfare. Along with the affidavit, a list of beneficiary States/Union Territories/ Ministries/Agencies and the distribution of seats of the Central Pool for the academic year 2011-2012 to the beneficiary Sates/ Union Territories/Ministries/Agencies has also been furnished, which is extracted hereinbelow:

S.No.	Beneficiary Sates/UT/Agency	2011-12	
		MBBS	BDS
1.	Tripura	7	2
2.	Manipur	24	2
3.	Mizoram	27	2
4.	Meghalaya	22	2
5.	Sikkim	8	2
6.	Arunachal Pradesh	26	2
7.	Nagaland	24	2
8.	Lakshadweep	13	2
9.	A & N Islands	18	2
10.	Daman & Diu	7	2
11.	Dadra & Nagar Haveli	8	2
12.	J & K	4	-
13.	Ministry of Defence	25	2
14.	Cabinet Secretariat (For SSF, RAW, ARC Dte.)	5	1
15.	Ministry of Home Affairs (for BSF, CRPF, ITBP, CISF, Assam Rifles, SSB Etc.)	7	2
16.	Ministry of External Affairs (i) For Indian Mission Staff posted abroad.	4	
	(ii) For Self financing foreign	26	1
17.	Ministry of HRD (for Tibetan Refugees)	1	-
18.	Indian Council for Child Welfare (for National Bravery Award Winners)	2	-
19.	Ministry of Home Affairs (Civil Terrorist Victims)	2	-
	Total:	260	28

The Central Government has, therefore, reserved 260 seats in the MBBS course for the Central Pool and has classified the sources from which admissions were to be made to these 260 seats on geographical and other basis. It has not been shown by the appellants that the classification of the sources from which admissions are to be made has no rational nexus with the objects sought to be achieved by the policy of the Central Government. Hence, the validity and constitutionality of the policy of the Central Government to reserve some seats on geographical and some other rational basis cannot be questioned. However, reservation of as many as 260 seats may not be justifiable in the changed circumstances discussed hereinafter in this judgment.

12. In fact, the main contention of the appellants is that the policy of the Central Government to reserve seats in favour of the NGOI is in breach of the principle of selection solely on the basis of merit as laid down by the Constitution Bench of this Court in *T.M.A. Pai Foundation* (supra) and as provided in Regulation 5 of the MCI Regulations. It has, however, been held

by the Constitution Bench of this Court in *Kumari Chitra Ghosh* (supra) that where some seats are reserved to be filled up only from properly classified sources, the selection on the basis of merit has to be confined to the sources from which the seats are to be filled up. Relevant extract from Paragraph 10 of the judgment of this Court in *Kumari Chitra Ghosh* (supra) is quoted hereunder:

> "As noticed before *the sources from which students have to be drawn are primarily- determined by the authorities who maintain and run the institution, e.g, the Central Government in the present case. In Minor P. Rajendran v. State of Madras* [AIR (1968) SC 1012] it has been stated that the object of selection for admission is to secure the best possible material. This can surely be achieved by making proper rules in the matter of selection *but there can be no doubt that such selection has to be confined to the sources that are intended to supply the material."*
>
> [Emphasis supplied]

Accordingly, the seats which are reserved for a particular source, i.e., the beneficiary State/Union Territory/Ministry/ Agency are to be filled up by selection on the basis of merit of candidates who have applied as candidates of that particular source, i.e., that beneficiary State/Union Territory/Ministry/ Agency. Thus, these candidates who constitute separate sources from which admissions are to be made to the seats allocated to the sources are not required to take the DUMET. They must go through the selection on the basis of merit as laid down in *T.M.A. Pai Foundation* (supra) and as provided in Regulation 5 of the MCI Regulations but such selection has to be confined to the candidates of the respective sources.

13. In Annexure – R/3 to the affidavit filed on behalf of the Union of India filed on 16.07.2012, the particulars of the candidates who have been nominated to the seats allocated

to the beneficiary States/Union Territories/Ministries/Agencies have been given. It has been stated in Annexure – R/3 that for the 26 seats allocated to the State of Arunachal Pradesh, the candidates were nominated on the basis of Joint Entrance Examination held by the State Government; to the 24 seats allocated to the State of Nagaland, the candidates have been nominated on the basis of Joint Entrance Examination conducted by the State Government; to the 27 seats allocated to the State of Mizoram, the candidates have been nominated on the basis of the State Technical Entrance Examination conducted by the State Government; to the 22 seats allocated to the State of Meghalaya, the candidates have been nominated on the basis of academic merit in 10+2; to the 8 seats allocated to the State of Sikkim, the candidates have been nominated on the basis of common entrance examination conducted by the State Government; to the 7 seats allocated to the State of Tripura, the candidates have been nominated on the basis of Common Entrance Examination conducted by the State Government; to the 24 seats allocated to the State of Manipur, the candidates have been nominated on the basis of the Common Entrance Examination conducted by the State Government; to the 13 seats allocated to the Union Territory of Lakshadweep, the candidates have been nominated on the basis of Medical Entrance Examination conducted by the Union Territory Government; to the 18 seats allocated to the Union Territory of Andaman and Nicobar Islands, the candidates have been nominated on the basis of marks obtained in 10th (20% weightage) and 12th (80% weightage): to the 8 seats allocated to the Union Territory of Dadar and Nagar Haveli, the candidates have been nominated on the basis of percentage of marks obtained in 10+2; to the 7 seats allocated to the Union Territory of Daman & Diu, candidates have been nominated on the basis of the percentage of marks obtained in 10+2; to the 4 seats allocated to the State of J & K, the candidates have been nominated on the basis of Professional Entrance Examination conducted by the State Government; to the 25 seats allocated to the Ministry of Defence, the candidates have

been nominated on the basis of marks obtained in the 10th (20% weightage) and 12th (80% weightage); to the 5 seats allocated to the Cabinet Secretariat, candidates have been nominated on the basis of marks obtained in 10th (20% weightage) and 12th (80% weightage); to the 7 seats allocated to the Ministry of Home Affairs, candidates have been nominated on the basis of marks obtained in 10th (20% weightage) and 12th (80% weightage); to the 4 seats allocated to the Ministry of External Affairs (Mission Staff), candidates have been nominated on the basis of marks obtained in 10+2; to the 26 seats allocated to the Ministry of External Affairs (Foreigners), candidates have been nominated on the basis of marks obtained in 10+2; to the one seat allocated to the Central Tibetan Administration, candidates have been nominated on the basis of marks obtained in 10+2; to the two seats allocated to the Indian Council for Child Welfare, candidates have been nominated on the basis of marks obtained in 10+2 and to the two seats allocated to the Ministry of Home Affairs, candidates have been nominated on the basis of marks obtained in 10+2.

14. The selection of candidates for the seats reserved for NGOI thus has been done either on the basis of marks in the Joint Entrance Examination or marks in the 10+2 examinations. Regulation 5 of the MCI Regulations provides for determining the merit on the basis of marks obtained in Physics, Chemistry, Biology and English in the qualifying examination where one University/Board/Examining Body conducts the qualifying examination or on the basis of a competitive entrance examination where more than one University/Board/ Examining Body conducts the qualifying examination. Unless a candidate who had applied to any of the allocated seats and who had not been selected for nomination comes to Court and places materials before the Court to show that the selection has not been made in accordance with Regulation 5 of the MCI Regulations or that his merit has been by-passed while making the selection, the Court cannot disturb the selection. In this case, the candidates who had applied for the seats allocated to the

beneficiary States/Union Territories/Ministries/Agencies have not approached the Court with their grievance that their merit has been bypassed or that the selection has not been made in accordance with Regulation 5 of the MCI Regulations. Instead the appellants who had not applied for the 30 seats reserved in LHMC for the NGOI have come before this Court with their grievance that they ought to have been selected and admitted to some of those 30 seats. The appellants, who have not applied for the 30 seats reserved for the NGOI, could not challenge the selection of the candidates to the 30 seats reserved for the NGOI on the ground that merit as provided in Regulation 5 of the MCI Regulations or as laid down in *T.M.A. Pai Foundation* has not been considered while making selection for nomination of these reserved seats. In taking this view, we are supported by the judgment of the Constitution Bench of this Court in *Kumari Chitra Ghosh* (supra), wherein it has been observed:

> "…….It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no *locus standi* in the matter of nomination to such seats. …"

Hence, even if some of the students may have been selected for admission to the seats reserved for NGOI not on merit as determined strictly in accordance with Regulation 5 of the MCI Regulations, we are not inclined to disturb their admissions in exercise of our power under Article 142 of the Constitution. However, if there are vacant seats in the two government medical colleges, namely, LHMC or MAMC, for the academic year 2011-2012 out of the quota for NGOI, then the petitioners should be given admission to these vacant seats on the basis of their merit in the DUMET 2011-2012 during the academic year 2012-2013.

15. The appellants, however, have contended that 4

candidates, who have been given admission in the seats reserved for NGOI in LHMC and MAMC during the academic year 2011-2012, have even failed in the DUMET and to grant admission to such failed candidates is making a mockery of the entire system of medical admissions. As we have already held, the candidates who have applied for the quota for the seats reserved for NGOI constitute separate sources from which admissions are to be made and the selection on the basis of merit is to be confined to each separate source from which the admissions are to be made and they are not required to take the DUMET. Hence, even if they have failed in DUMET, they are still entitled to be admitted to the seats reserved for NGOI, if they are selected on the basis of merit from amongst all the candidates who have applied from the aforesaid separate sources for admission. Nonetheless, if the candidates who have failed in the DUMET are admitted through a separate source of admission, as in the present case, this may result in lot of heart burn amongst the students who have cleared the DUMET but have not got the admission to a seat in the MBBS course on account of their lower rank in the merit list. Hence, in future the Delhi University must stipulate in the Bulletin and the Government of India must issue instructions that candidates who opt to take the DUMET but do not qualify will not be eligible for admission to the quota reserved for NGOI. This anomaly, however, has been addressed by the MCI by making amendments to the MCI Regulations and by providing therein that from the academic year 2013-2014 every candidate seeking admission to the MBBS course must obtain a minimum marks of 50% in the National Eligibility-cum-Entrance Test in the MBBS course if he is a general category candidate and must secure a minimum marks of 40% in the National Eligibility-cum-Entrance Test if he is a candidate belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes. From the academic year 2013-2014, therefore, NGOI applying for the reserved seats will have to secure the aforesaid minimum marks in the National Eligibility-cum-Entrance Test for MBBS course.

16. We may now deal with the contention of the appellants that the reservations of seats for NGOI in LHMC is excessive and when taken together with the quota of seats for SC, ST, OBC and 15% of all-India even exceeds the 50% ceiling of reservation fixed by this Court. We have perused the decisions in *Indira Sawhney v. Union of India, Post Graduate Institute of Medical Education and Research v. Faculty Association* and *Union of India v. Ramesh Ram & Ors.* (supra) cited by Ms. Malhotra and we find that the aforesaid decisions do not relate to reservations of seats for admission in medical colleges or other educational institutions, but they relate to reservations of posts in favour of SC, ST and Other Backward Classes in public services. We have also perused the decision of this Court in *Indian Medical Association vs. Union of India* (supra) cited by Ms. Malhotra and we find that the aforesaid decision holds that in the case of non-minority private unaided professional institutions when the candidates are to be selected from the source of general pool, selection has to be based on *inter se* rank of students, who have qualified and applied or opted to choose to be admitted to such non-minority private unaided professional institutions, whereas in the case of minority educational institutions the source can be delimited to the particular minority the institution belongs to. The aforesaid decision in the case of *Indian Medical Association vs. Union of India* (supra), therefore, has no application to the facts of this case as LHMC is not a private unaided medical college. Instead, it is a college of the Central Government. In any case, the total number of seats in MBBS course in the LHMC is 150 out of which 55 seats are filled up from general candidates on the basis of their *inter se* merit in DUMET and 22 more seats are filled up by candidates on the basis of their *inter se* rank in the merit list pursuant to an all-India examination conducted by the CBSE. Moreover, in para 13 of the affidavit filed on behalf of the Union of India on 16.07.2010, it is stated that LHMC had earlier an overall intake of 150 students which has been increased to 200 students from the academic year 2011-2012 and despite the increase of 50 seats, the number of seats for

NGOI for the academic year 2011-2012 was fixed at 30. It is further stated in para 13 of the aforesaid affidavit that the seats reserved for NGOI in LHMC has been reduced to 20 during the academic year 2012-2013, to 17 during the academic year 2013-2014 and to 15 for the academic year 2014-2015, as it will be clear from the letter dated 25.04.2012 of the Union of India to LHMC. It is also stated in para 13 of the aforesaid affidavit that while LHMC is a Central Government institution, UCMS and MAMC are institutions controlled by the Government of NCT Delhi and the Government of India cannot demand surrender of seats towards Central Pool and further LHMC is the only college which specializes in medical education for the girl students and the Government wants to propagate medical education among the girls, particularly in the North-Eastern region. Considering the aforesaid steps taken by the Government of India to reduce the number of seats in phases from 30 to 15 for NGOI in LHMC, we think that the grievance that there has been excessive reservation for NGOI in LHMC, if any, has been taken care of. That apart, for students of Delhi, UCMS and MAMC are also other institutions where MBBS course can be pursued by the general candidates including general female candidates and the total number of seats in these institutions are 200 and 150 respectively out of which only 6 are reserved for NGOI.

17. We, however, find that in para 31 of the impugned judgment, the High Court has held that even if there was a justification as offered by the Government of India that many States/Union Territories did not have medical institutions of their own, particularly in North-Easter States, there has been an overall economic development in the country and a number of State-funded and private medical and other institutions have been established in the meanwhile in the country and, therefore, a re-look by the Government of India at the extent of the seats reserved for the NGOI was necessary. We agree with this view of the High Court in the impugned judgment and we are of the considered opinion that the Central Government should review

and find out the number of seats in MBBS course available in the State-funded and the private medical colleges in the States/ Union Territories for which seats are being allocated from the quota for NGOI and decide afresh as to how many seats should be allocated to these States/Union Territories.

18. In the result, we:

(i) hold that the Bulletin insofar as it reserves 30 seats in the MBBS course in LHMC for NGOI is not *ultra vires* the Constitution and in so far it exempts candidates to be admitted to these 30 seats from taking the DUMET is not *ultra vires* the MCI Regulations.

(ii) hold that the provisions of Regulation 5 of the MCI Regulations for selection for admission to the MBBS course solely on the basis of merit have to be followed by the beneficiary States/Union Territories/Ministries / Agencies while selecting the students who apply for the seats reserved or allocated for the concerned State/Union Territory/ Ministry/Agency.

(iii) hold that even if merit of the applicants may not have been determined strictly in accordance with Regulation 5 of the MCI Regulations by the beneficiary States/Union Territories/Ministries/Agencies while selecting some of the students for the seats reserved for NGOI for the academic session 2011-2012, we are not inclined to disturb their admissions in exercise of our powers under Article 142 of the Constitution.

(iv) direct that with effect from the academic year 2012-2013, no admission will be made to any of the seats reserved for NGOI in LHMC, MAMC and UCMS of any student who has failed in the DUMET.

(v) direct that for the academic year 2013-2014 onwards, the candidate applying for seats reserved for NGOI have

to obtain the minimum marks in the All India National Eligibility-cum-Entrance Test for admission to the MBBS course as provided in the amended MCI Regulations and the admissions will be made on merit after calling for applicants through advertisement in the newspapers having wide circulation.

(vi) direct that the Central Government will make a review of the government and private medical colleges which have been established in the meanwhile in the States/ Union Territories to which seats are being allocated under the quota for NGOI and if they find that additional intake capacity for the MBBS course has been created in these States/Union Territories, the Central Government will take a fresh decision on the number of seats in the MBBS course to be reserved for NGOI for these States with effect from the academic year 2013-2014.

(vii) direct that if there are vacant seats in the quota for NGOI in the LHMC and MAMC for the academic year 2011-2012, the petitioners will be given admission to these vacant seats on the basis of their merit in DUMET 2011-2012 during the academic year 2012-2013.

19. With the aforesaid directions, the appeals are disposed of. There shall be no order as to costs.

K.K.T. Appeals disposed of.

ASHWANI KUMAR SAXENA

v.

STATE OF M.P.

(Criminal Appeal No. 1403 of 2012)

SEPTEMBER 13, 2012

[K.S. RADHAKRISHNAN AND MADAN B. LOKUR, JJ.]

Juvenile Justice (Care and Protection of Children) Act, 2000 – s. 7A r/w. r. 12 of Juvenile Justice Rules, 2007 – Inquiry under – Nature, scope and ambit of – Claim of juvenility – Procedure to be followed – For determination of age – Held: Age determination inquiry is contemplated u/s. 7A r/w r. 12 – Therefore, such inquiry is an inquiry under the Act and to be conducted following the procedure u/r. 12 and not following the procedure under Cr.P.C. – Age to be determined initially on the basis of the documents/certificates as indicated in r. 12(3)(a)(i)(ii) and (iii) – The question of obtaining medical opinion arises only if the documents/ certificates are unavailable or found to be fabricated or manipulated – Once the court passes order determining the age of the juvenile following the procedure laid down u/s. 7A r/w r.12, that shall be conclusive proof as regards the age of that juvenile – In the instant case, the court examined the question of juvenility as if it was a criminal trial or inquiry under Cr.P.C – The document produced to prove the date of birth was not refuted or rebutted by the opposite party – Hence rule 12(3)(a)(i)(ii) is complied with – The court wrongly ordered for medial opinion disbelieving the documents in support of date of birth of the juvenile – Juvenile Justice (Care and Protection of Children) Rules, 2007 – r. 12 – Code of Criminal Procedure, 1973.

Penal Code, 1860 – s. 320 r/w s.27 of Arms Act, 1959 – Prosecution under – Conviction and sentence of life imprisonment by trial court – Appeal pending before High

Court – In the meantime, in an application u/ss. 6 and 7 of Juvenile Justice Act, Supreme Court finding that the accused was a juvenile – Sentence set aside – Direction to High Court to place the records before Juvenile Justice Board for awarding sentence in accordance with the Act of 2000 – Juvenile Justice (Care and Protection of Children) Act, 2000 – Arms Act, 1959 – s. 27.

Words and Phrases:

'inquiry', 'enquiry', 'investigation' and 'trial' – Meaning of, in the context of Cr.P.C. and Juvenile Justice (Care and Protection of Children) Act, 2000.

The appellant accused was prosecuted u/s. 302 IPC r/w s. 27 of Arms Act. During pendency of the trial, he moved an application u/ss. 6 and 7 of Juvenile Justice (Care and Protection of Children) Act, 2000, claiming to be a juvenile (i.e. below 18 years age on the date of the incident). In support of his date of birth, he produced mark-sheets of eighth standard and Higher Secondary Board examinations.

The court directed Ossification Test. As per the medical reports, the age of the accused was not below 18 years on the date of the incident. The court disbelieving the school records and relying on the medical evidence, dismissed the application.

Appellate court called for the original school records in order to ascertain the basis for entry of the date of birth, but disbelieving the same, dismissed the appeal. The order was confirmed by the High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1 Courts below, while dealing with the claim of juvenility have not properly understood the scope of

the Juvenile justice (Care and Protection of Children) Act, 2000 particularly, meaning and content of Section 7A of the Act read with Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007. Section 7A, obliges the court only to make an *inquiry, not an investigation or a trial,* **an inquiry not under Cr.P.C. but under the Act. Criminal Courts, JJ Board, Committees etc., proceed as if they are conducting a trial, inquiry, enquiry or investigation as per Cr.P.C. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in 2007 Rules. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. [Paras 13, 27 and 28] [553-B; 561-B-G]**

1.2. The *age determination inquiry* **has to be completed and age be determined within thirty days from the date of making the application, which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the Act, but Section 2(y) of the Act says that all words and expressions used and not defined in the Act but defined in Cr.P.C, shall have the meanings respectively assigned to them in that Code. [Para 28] [561-G-H; 562-A]**

1.3. The words ínquiry'and ínvestigation'have been defined in ss. 2(g) and 2(h) of Cr.P.C. respectively. The word "enquiry" is not defined under Cr.P.C. which is an act of asking for information and also consideration of some evidence, may be documentary. The expressions "trial" has also not been defined in Cr.P.C. but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of Cr.P.C. [Para 29] [562-C-G]

1.4. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some offences committed. In very many cases the Court /the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) Cr.P.C. but an inquiry under the Act, following the procedure laid under Rule 12 and not following the procedure laid down under Cr.P.C. [Para 30] [562-G-H; 563-A-B]

1.5. Cr.P.C. makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under Cr.P.C. naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7A read with Rule 12 of the 2007 Rules. Thus, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry. The procedure to be followed under the Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. One cannot import other procedures laid down in Cr.P.C. or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the

court exercising powers under section 7A of the Act. [Paras 31 and 32] [563-B-F]

1.6. A duty is cast on all Courts/J.J. Board and the Committees functioning under the Act to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection. [Para 33] [563-G-H; 564-A]

1.7. "Age determination inquiry" contemplated u/s. 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year. [Para 34] [564-A-E]

1.8. Once the court, following the above mentioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) of Rule 12 that no further inquiry shall be

conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the Act also draws a presumption of the age of the Juvenility on its determination. [Para 35] [564-E-G]

1.9. Age determination inquiry contemplated under the Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination. [Para 36] [564-G-H; 565-A-B]

1.10. Legislature and the Rule making authority in their wisdom have in categorical terms explained how to proceed with the age determination inquiry. Further, Rule 12 has also fixed a time limit of thirty days to determine the age of the juvenility from the date of making the application for the said purpose. Further, it is also evident from the Rule that if the assessment of age could not be done, the benefit would go to the child or juvenile considering his / her age on lower side within the margin of one year. [Para 42] [568-B-C]

2.1. In the instant case, the court examined the question of juvenility of the appellant as if it was conducting a criminal trial or inquiry under Cr.P.C. After

having summoned the admission register of the Higher Secondary School where the appellant had first studied and after having perused the same produced by the principal of school and having noticed the fact that the appellant was born on 24.10.1990, the court should have accepted the admission register produced by the principal of the school. The date of birth of the appellant was discernible from the school admission register. Entry made therein was not controverted or countered by the counsel appearing for the State or the private party, which is evident from the proceedings recorded and which indicates that they had conceded that there was nothing to refute or rebut the factum of date of birth entered in the School Admission Register. The above document produced by the principal of the school conclusively shows that the date of birth was 24.10.1990 hence section 12(3)(a)(i)(ii) has been fully satisfied. The appellant has successfully established his juvenility on the date of occurrence. [Paras 38, 40 and 46] [565-F; 567-E-G; 569-C]

2.2. The admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility. [Para 45] [569-A-B]

2.3. The appellant has already faced the criminal trial and the court found him guilty along with two others under section 302 IPC and has been awarded life imprisonment which is pending in appeal, before the High Court. The accused is also involved in few other criminal cases as well. Since the appellant was a juvenile on the date of the incident, the sentence awarded in

sessions case is set aside and the High Court is directed to place the records before J.J. Board for awarding appropriate sentence in accordance with the provisions of the Act, 2000 and if the appellant has already undergone the maximum sentence of three years as prescribed in the Act, he has to be let free, provided he is not in custody in any other criminal case. [Para 47] [569-E-G]

Babloo Parsi v. State of Jharkhand and Anr. **(2008) 13 SCC 133: 2008 (14) SCR 161;** *Shah Nawaz v. State of Uttar Pradesh and Anr.* **(2011) 13 SCC 751: 2011 (9) SCR 859 – relied on.**

Arnit Das v. State of Bihar **(2000) 5 SCC 488: 2000 (1) Suppl. SCR 69;** *Pratap Singh v. State of Jharkhand* **(2005) 3 SCC 551: 2005 (1)SCR 1019 ;** *Hari Ram v. State of Rajasthan and Anr.* **(2009) 13 SCC 211: 2009 (7) SCR 623;** *Dharambir v. State (NCT of Delhi) and Anr.* **(2010) 5 SCC 344: 2010 (5) SCR 137;** *Mohan Mali and Anr. v. State of Madhya Pradesh* **(2010) 6 SCC 669;** *Jabar Singh v. Dinesh and Anr.* **(2010) 3 SCC 757: 2010 (3) SCR 353;** *Dayanand v. State of Haryana* **(2011) 2 SCC 224: 2011 (1) SCR 173 ;** *Anil Agarwal and Anr. v. State of West Bengal* **(2011) 2 SCALE 429 – referred to.**

Case Law Reference:

2000 (1) Suppl. SCR 69	**Referred to.**	**Para 14**
2005 (1) SCR 1019	**Referred to.**	**Para 14**
2009 (7) SCR 623	**Referred to.**	**Para 15**
2010 (5) SCR 137	**Referred to.**	**Para 17**
(2010) 6 SCC 669	**Referred to.**	**Para 19**
2010 (3) SCR 353	**Referred to.**	**Para 20**
2011 (1) SCR 173	**Referred to.**	**Para 22**
(2011) 2 SCALE 429	**Referred to.**	**Para 23**
2008 (14) SCR 161	**Relied on.**	**Para 43**
2011 (9) SCR 859	**Relied on.**	**Para 44**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1403 of 2012.

From the Judgment & Order dated 3.12.2010 of the High Court of Madhya Pradesh at Jabalpur in Criminal Revision No. 495 of 2009.

Dinesh Kumar Garg for the Appellant.

Sidhartha Dave, Jemtiben AO (for Vibha Datta Makhija) for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We notice that large number of cases are being brought before this Court against orders passed by the criminal courts, on the claim of juvenility under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the J.J. Act') read with Rule 12 of The Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'the 2007 Rules'), primarily for the reason that many of the criminal courts are not properly appraised of the scope of enquiry contemplated under those statutory provisions. We find it appropriate in this case to examine the nature of inquiry contemplated under Section 7A of the J.J. Act read with Rule 12 of the 2007 Rules, for future guidance and application by the Courts, Boards and the Committees functioning under the J.J. Act and Rules.

3. Before considering the above question and other related issues, we may examine, what transpired in the case on hand.

Appellant – Ashwani Kumar Saxena and two others, namely, Jitender and Ashish were charge-sheeted for the offences punishable under Section 302 of the Indian Penal Code (for short 'the IPC') read with Section 27 of Arms Act and Section 302 IPC read with Section 34 of the IPC, respectively, for an offence committed on 19.10.2008 at 12.30 am in front of Krishna Restaurant, Chhatarpur which resulted in the death of one Harbal Yadav for which Sessions Case No.28/09 was pending before the First Additional Sessions Judge, Chhatarpur, Madhya Pradesh (M.P.). On 11.11.2008 the appellant filed an application before Chief Judicial Magistrate (CJM) Court, Chhatarpur under Sections 6 and 7 of the J.J. Act claiming that he was juvenile on the date of the incident and hence, the criminal court had no jurisdiction to entertain this case and the case be referred to Juvenile Justice Board and he be granted bail.

4. The appellant stated that his date of birth is 24.10.1990 and hence on the date of the incident i.e. on 19.10.2008, he was aged only 17 years, 11 months and 25 days and was thus a juvenile. In support of this contention, he produced the attested mark sheets of the High School of the Board of Secondary Education, M.P. Bhopal as well as Eighth standard Board Examination, wherein the date of birth was mentioned as 24.10.1990.

5. Smt. Kiran, widow of victim raised objection to the application contending that no evidence had been adduced to show that the entry made in the school Register was correct and normally parents would not give correct date of birth on the admission Register. Further, it was also stated that on physical appearance, as well, he was over 21 years of age and therefore the application be dismissed. Ram Mohan Saxena, father of the appellant, was examined as PW1 and he deposed that the date of birth of his son was 24.10.1990 and that he was born in the house of Balle Chaurasia in Maharajpur and his son was admitted in Jyoti Higher Secondary School, wherein his date

of birth was also entered as 24.10.1990. Reference was also made to the transfer certificate issued by the above-mentioned school, since the appellant had studied from 8th standard to 10th standard in another school, namely, Ceiling Home English School. Further reliance was also placed on a horoscope, which was prepared by one Daya Ram Pandey, marked as exhibit P-4. Savitri Saxena, the mother of the appellant was also examined as PW-4, who also deposed that his son was born on 24.10.1990 and had his education at Jyoti Higher Secondary School and the School Admission Register kept in the school would also indicate his correct date of birth.

6. The C.J.M. court thought of conducting an ossification test for determination of the age of the appellant. Dr. R.P. Gupta, PW-2 conducted age identification of the body of the appellant by X ray and opined that epiphysis of wrist, elbow, knee and iliac crest was fused and he was of the opinion that the appellant was more than 20 years of age on 14.11.2008 and a report exhibited as P-5 was submitted to that extent. Dr. S.K. Sharma, Medical Officer, District Hospital, Chhatarpur was examined as PW-3, who conducted teeth test on the appellant for age identification. PW-3 had found that all 32 teeth were there including all wisdom teeth, so the age of the appellant was more than 21 years.

7. Dr. R.P. Gupta (PW-2) and Dr. S.K. Sharma (PW-3) were cross-examined by the counsel for the appellant. Dr. R.P. Gupta (PW-2) stated that there might be margin of 3 years on both side while Dr. S.K. Sharma (PW-3) had denied the said statement and he was of the opinion that wisdom teeth never erupt before the age of 17 years and might be completed upto the age of 21 years. Dr. S.K. Sharma (PW-3) concluded since all four wisdom teeth were found erupted, the appellant would be more than 21 years as on 14.11.2008.

8. The C.J.M. Court felt that school records including mark sheets etc. cannot be relied upon since teacher, who entered those details, was not examined and stated as follows:

"The date of birth mentioned in all the certificates is 24.10.1990. But it is significant that such date of birth was recorded on the basis of the date of birth disclosed by the father while getting him admitted in the school and neither the school admission form, admission register in original were called for and even statement of no teacher, who got admitted in the school, was got recorded in the court to determine on the basis of which document actually the date of birth was got recorded as per the principle of law laid down by the Honourable Supreme Court that the date of birth should be relied only when it was recorded in the school on the basis of our authenticated documents and the parents used to get the date of birth of the children recorded for some with variation for some benefit and therefore same cannot be held as authenticated."

9. The C.J.M., therefore, placing reliance on the report of the ossification test took the view that the appellant was more than 18 years of age on the date of the incident. Consequently, the application was dismissed vide order dated 1.01.2009. The appellant aggrieved by the above mentioned order filed Criminal Appeal No. 15 of 2009 before the First Additional Sessions Judge, Chhatarpur.

10. The appellant again placed considerable reliance on school records including mark sheets, transfer certificate etc. and submitted that the reliance placed on the odontology report was wrongly appreciated to determine the age of the appellant.

The First Additional Sessions Judge stated as follows:

"On the perusal of entire record it appears that the evidence of Ram Mohan Saxena who is father of the appellant is not reliable as he says that the date of birth of appellant was mentioned by him at the time of admission in school on the basis of Horoscope. It does not bear the date when it was prepared. Papers of the Horoscope are crispy. *The Pandit who prepared the Horoscope was not*

examined for the reason best known to the appellant. Therefore, the best evidence has been withheld by the appellant. Therefore, adverse inference is to be drawn against the appellant. The Horoscope is manufactured and fabricated and tailored for ulterior motive."

(emphasis added)

11. The First Additional Sessions Judge though summoned the original register of Jyoti English School, wanted to know on what basis the date of birth of the appellant was entered in the School Admission Register. PW1, the father of the appellant had therefore to rely upon the horoscope on which First Additional Sessions Judge has commented as follows:

"Horo-Scope was found to be recently made which does not mention the date when it was prepared and it appears to be recently made and original register of the Jyoti Higher Secondary School also does not mention that on what basis the date of birth of the appellant was recorded first time in the school register. Therefore, the version of the Ram Mohan Saxena that the date of birth of the appellant was recorded on the basis of *Horoscope is not supported by the register No.317 of the school. The Horoscope does not bear the date when it was prepared. It appears to be recently made. The original school admission form and the person who made the entries first time in the school has not been examined in this Court. Therefore, no credence can be given to such entry in the school."*

(emphasis added)

12. Learned First Additional Sessions Judge, on the above reasoning, dismissed the appeal though the Principal of Jyoti Higher Secondary School himself had appeared before the Court with the School Admission Register, which showed the date of birth as 24.10.1990. Aggrieved by the same, the appellant approached the High Court and the High Court

confirmed the order passed by the C.J.M. Court as well as the First Additional Sessions Judge stating that the appellant had failed to establish his onus that his age was below 18 years on the date of the incident.

13. We are unhappy in the manner in which the C.J.M. Court, First Additional Sessions Judge's Court and the High Court have dealt with the claim of juvenility. Courts below, in our view, have not properly understood the scope of the Act particularly, meaning and content of Section 7A of the J.J. Act read with Rule 12 of the 2007 Rules Before examining the scope and object of the above mentioned provisions, it will be useful to refer some of the decided cases wherein the above mentioned provisions came up for consideration, though on some other context.

14. In *Arnit Das v. State of Bihar ,* [(2000) 5 SCC 488], this Court 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, 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 are possible on the same evidence, the court should lean in favour of holding the accused to be juvenile in borderline cases. In Arnit Das case, this Court has taken the view that the date of production before the Juvenile Court was the date relevant in deciding whether the appellant was juvenile or not for the purpose of trial. The law laid down in Arnit Das to that extent was held to be not good law, in *Pratap Singh v. State of Jharkhand* [(2005) 3 SCC 551], wherein a five Judge Bench of this Court decided the scope of sections 32 and 2(h), 3, 26, 18 of the Juvenile Justice Act, 1986 and took the view that it was the date of the commission of the offence and not the date when the offender was produced before the competent court was relevant date for determining the juvenility.

15. In *Pratap Singh* case, this Court held that section 20

of the Act would apply only in cases in which accused was below 18 years of age on 01.04.2001 i.e. the date of which the 2000 Act came into force, but it would have no application in case the accused had attained the age of 18 years on date of coming into force of the 2000 Act. Possibly to get over the rigor of Pratap Singh, a number of amendments were introduced in 2000 Act w.e.f 28.02.2006 by Act 33 of 2006, the scope of which came up for consideration in *Hari Ram v. State of Rajasthan and Another* [(2009) 13 SCC 211]. In Hari Ram, this court took the view that the Constitution Bench judgment in Pratap Singh case was no longer relevant since it was rendered under the unamended Act. In *Hari Ram* while examining the scope of Section 7A of the Act, this Court held that the claim of juvenility can be raised before any court at any stage and such claim was required to be determined in terms of the provisions contained in the 2000 Act and the Rules framed thereunder, even if the juvenile had ceased to be so on or before the date of commencement of the Act. It was held that a juvenile, who had not completed 18 years of age on the date of commission of the offence, was also entitled to the benefits of Juvenile Justice Act, 2000 as the provisions of section 2(k) had always been in existence even during the operation of the 1986 Act.

16. Further, it was also held that on a conjoint reading of sections 2(k), 2(l), 7A, 20 and 49 r/w Rules 12 and 98 places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1.4.2001 would be treated as juveniles even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. With regard to the determination of age, this Court held that the determination of age has to be in the manner prescribed in Rule 12 of the 2007 Rules and opined that the determination of age is an important responsibility cast upon the Juvenile Justice Boards.

17. The scope of Section 7A of the Act and Rule 12 of the 2007 Rules again came up for consideration before this Court in *Dharambir v. State (NCT of Delhi) and Another* [(2010) 5 SCC 344]. That was a case where the appellant was convicted for offences under section 302/34 and 307/34 IPC for committing murder of one of his close relatives and for attempting to murder his brother. The appellant was not a juvenile within the meaning of 1986 Act, when the offences were committed but had not completed 18 years of age on that date.

18. This court held from the language of the Explanation to Section 20 that in all pending cases, which would include not only trial but even subsequent proceedings by way of revision or appeal etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April 2001, when the Act of 2000 came into force, and the provisions of the Act would have applied as if the said provision had been in full force for all purposes and for all material times when the alleged offence was committed. This Court held clause (l) of Section 2 of the Act 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of the commission of such offence. Section 20 also 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 J.J. Board concerned for passing sentence in accordance with the provisions of the 2000 Act.

19. This Court in *Mohan Mali and Another v. State of Madhya Pradesh* [(2010) 6 SCC 669] has again considered the scope of Section 7A of the Act. That was a case where plea of juvenility was raised before this court by the convict undergoing sentence. The appellant therein was convicted under sections 302/34, 326/34 and 324/34 IPC and was

sentenced to life imprisonment and had already undergone 9 years of imprisonment. In that case a copy of the birth certificate issued by the Chief Registrar (Birth and Death) Municipal Corporation, Dhar u/s 12 of the Birth and Death Registration Act 1969 maintained by the Corporation was produced. This Court noticed that as per that certificate the date of birth of the accused was 12.11.1976. After due verification, it was confirmed by the State of Madhya Pradesh that he was a juvenile on the date of commission of the offence and had already undergone more than the maximum sentence provided under Section 15 of the 2000 Act by applying Rule 98 of the 2007 Rules read with Section 15 and 64 of the 2000 Act. The accused was ordered to be released forthwith.

20. In *Jabar Singh v. Dinesh and Another* [(2010) 3 SCC 757], a two Judge Bench of this Court while examining the scope of Section 7A of the Act and Rule 12 of the 2007 Rules and Section 35 of the Indian Evidence Act took the view that the trial court had the authority to make an enquiry and take necessary evidence to determine the age. Holding that the High Court was not justified in exercise of its revisional jurisdiction to upset the finding of the trial court, remitted the matter to the trial court for trial of the accused in accordance with law treating him to be not a juvenile at the time of commission of the alleged offence. The court noticed that the trial court had passed the order rejecting the claim of juvenility of respondent No.1 therein on 14.02.2006, the Rules, including Rule 12 laying down the procedure to be followed in determination of the age of a juvenile in conflict with law, had not come into force. The court opined that the trial court was not required to follow the procedure laid down in Section 7A of the Act or Rule 12 of the Rules and therefore in the absence of any statutory provision laying down the procedure to be followed in determining a claim of juvenility raised before it, the Court had to decide the claim of juvenility on the materials or evidence brought on record by the parties and section 35 of the Evidence Act.

21. The court further stated that the entry of date of birth of respondent No.1 in the admission form, the school records and transfer certificates did not satisfy the condition laid down in Section 35 of the Evidence Act in as much as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and therefore, the entry was not relevant under section 35 of the Evidence Act for the purpose of determining the age of respondent no.1 at the time of commission of the alleged offence. We have our own reservations on the view expressed by the bench in *Jabar Singh's* case. (supra).

22. In *Dayanand v. State of Haryana* [(2011) 2 SCC 224]., this Court considered the scope of sections 2(k), 2(l), 7-A 20 and 64 (as amended by Act 33 of 2006 w.e.f. 22.08.2006]. This Court dealt with a case where the appellant was aged 16 years 5 months and 19 days on the date of occurrence, the Court held that he was a juvenile and thus could not be compelled to undergo the rigorous imprisonment as imposed by the trial court and affirmed by High Court. This Court set aside the sentence and ordered that the appellant be produced before the J.J. Board for passing appropriate sentence in accordance with 2000 Act.

23. In *Anil Agarwal and Another v. State of West Bengal* [(2011) 2 SCALE 429], this Court was examining the claim of juvenility made at a belated stage stating that the appellants were minors at the time of the alleged offence and hence should not be tried along with the adult co-accused. The trial court dismissed the appellant's application as not maintainable as it had been filed at a belated stage. The High Court, in revision, while holding that the application had been made belatedly, granted liberty to appellants to raise their plea of juvenility and to establish the same before the Sessions Judge at the stage of the examination under section 313 Cr.P.C.

24. Reversing the finding recorded by the High Court, this

Court took the view that Section 7A of the Act, as it now reads, gives right to any accused to raise the question of juvenility at any point of time and if such an issue is raised, the Court is under an obligation to make an inquiry and deal with that claim. The court held Section 7A has to be read along with Rule 12 of the 2007 Rules. This Court, therefore, set aside the order of the High Court and directed the trial court to first examine the question of juvenility and in the event, the trial court comes to a finding that the appellants were minors at the time of commission of the offence, they be produced before the J.J. Board for considering their cases in accordance with the provisions of the 2000 Act.

25. We may in the light of the judgments referred to herein before and the principles laid down therein while examining the scope of Section 7 A of the Act, Rule 12 of the 2007 Rules and Section 49 of the Act examine the scope and ambit of inquiry expected of a court, the J.J. Board and the Committee while dealing with a claim of juvenility.

26. We may, however, point out that none of the above mentioned judgments referred to earlier had examined the scope, meaning and content of Section 7A, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7A of the Act and Rule 12 of the 2007 Rules:

> *"Section 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 recognised 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 order, and the sentence if any, passed by a court shall be deemed to have no effect."

Rule 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 subrule(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.

(emphasis added)

27. Section 7A, obliges the court only to make an *inquiry, not an investigation or a trial,* an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

28. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The

word 'inquiry' has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

29. Let us now examine the meaning of the words inquiry, enquiry, investigation and trial as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions.

"Inquiry" as defined in Section 2(g), Cr.P.C. reads as follows:

"Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in section 2(h), Cr.P.C. reads as follows:

"Investigation includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure."

30. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some

offences committed. We find in very many cases that the Court /the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the J.J. Act, following the procedure laid under Rule 12 and not following the procedure laid down under the Code.

31. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Indian Penal Code or under other Penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry.

32. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

33. We also remind all Courts/J.J. Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a

parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the Juvenility on its determination.

36. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate

from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.

37. We have come across several cases in which trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted.

38. We notice that none of the above mentioned principles have been followed by the courts below in the instant case. The court examined the question of juvenility of the appellant as if it was conducting a criminal trial or inquiry under the Code. Notice was issued on the application filed by the juvenile and in response to that State as well as the widow of the victim filed objection to the application. The father of the appellant was cross examined as PW 1 and was permitted to produce several documents including the mark sheet of class five marked as exhibit P-1, mark sheet of class eight marked as exhibit P-2, mark sheet of Intermediate Education Board, MP, marked as exhibit P-3, horoscope prepared by Daya Ram Pandey marked as exhibit P-4. Further, the mother of the appellant was examined as PW 4, Transfer Certificate was produced on the side of the appellant which was marked as

exhibit P-6. Noticing that the parents of the appellant were attempting to show a lesser age of the child so as to escape from the criminal case, the Court took steps to conduct ossification test. Dr. R.P. Gupta was examined as PW 2 who had submitted the report. Dr. S.K. Sharma was examined as PW 3. Placing considerable reliance on the report submitted after conducting ossification test, the application was dismissed by the trial court.

39. We find that the appellate court, of course, thought it necessary to summon the original register of Jyoti English School where the appellant was first admitted and the same was produced by the Principal of the School. We have called for the original record from the Court and perused the same. On 4.09.2009, the Sessions Judge passed the following order:

> 04.02.09. Court found it necessary to call for the Admission Register of the appellant in Jyoti High Secondary School and ordered the production of the Register of Admission, from the concerned school in ST. No. 29/09.
>
> Sd/-
> Judge

On 09.02.2009, another order was passed as follows:

> *From Jyoti High Secondary School, the Principal of the school was present along with the concerned admission register. He produced the copy of the admission register before the court after proving its factum.* Register was returned after the perusal. The Counsel is directed that if he wants to produce any other evidence/documents, he may do so.
>
> (emphasis added)
> Sd/-
> Judge

On 11.02.09, after hearing the counsel on either side, the Court passed the order:

The counsel for the state *Shri Nayak, APG stated/ conceded that in respect to refute/rebuttal of the Admission Register the state do not wish to file further Evidence/documents.*

(emphasis added)
Sd/-
Judge

On 12.02.2009, after hearing counsel on either side, the Court again passed the order:

In presence of the advocates, order pronounced in the open court that this Appeal is hereby Dismissed.

Sd/-
Judge

40. We fail to see, after having summoned the admission register of the Higher Secondary School where the appellant had first studied and after having perused the same produced by the principal of school and having noticed the fact that the appellant was born on 24.10.1990, what prompted the Court not to accept that admission register produced by the principal of the school. The date of birth of the appellant was discernible from the school admission register. Entry made therein was not controverted or countered by the counsel appearing for the State or the private party, which is evident from the proceedings recorded on 11.02.2009 and which indicates that they had conceded that there was nothing to refute or rebut the factum of date of birth entered in the School Admission Register. We are of the view the above document produced by the principal of the school conclusively shows that the date of birth was 24.10.1990 hence section 12(3)(a)(i)(ii) has been fully satisfied.

41. The Sessions Judge, however, has made a fishing inquiry to determine the basis on which date of birth was entered in the school register, which prompted the father of the

appellant to produce a horoscope. The horoscope produced was rejected by the Court stating that the same was fabricated and that the Pandit who had prepared the horoscope was not examined. We fail to see what types of inquiries are being conducted by the trial courts and the appellate courts, when the question regarding the claim of juvenility is raised.

42. Legislature and the Rule making authority in their wisdom have in categorical terms explained how to proceed with the age determination inquiry. Further, Rule 12 has also fixed a time limit of thirty days to determine the age of the juvenility from the date of making the application for the said purpose. Further, it is also evident from the Rule that if the assessment of age could not be done, the benefit would go to the child or juvenile considering his / her age on lower side within the margin of one year.

43. The Court in *Babloo Parsi v. State of Jharkhand and Another* [(2008) 13 SCC 133] held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The court held that the medical evidence as to the age of a person, though a useful guiding factor is not conclusive and has to be considered along with other cogent evidence. This court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to re-determine the age of the accused.

44. In *Shah Nawaz v. State of Uttar Pradesh and Another* [(2011) 13 SCC 751], the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The court had held entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school

leaving certificate for determining the age of the appellant.

45. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.

46. We are, therefore, of the view that the appellant has successfully established his juvenility on the date of occurrence of the crime i.e. 19.10.2008 on which date he was aged only 17 years 11 months 25 days. The appellant has already faced the criminal trial in sessions case No. 28 of 2009 and the Court found him guilty along with two others under section 302 IPC and has been awarded life imprisonment which is pending in appeal, before the Hon'ble Court at Jabalpur as Crime Appeal No. 1134 of 2009.

47. We notice that the accused is also involved in few other criminal cases as well. Since we have found that the appellant was a juvenile on the date of the incident, in this case, we are inclined to set aside the sentence awarded in sessions case No. 28/2009 by Sessions Court and direct the High Court to place the records before J.J. Board for awarding appropriate sentence in accordance with the provisions of Act, 2000, and if the appellant has already undergone the maximum sentence of three years as prescribed in the Act, needless to say he has to be let free, provided he is not in custody in any other criminal case. We are informed that the appellant is involved in few other criminal cases as well, those cases will proceed in accordance with law.

48. The appeal is allowed. Sentence awarded by the court below is accordingly set aside and the case records be placed before the concerned J.J. Board for awarding appropriate sentence.

K.K.T. Appeal allowed.

KURIA & ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 2488 of 2009)

SEPTEMBER 13, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860:

ss. 302 and 364 r/w s. 34 – Prosecution under – 15 accused causing death of one person – 4 eye-witnesses – Animosity between parties – Conviction of 3 and acquittal of rest of the accused by trial court – Appeal of one accused abated due to his death – High Court upholding the conviction of the two accused – On appeal, held: The eye-accounts are fully supported by statement of Investigating Officer, inquest report, post mortem report and the recoveries – There was also motive for the accused to kill the deceased – Prosecution has been able to prove its case beyond reasonable doubt – In view of the evidence, accused rightly convicted.

s. 34 – Applicability – Held: The provision is applicable in cases where it is not possible to attribute a specific role to a particular accused – The basic essentials for applying it are : (1) Criminal act committed by several persons (2) The act is done in furtherance of common intention.

s. 34 – Nature of – Held: The provision is a rule of evidence and does not create a substantive offence.

Criminal Trial:

Improved and contradictory statements – Evidentiary value – Held: The discrepancies or improvements which do not materially affect the case of the prosecution and are

insignificant, cannot be made the basis for doubting the prosecution case.

Witnesses:

Sole-eye witness – Evidentiary value – Held: The court can act on the testimony of sole eye-witness provided he is wholly reliable and can base conviction relying on such witness.

Related witness – Evidentiary value – Held: If testimony of an eye-witness found truthful, it cannot be discarded merely on the ground that the witness was relative of the deceased.

Words and Phrases:

Expression 'Sterling worth' in the context of Criminal Jurisprudence – Meaning of.

The two appellants-accused alongwith 13 other accused were prosecuted u/ss. 302 and 364 r/w s. 34 IPC for having caused death of one person. According to prosecution, there were 4 eye-witnesses (PWs 1, 3, 5 and 15) to the incident. One of the eye-witnesses PW 3 was the son of the deceased and was the informant. There was rivalry between the accused party and the complainant party. During trial, two of the eye-witnesses viz. Pws 1 and 5 turned hostile. Trial court acquitted all the accused except three accused, including the two appellants-accused. The convicted accused filed appeal before High Court. During pendency of the appeal, one of the convicted accused died and the appeal abated against him. High Court confirmed the conviction of the appellants-accused.

In appeal to this Court, the appellants contended that there is contradiction between the ocular and medical evidence; that there are contradictions and

improvements in the statements of the witnesses; that presence of PWs 3, 4, 7 and 15, at the scene of occurrence, was doubtful hence their evidence not reliable; that no specific role or use of weapon in the attack was seen by any of the witnesses; that the statements of hostile witness or unreliable witnesses cannot be used for the purpose of corroboration of other witnesses; and that s. 34 IPC is not attracted in the present case and therefore the conviction was not justified.

Dismissing the appeal, the Court

HELD: 1. In the facts and circumstances of the case, the cumulative effect of the prosecution evidence is that the prosecution has been able to prove its case beyond reasonable doubt. [Para 29] [601-B]

2. It is not correct to say that there is conflict between the medical evidence and the ocular evidence in relation to the manner in which injuries were inflicted and the consequences thereof. Except where it is totally irreconcilable with the medical evidence, oral evidence has primacy. In the present case, a large number of persons had attacked one person. These witnesses cannot be expected to explain the role in the inflicting of injuries by each one of them individually and the weapons used. Such conduct would be opposed to the normal conduct of a human being. The fear for his own life and anxiety to save the victim would be so high and bothersome to the witness that it will not only be unfair but also unfortunate to expect such a witness to speak with precision with regard to injuries inflicted on the body of the deceased and the role attributable to each of the accused individually. In the present case, the result of the blunt injuries is evident from the report of the post mortem. The post mortem report, the inquest report, the statements of PW2, PW3, PW4, PW7 and PW15 are in line

with each other and there is no noticeable conflict between them. The injuries on the body of the deceased were so severe that they alone could be the cause of death and the statement of PW6 (doctor) in relation to cause of death is definite and certain. [Paras 8, 13 and 16] [585-B; 590-E; 592-G-H; 593-A-D]

Abdul Sayeed v. The State of Madhya Pradesh **(2010) 10 SCC 259: 2010 (13) SCR 311;** *Baso Prasad and Ors. v. State of Bihar* **2006 (13) SCC 65: 2006 (9) Suppl. SCR 431;** *Krishnan v. State* ***(2003) 7 SCC 56: 2003 (1) Suppl. SCR 771 – relied on.***

3.1. Improvements or variations of the statements of the witnesses should be of such nature that it would create a definite doubt in the mind of the court that the witnesses are trying to state something which is not true and which is not duly corroborated by the statements of the other witnesses. That is not the situation in the present case. The improvements do not create any legal impediment in accepting the statements of PW3, PW4, PW7 and PW15 made under oath. The discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged

improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. [Para 21] [596-H; 597-A]

Kathi Bharat Vajsur and Anr. v. State of Gujarat **(2012) 5 SCC 724;** *Narayan Chetanram Chaudhary and Anr. v. State of Maharashtra* **(2000) 8 SCC 457:2000 (3) Suppl. SCR 104 ;** *D.P. Chadha v. Triyugi Narain Mishra and Ors.* **(2001) 2 SCC 205: 2000 (5) Suppl. SCR 408 ;** *Sukhchain Singh v. State of Haryana and Ors.* **(2002) 5 SCC 100: 2002 (3) SCR 408 – relied on.**

3.2. Every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. [Para 23] [597-G]

Ashok Kumar vs. State of Haryana **(2010) 12 SCC 350: 2010 (7) SCR 1119;** *Shivlal and Anr. v. State of Chhattisgarh* **(2011) 9 SCC561: 2011 (11) SCR 429 – relied on.**

3.3. The presence of PW15 cannot be doubted at the site in question. He was going from the bus stand to his house and had stopped on the way after seeing the incident. This behavior of PW15 is very normal behavior and does not call for the raising of any unnecessary doubts. As far as absence of the name of PW15 from the FIR is concerned, it is clear that PW3 was following his father from behind and the moment the accused persons, who were large in number, started assaulting his father with weapons that they were carrying, for fear of his own

life and to bring people to save his father, he ran from the site. Obviously, PW15 appeared at the scene at that time and PW3 had not seen him at that juncture. Afterwards, when he came to the site along with other witnesses, i.e., PW2, PW4 and PW7, he saw his father's body being thrown near the hand pump in front of the house of the accused. The death of his father would have perturbed him so much that his priorities would be only to take his father to the hospital and inform the police, rather than viewing as to who was there around him besides the persons who had come with him. [Para 19] [594-C-F]

3.4. The variations or insignificant improvements in the statements of PW3 and PW7 are of such nature that they cannot make the statement of these witnesses unbelievable and unreliable. The witnesses have stated that they had informed the police of what they stated under oath before the court, but why it was not so recorded in their statements under Section 161 recorded by the Investigating Officer would be a reason best known to the Investigating Officer. It is only when exaggeration fundamentally changes the nature of the case, the court has to consider whether the witness was stating truth or not. [Paras 20 and 22] [595-E]

Sunil Kumar v. State Govt. of NCT of Delhi **(2003) 11 SCC 367: 2003(4) Suppl. SCR 767 – relied on.**

3.5. The variations in the statement of witness cannot be termed as contradictions between the statements of the witnesses. They are explainable variations which are likely to occur in the normal course and do not, in any way, adversely affect the case of the prosecution. Thus, there are no material contradictions in the statement of the witnesses or the documents, nor can the presence of PW15 be doubted at the place of occurrence. [Para 20] [595-E]

3.6. 'Sterling worth' is only an expression that is used for judging the worth of the statement of a witness. The use of such an expression in the context of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the witnesses, if any, noticed by the court. Linguistically, 'sterling worth' means 'thoroughly excellent' or 'of great value'. This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. In the instant case, the statements of the witnesses are reliable, trustworthy and deserve credence by the Court. They do not seem to be based on any falsehood. [Para 18] [593-H; 594-A-B]

4.1. The presence of PW3, PW4, PW7 and PW15 at the place of occurrence is neither unnatural nor improbable. In fact, their statements are trustworthy and their presence at the place of occurrence at different timings is plausible and fully fits into the case of the prosecution. The version given by these witnesses is fully corroborated by documentary and medical evidence. The eye account given by these witnesses fully finds support from the statement of the Investigating Officer, the inquest report, post-mortem report as well as the recoveries effected from the place of occurrence including the blood- stained earth and wood from the door of the house of the accused. As a general rule, the court can and may act on the testimony of a single eye-witness provided he is wholly reliable and base the conviction on the testimony of such sole eye-witness. There is no legal impediment in convicting a person on the sole testimony of a single witness. [Para 24] [597-H; 598-A-B-C, D-E, G-H]

4.2. The testimony of an eye-witness, if found truthful, cannot be discarded merely because the eye-witness was

a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. [Para 25] [599-A-C]

Sunil Kumar v. State Govt. of NCT of Delhi **(2003) 11 SCC 367: 2003(4) Suppl. SCR 767;** *Brathi alias Sukhdev Singh v. State of Punjab***(1991) 1 SCC 519: 1990 (2) Suppl. SCR 503;** *Alagupandi @ Alagupandian v. State of Tamil Nadu* **2012 (5) SCALE 595 – relied on.**

4.3. All the witnesses were present at the place of occurrence and their statements are reliable. In the alternative, if the court relies upon the statement of PW15 (according to the accused, the sole eye-witness) whose statement, according to the accused, is unreliable, the conviction can be based on the statement of PW15, as the statement of that witness is trustworthy, reliable and is completely corroborated by other ocular and documentary evidence. [Para 26] [599-D-E]

5. The accused/appellants cannot draw any advantage from PW1 and PW5 being declared hostile. Whatever doubt these witnesses could cause to the case of the prosecution stands fully supplied and erased by the statement of other eye-witnesses and the other medical and expert evidence. [Para 27] [600-B-C]

6. Another very material piece of evidence which directly links the accused to the offence is that when the blood-stained clothes of the deceased and other articles were recovered, sealed and sent for serological

examination to the FSL and the Chemical Analyst had submitted its report Exhibit P/43 after such serological examination, human blood of blood group 'O', which was also the blood group of the deceased, was found on all the three articles. [Para 27] [600-C-D]

7. According to PW-1 there was animosity between the parties regarding agricultural land. There were cases pending in the court. Though he denied the suggestion that they had murdered the deceased due to this reason, but he does provide a motive for the accused persons to commit the offence. In all likelihood, that was the cause for murdering the deceased. [Para 28] [600-G]

8. In face of the unimpeachable evidence, ocular and documentary, the question of corroboration by unreliable evidence does not arise in the present case. [Para 28] [600-G-H]

State of Punjab v. Parveen Kumar **(2005) 9 SCC 769 – held inapplicable.**

9.1. It is not correct to say that it was not a case of pre-meditated murder, and the provisions of Section 34 IPC are not attracted in the present case. It has come in evidence that all the accused persons had come with weapons, assaulted the deceased and taken him inside the house where he was again assaulted by the accused persons and after sometime, his body was dragged by the accused persons, including the appellant and thrown near the hand pump. There was motive for the accused persons to kill the deceased, they had come out with common intention and object to assault and kill the deceased in which they succeeded. In the cases where it is not possible to attribute a specific role to a particular accused, like the present case, recourse to this provision is appropriately made by the prosecution. [Paras 30 and 31] [601-B-E]

9.2 . The soul of Section 34, IPC is the joint liability in doing a criminal act. The section is a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by the other in the course of criminal act perpetrates to all other persons, under Section 34 IPC, if such criminal act is done in furtherance of the common intention of the person who joins in committing the crime. The Court has to examine the prosecution evidence with regard to application of Section 34 cumulatively and if the ingredients are satisfied, the consequences must follow. It is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend on the facts and circumstances of the given case whether the person involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together. The provisions of Section 34 IPC come to the aid of law while dealing with the cases of criminal act and common intention. Its basic essentials are : that the criminal act is committed by several persons, such act is done in furtherance of common intention of all and each of such persons is liable for that act in the same manner as if it were done by him alone. [Para 32] [601-G-H; 602-A-D]

Shyamal Ghosh v. State of West Bengal **2012 (6) CALE 381;** *Hemchand Jhas alias Hemchandra Jha v. State of Bihar* **(2008) 11 SCC 303: 2008 (9) SCR 1171;** *Nand Kishore v. State of Madhya Pradesh* **(2011) 12 SCC 120: 2011 (7) SCR 1152 – relied on.**

9.3. All the accused had committed criminal acts punishable under the provisions of the IPC. They had done so with common intention, as is evident from the statement of the witnesses and the documents on record. And lastly, each one of them, whether he actually made any assault on the body of the deceased or not, dragged him and threw his body in the gully or not, shall all be deemed to have committed the said offences with the aid of Section 34 IPC. [Para 33] [602-F-G]

Case Law Reference:

2010 (13) SCR 311	**Relied on**	**Para 13**
2006 (9) Suppl. SCR 431	**Relied on**	**Para 14**
2003 (1) Suppl. SCR 771	**Relied on**	**Para 15**
(2012) 5 SCC 724	**Relied on**	**Para 21**
2000 (3) Suppl. SCR 104	**Relied on**	**Para 21**
2000 (5) Suppl. SCR 408	**Relied on**	**Para 21**
2002 (3) SCR 408	**Relied on**	**Para 21**
2003 (4) Suppl. SCR 767	**Relied on**	**Para 22**
2010 (7) SCR 1119	**Relied on**	**Para 23**
2011 (11) SCR 429	**Relied on**	**Para 23**
2003 (4) Suppl. SCR 767	**Relied on**	**Para 25**
1990 (2) Suppl. SCR 503	**Relied on**	**Para 25**
2012 (5) SCALE 595	**Relied on**	**Para 25**
(2005) 9 SCC 769	**held inapplicable**	**Para 28**
2012 (6) SCALE 381	**Relied on**	**Para 32**
2008 (9) SCR 1171	**Relied on**	**Para 32**
2011 (7) SCR 1152	**Relied on**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2488 of 2009.

From the Judgment & Order dated 20.5.2008 of the High

Court of Rajasthan at Jodhpur in D.B. Criminal Appeal No. 1130 of 2003.

Bhagwati Prasad, H.D. Thanvi, Pushpendra Singh, Sarad Kumar Singhania for the Appellants.

P.P. Malhotra, ASG, Wasim A. Qadri, Kiran, B.K. Prasad, B.V. Balramdas, Suryanarayana Singh, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. At the outset, we may notice that 15 accused persons had faced trial for offences under Sections 302 and 364 read with Section 34 of the Indian Penal Code, 1860 (for short "IPC") before the Court of the Additional Sessions Judge, Banswara (Rajasthan). Vide its judgment dated 5th September, 2003, learned Trial Court acquitted all the accused persons except Laleng son of Bajeng, Laleng son of Dalji and Kuriya son of Laleng. These three accused were convicted for both these offences and were directed to undergo rigorous imprisonment for life with a fine of Rs.4,000/- each and in default to further undergo rigorous imprisonment for four months under Section 302/34 IPC and to undergo rigorous imprisonment for ten years with a fine of Rs.1000/- each and in default to undergo further rigorous imprisonment for one month under Section 364/34 IPC.

2. All the three accused persons preferred separate appeals before the High Court, impugning the judgment of the Trial Court. Unfortunately, during the pendency of the appeal before the High Court, Laleng son of Bajeng died. Vide its judgment dated 25th May, 2008, the Division Bench of the High Court of Rajasthan at Jodhpur confirmed the judgment of conviction and order of sentence against the remaining two accused, i.e., Kuria son of Laleng and Laleng son of Dalji.

3. Aggrieved from the judgment of the High Court, both the accused have filed the present appeal. The State did not

challenge the acquittal of the 12 accused persons by the Trial Court before the High Court. Thus, in the present appeal, we are only concerned with the appeal of the aforementioned two accused.

4. Now, we may notice the case of the prosecution in brief. Laleng, son of Mogji Patidar went to the Police Station, Garhi on 28th January, 2001 and lodged a written report (Exhibit P3) to the effect that his father had gone to some other place as a guest. At about 5.30 in the evening, he was returning to his house. The informant (who was also going in the same direction), was at some distance behind him. Along with him were two persons, namely, Dhulji and Bapulal. When his father reached near the house of Yatendra, son of Shivaji and was standing on the road, Laleng and Dalji started assaulting his father and on their hands, took him inside their house. According to Laleng, who was examined as PW3, Laleng son of Dalji, the accused, was carrying an axe in his hand. The other accused, Laleng s/o Wajeng, was carrying a 'kash' and Kuriya was carrying a 'lath' in his hands and others were also carrying 'laths'. PW3 and the others with him could not interfere because of the large number of accused and, due to fear, they ran to the village to get help. Once this fact was disclosed, Dhulji son of Gotam, Bajeng son of Pemji and Dalji son of Gotam had also arrived at the place of incident. In their presence, Laleng and his son Kuria, Laleng son of Dalji, Dhulji son of Bajeng, Kuber son of Jasu and Bhemji son of Nathu were beating his father and while assaulting him, dragged and threw him on the road in front of the house of Laleng, the accused. When the informant and the others came near his father, they saw that he had expired. The body of the deceased was lying at the spot. According to this witness, there was rivalry between these persons and the deceased. PW3, thus, had seen the incident. The FIR was registered under Sections 147, 148, 149 and 302 of the IPC vide Exhibit P/4. The Investigating Officer commenced his investigation, went to the place of occurrence, prepared the site plan (Exhibit P/5) and recorded statement of

the witnesses vide *panchnama* (Exhibit P/2). The body of the deceased was taken into custody. The clothes worn by the deceased were also taken into possession vide Exhibit P/7. The body of the deceased was subjected to post mortem which was prepared by Dr. S.K. Bhatnagar, PW6 being Exhibit P/11. From the house of the accused Laleng, blood stained *Dahli* (piece of wood of the door of the house) was taken into possession vide Exhibit P/9. In furtherance to the statement of the accused, the recoveries of iron kash, axe and laths were made and the same were taken into possession vide Exhibits P/13 to P/18. The recovered articles were sent to the Forensic Science Laboratory, Udaipur (FSL) vide Exhibit P/30 for which permission was granted by the Superintendent of Police vide Exhibit P/29 [Acknowledgment receipt (Exhibit P/31)]. The report of the FSL was received and accepted as Exhibit P/43. Based upon the oral statements and the documentary evidence collected during the course of the trial and the statements recorded during investigation, the Investigating Officer (PW16) completed his investigation and submitted *chalan* under Section 173(3) of the Code of Criminal procedure, 1973 (for short, the Cr.P.C.) to the court of competent jurisdiction.

5. As already noticed, the accused-appellants faced trial before the Trial Court and were convicted. Their conviction and order of sentence was confirmed by the High Court.

6. The prosecution, in order to prove its case, had examined as many as 17 witnesses. PW1, PW3, PW5 and PW15 were projected by the prosecution as eye-witnesses. However, during the course of their examination, PW1 and PW5 were declared hostile as they did not support the case of the prosecution and the case of the prosecution primarily hinges upon the statements of PW3 and PW15 coupled with the post mortem report, the report of the FSL, statement of PW6 and the attendant circumstances.

7. While impugning the concurrent judgments before this Court, the contentions raised on behalf of the appellants are :

(1) PW1 is not a reliable eye-witness, inasmuch as from his statement and the attendant circumstances, it is clear that he has not seen the occurrence.

(2) Presence of PW15 at the place of occurrence is doubtful inasmuch as PW3 in his report to the Police, Exhibit P/3 did not name him. Thus, the presence of PW15 is very doubtful.

(3) No specific role or use of a particular weapon in causing injuries by the respective accused has been seen by PW3 or any other witness.

(4) There is clear contradiction between the ocular and medical evidence inasmuch as, according to PW3 and PW15, axe and kash were used for inflicting injuries upon the deceased, while, according to the post mortem report (Exhibit P/11), all the injuries were caused with blunt weapons and there was no bleeding injury. Furthermore, the question of collecting the blood from the *dahli* of the accused did not arise as the deceased was not bleeding as per the version given by the eye-witnesses. Consequently, there are serious holes in the case of the prosecution.

(5) The statement of hostile witnesses or unreliable witnesses cannot be used for the purposes of corroboration of other witnesses. A statement which is otherwise untrustworthy cannot be corroborated by another piece of unreliable evidence. Deliberate and unbelievable improvements have been made in the statements of the witnesses between their recording of statement under Section 161 of the Cr.P.C. and statements in the Court. Statements of the witnesses are not sterling worthy and the entire case of the prosecution is based upon suspicion.

Lastly, the provisions of Section 34 IPC are not attracted in the present case, as it was not a case of common intention and object.

8. First of all, we may deal with the argument advanced on behalf of the appellant that there is clear conflict between the medical evidence and the ocular evidence in relation to the manner in which injuries were inflicted and the consequences thereof. Even the cause of death is not evident from the post mortem report and once the cause of death is not proved, the accused would be entitled to an order of acquittal.

9. In order to examine the merit of this contention, it is necessary for us to refer to the post mortem report at the very threshold. The post mortem report had been exhibited as Exhibit P/11 and the relevant part thereof reads as under :

"1. Bruse 2 x 2 cm above RT eye

2. Bruse 3 x 2 cm on Pissa Rt ear

3. Bruse 9x3 cm near Rt side Nose

4. Bruse 3x2 cm Rt cheek near ear

5. Bruse 25x20 cm in front of chest and extending to the base of left side of Abdomen

6. Brine 7x2 cm

7. Bruse 5x4 cm Rt lower back

8. Bruse 7x4 cm Rt upper arm

9. Bruse 4x2 cm Left Elbow

10. Bruse 7x2 cm back of left hand

11. Barne Entire back from lateral bone both side superior border should interior border till lower left of last lib

12. Brune 4 x 4 cm Rt leg

13. Burn 5x5 cm left leg

14. Burne 5x5 cm left thigh

15. Burne 4x4 cm left thigh

All are simple except 5&11 only two & all are caused by blunt object & within 24 hrs duration.

dissection at the neck shows Oedema & haemorahage at the base of neck of muscles & is underlying soft tissue and at the base & antemortem of both enclo of hyoid bones.

II. CRANIUM AND SPINAL CORD

Note The Spinal need not be examined unless any indication on disease or injury exist.

Healthy

III THORAX

1. Walls, Rab and Cartines Healthy

2. Pleaurae Healthy – Pleaural cavity both full of blood

3. Tharynx and Trachea Healthy except congestion at Trachsea & barynx

4. Right Lung Voluminous cut section shows blood stained

5. Left Lung Voluminous cut section show blood stained froth

6. Periartium health There are #s of 3rd to vth ribts

7. Heath Rt side Posteriorly precing in between tissue causing

8. Large vessel. Lacurateen of lung (RT) similarly there is # of V to Viithy ribs posters only causing piefcyr & Lacuratren of in between tissue & Lungs on left side. However nonstravenatic segments of

both lungs are voluminous as disabible above Pericardium & large vessels & Heart is Healthy all four chambers of heart are empty.

In abdomen all organs are healthy stomach & intestine formally both contains semidigistel food & Large intestine contains faecial matri

10. Bladder Empty & Healthy

11. Organs and interal Healthy

V. MUSCLES BONES AND JOINT

Healthy

REMARKS AND MEDICAL OFFICER

1. All injuries are within 24 hrs & antemortem in nature.
2. Examinee expired 6-24 hrs of duration
3. Examinee expired due to injury both Lungs causing haemothorax associated pressue on neck causing asphyxia."

Sd/- A B C D

(Dr. R. Vpaothyarya)"

The above report has been copied from the original Post Mortem report and no corrections have been made thereto.

10. The doctor was examined as PW6. According to the doctor, the deceased was a healthy person and had suffered the abovestated 15 injuries. When he dissected the body of the deceased, he found that both pleural cavities were full of blood and the trachea and lungs were congested. At the back, ribs three to five were fractured and they had perforated the lungs. Similarly, on the left side as well ribs from five to seven had been fractured and had perforated the lungs even on that side. The cause of death, according to PW6, was as a result of

injuries to both the lungs and the pleural cavity being full of blood which caused pressure on the neck, causing the deceased to suffocate. PW6 was subjected to a lengthy cross-examination but nothing material has been found. In his cross examination, he stated that he had prepared Exhibit P/11 immediately after examining the body of the deceased.

11. PW3, the son of the deceased, stated that the accused persons were beating his father. Fearing his own death, he ran to the village for help and when he along with Bajeng, Dhulji and Dalji reached back, they saw that the accused persons threw the body of his late father on the road and by the time they got there, his father had already died. He admitted his signatures on the report, Exhibit P/3 and also stated that the Police had prepared the site plan. Clothes of the deceased were taken in his presence and he had signed the memo (Ex. P/7). In his cross-examination, he stated that despite his screaming, nobody came to help. PW4 corroborated the statement of PW3 and stated that he had come screaming that the accused people were beating his father. All of them ran towards the house of the accused along with other named persons and saw that the accused persons had thrown the body of the deceased on the road. According to this witness, there were 15-16 injuries on the body of the deceased. There was an injury on the neck. According to him, the neck had been twisted (*marod*) whereupon the deceased died. PW7 is the other witness who has stated that they went to the place of occurrence running and when they reached, they saw that body of the deceased was being dragged by the accused persons and, according to him, there was injury on the neck of the deceased and neck had been broken and his whole body had injuries. PW2 is the other witness who has specifically stated that body of the deceased was lying in front of the house of Laleng, the accused, when he went to the place of occurrence. This witness clearly stated that when he saw the body of the deceased, he noticed that blood was oozing from his body. In answer to a question in his cross-examination, he stated that there were disputes between

Khemji and Kachru relating to agricultural land. The inquest report of the body of the deceased is also a relevant document in this regard. The Investigating Officer noticed as many as 15 injuries on the body of the deceased which completely matched with the post mortem report. He also noticed that on the wrist of the hand and finger (left), there was blood. There were a number of injuries on the right foot of the deceased. There was fresh injury seen on the right foot. The deceased was wearing white tericot *jhabba* which was blood stained. There is complete consistency between the ocular and medical evidence. The mere fact that no injuries on the body of the deceased were found which could have been caused by an axe or *kash* (which are stated to be sharp aged weapons), would not *ex facie* belie the ocular and medical evidence. There were a large number persons (15) who were involved in the commission of the crime. Except two, all were carrying *laths* and all the injuries on the body of the deceased were caused by a blunt weapon. Even an axe or *kash* could be used from the other side, i.e., not the sharp edge to cause such injuries. Even if they were not used, it would not, in any way, cause a dent in the case of the prosecution. All the witnesses have truthfully spoken about the occurrence. Except PW3, nobody could have actually seen the assault on the deceased by the accused persons. It will be unfair to expect a young boy, whose father is being beaten to death, to watch with precision as to which of the accused was causing which injury and by what weapon. His entire interest would be to somehow save his father. There was so much of fear in his mind that he could not gather the courage of preventing the accused persons from assaulting his father as he thought that accused persons would kill him as well. This conduct of PW3 cannot be said to be abnormal in the facts and circumstances of the present case. He immediately got other persons to help.

12. PW15 stated that at about 5.30 p.m., he was going from the bus stand towards his house, when he heard the screams of the deceased. When he went there, the accused

persons were beating the deceased and while continuing to beat him, took the deceased into their house. He also stated that they had brought the body of the deceased outside and threw it near the hand pump in front of their house and when he saw the deceased he was dead and his neck was turned in one direction. He also stated that there was dispute about the agricultural land between the deceased and the accused persons. In his cross-examination, he admitted that he was alone at the place of occurrence when the deceased was being beaten by the accused persons. He also stated that he had screamed and raised an alarm but nobody came forward to help after which the son of the deceased along with others had come there. In response to a question in his cross-examination, he stated another fact that four accused persons had brought the dead body of the deceased outside their house while dragging it. However, it had not been recorded and the Police has not noticed the same. He reiterated that body of the deceased was dragged and thrown in front of the hand pump.

13. This Court has consistently taken the view that except where it is totally irreconcilable with the medical evidence, oral evidence has primacy. In the case of *Abdul Sayeed v. The State of Madhya Pradesh* [(2010) 10 SCC 259], this Court held as under:

> "38. In *State of U.P. v. Hari Chand,* (2009) 13 SCC 542, this Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)
>
> > '… In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.'
>
> 39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a

relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

40. In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact-situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants."

14. Similar view was taken by this Court in the case of *Baso Prasad & Ors. v. State of Bihar* [2006 (13) SCC 65] wherein this Court held as under :

"27. In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence , as the same will depend upon the facts and circumstances of each case.

28. No hard and fast rule can be laid down therefore. It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-a-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report."

15. In the case of *Krishnan* v. *State* [(2003) 7 SCC 56], this Court held as under:

"18. The evidence of Dr. Muthuswami (PW 7) and Dr Abbas Ali (PW 8) do not run in any way contrary to ocular evidence. In any event, the ocular evidence being cogent,

credible and trustworthy, minor variance, if any with the medical evidence is not of any consequence.

20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitness account which had to be tested independently and not treated as the "variable", keeping the medical evidence as constant.

21. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and years of justice. Hence, the importance and primacy of the quality of trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit worthy; consistency with undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then, the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

16. In light of the above principles, we may revert to the evidence in the present case. A large number of persons had attacked one person. These witnesses cannot be expected to explain the role in the inflicting of injuries by each one of them individually and the weapons used. Such conduct would be opposed to the normal conduct of a human being. The fear for his own life and anxiety to save the victim would be so high and bothersome to the witness that it will not only be unfair but also

unfortunate to expect such a witness to speak with precision with regard to injuries inflicted on the body of the deceased and the role attributable to each of the accused individually. In the present case, the result of the blunt injuries is evident from the report of the post mortem (Exhibit P/11), the ribs of the deceased were broken and they had punctured the lungs. The pleural cavities were full of blood and his body was dragged causing injuries on his back. In these circumstances, some blood would but naturally ooze out of the body of the deceased and his clothes would be blood stained. The post mortem report (Exhibit P/11), the inquest report, the statements of PW2, PW3, PW4, PW7 and PW15 are in line with each other and there is no noticeable conflict between them. The injuries on the body of the deceased were so severe that they alone could be the cause of death and the statement of PW6 in relation to cause of death is definite and certain. Thus, we see no merit in this contention raised on behalf of the accused.

17. The other submission on behalf of the appellant relates to contradictions and improvements in the statements of the witnesses. It is contended that Exhibit P/4 does not confine itself to the lodging of the FIR. PW3 has not mentioned the presence of PW15 at the place of occurrence while, according to PW15, he was present at the site. The witnesses had also stated that the neck of the deceased was broken, while according to PW6, it was not so. The witnesses, including PW3, PW7 and PW15 have made definite improvements in their statements before the Court in comparison with their statements recorded under Section 161 of the Cr.P.C. by the Investigating Officer, with which they were even confronted. The counsel has then argued that the witnesses have to be of 'sterling worth', otherwise the case of the prosecution would fall.

18. 'Sterling worth' is not an expression of absolute rigidity. The use of such an expression in the context of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the

witnesses, if any, noticed by the Court. Linguistically, 'sterling worth' means 'thoroughly excellent' or 'of great value'. This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. It is only an expression that is used for judging the worth of the statement of a witness. To our mind, the statements of the witnesses are reliable, trustworthy and deserve credence by the Court. They do not seem to be based on any falsehood.

19. As far as absence of the name of PW15 from the FIR (Exhibit P/4) is concerned, it is clear that PW3 was following his father from behind and the moment the accused persons, who were large in number, started assaulting his father with weapons that they were carrying, for fear of his own life and to bring people to save his father, he ran from the site. Obviously, PW15 appeared at the scene at that time and PW3 had not seen him at that juncture. Afterwards, when he came to the site along with other witnesses, i.e., PW2, PW4 and PW7, he saw his father's body being thrown near the hand pump in front of the house of the accused. The death of his father would have perturbed him so much that his priorities would be only to take his father to the hospital and inform the police, rather than viewing as to who was there around him besides the persons who had come with him. The presence of PW15, thus, cannot be doubted at the site in question. He was going from the bus stand to his house and had stopped on the way after seeing the incident. This behavior of PW15 is very normal behavior and does not call for the raising of any unnecessary doubts. Similarly, in the post mortem report, no bleeding injury was noticed, which obviously means that there was no open cut injury which was bleeding. In the inquest report, the injuries of the deceased have been noticed and it had also been noticed that blood was coming from the body of the deceased which could be very possible when examined in conjunction with the statement of the witnesses including PW3, PW7 and PW15 that the clothes of the deceased were blood stained and his body was dragged from inside the house of the accused to the

outside near the hand pump. No doubt, the eye witnesses have stated that the neck of the deceased was broken, while according to other witnesses, it was lying in a twisted condition. According to the post mortem report (Exhibit P/11) and statement of PW6, there were bruises on the entire back including shoulders. However, no apparent external injury was noticed on the neck of the deceased. But after dissecting the neck, the doctor came to know that there was swelling in the neck muscles and hard bone edges had fractures which were prior to the death of the deceased. In Exhibit P/2, when the Investigating Officer under Item No.8 examined the neck of the deceased, he also noticed that the neck was not stable and was loosely turning both sides with external aid. This clearly shows that the neck of the deceased was badly injured and even had a fracture. It is obvious that there is also no contradiction between the statement of the witnesses and the medical evidence even in this regard.

20. These cannot be termed as contradictions between the statements of the witnesses. They are explainable variations which are likely to occur in the normal course and do not, in any way, adversely affect the case of the prosecution. Thus, there are no material contradictions in the statement of the witnesses or the documents, nor can the presence of PW15 be doubted at the place of occurrence.

21. For instance PW15, in his cross-examination, had stated before the Court that Laleng had twisted the neck of the deceased. According to the accused, it was not so recorded in his statement under *Section 161, Exhibit D/2 upon which he explained that he had stated before the police the same thing, but he does not know why the police did not take note of the same.* Similarly, he also said that he had informed the police that the four named accused had dragged the body of the deceased and thrown it near the hand pump outside their house, but he does not know why it was not so noted in Exhibit D/2. There are some variations or insignificant improvements in the statements of PW3 and PW7. According to the learned

counsel appearing for the appellants, these improvements are of such nature that they make the statement of these witnesses unbelievable and unreliable. We are again not impressed with this contention. The witnesses have stated that they had informed the police of what they stated under oath before the court, but why it was not so recorded in their statements under Section 161 recorded by the Investigating Officer would be a reason best known to the Investigating Officer. Strangely, when the Investigating Officer, PW16, was being cross-examined, no such question was put to him as to why he did not completely record the statements of the witnesses or whether these witnesses had made such afore-mentioned statements. Improvements or variations of the statements of the witnesses should be of such nature that it would create a definite doubt in the mind of the court that the witnesses are trying to state something which is not true and which is not duly corroborated by the statements of the other witnesses. That is not the situation here. These improvements do not create any legal impediment in accepting the statements of PW3, PW4, PW7 and PW15 made under oath. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the

testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur and Another v. State of Gujarat* [(2012) 5 SCC 724], *Narayan Chetanram Chaudhary and Another v. State of Maharashtra* [(2000) 8 SCC 457], *D.P. Chadha v. Triyugi Narain Mishra and Others* [(2001) 2 SCC 205], *Sukhchain Singh v. State of Haryana and Others* [(2002) 5 SCC 100].

22. What is to be seen next is whether the version presented in the Court was substantially similar to what was said during investigation. It is only when exaggeration fundamentally changes the nature of the case, the Court has to consider whether the witness was stating truth or not. {Ref. S*unil Kumar v. State Govt. of NCT of Delhi* [(2003) 11 SCC 367]}

23. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to a state minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to *Ashok Kumar Vs. State of Haryana* [(2010) 12 SCC 350] and *Shivlal and Another v. State of Chhattisgarh* [(2011) 9 SCC 561].

24. Next contention is that the presence of PW3, PW4,

PW7 and PW15 at the place of occurrence is doubtful. Secondly, according to the accused, PW15 is the only eye-witness and it is submitted that his statement is not reliable and, therefore, cannot be made the foundation for their conviction. We have already held that the presence of these witnesses at the place of occurrence is neither unnatural nor improbable. In fact, their statements are trustworthy and their presence at the place of occurrence at different timings is plausible and fully fits into the case of the prosecution. The version given by these witnesses is fully corroborated by documentary and medical evidence. PW3 is an eye-witness to the assault on the deceased. He had run away from the site to save his life and call his friends and then it was PW15 who appeared at the scene and saw the victim being assaulted by the accused and being taken into the house of the accused from where, after sometime, they dragged out the body of the deceased and threw it near the hand pump in the street. The eye account given by these witnesses fully finds support from the statement of the Investigating Officer, the inquest report Exhibit P/2, post-mortem report Exhibit P/11 as well as the recoveries effected from the place of occurrence including the blood stained earth and wood from the door of the house of the accused. PW9 and PW17 are the witnesses to the recovery (of weapons) while PW10 and PW11 are the witnesses to the seizure of the blood stained cloth of the deceased. PW3 was coming from a different place, while his father, the deceased, was coming from a different place. He was just following his father at a distance and after he saw the incident and found his father dead, he lodged an FIR with the police without any delay. Eye account given by these witnesses is trustworthy and is duly corroborated as well. The Court has stated the principle that, as a general rule, the Court can and may act on the testimony of a single eye-witness provided he is wholly reliable and base the conviction on the testimony of such sole eye-witness. There is no legal impediment in convicting a person on the sole testimony of a single witness.

25. The testimony of an eye-witness, if found truthful, cannot be discarded merely because the eye-witness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to the case of *Sunil Kumar* (supra), *Brathi alias Sukhdev Singh Vs. State of Punjab* [(1991) 1 SCC 519] and *Alagupandi @ Alagupandian v. State of Tamil Nadu* [2012 (5) SCALE 595].

26. In light of these principles, it can safely be recorded that firstly all these witnesses were present at the place of occurrence and their statements are reliable. In the alternative, if we rely upon the statement of PW15 (according to the accused, the sole eye witness) whose statement, according to the accused, is unreliable, then this Court should have no hesitation in basing the conviction on the statement of PW15, as the statement of that witness is trustworthy, reliable and is completely corroborated by other ocular and documentary evidence.

27. The learned counsel appearing for the appellants laid emphasis on the fact that PW5 was an eye-witness but had been declared hostile by the court. Thus, the entire case of the prosecution is based on a mere suspicion and falls to the ground. .This argument does not impress us at all. No doubt PW5 had been declared hostile by the prosecutor and he was subjected to some cross-examination. In his statement, he stated that at about 5.30 p.m., he was coming from the village Bajawan Bus Stand towards his house. On the way, in the street and lying in front of Laleng's house, he saw the dead body of Mogji. He claimed that he did not see anything else. He denied that he knew who had killed Mogji. From the statement of this

witness, it is clear that he saw the dead body of the deceased at the same place where PW3, PW4, PW7 and PW15 had seen. Even his statement to this extent fully corroborates the statement of other eye-witnesses. We fail to understand, much less appreciate, as to what advantage the accused/appellants wish to draw from PW1 and PW5 being declared hostile. Whatever doubt these witnesses could cause to the case of the prosecution stands fully supplied and erased by the statement of other eye-witnesses and the other medical and expert evidence. Another very material piece of evidence which directly links the accused to the offence is that when the blood stained cloths of the deceased and other articles were recovered, sealed and sent for serological examination to the FSL and the Chemical Analyst had submitted its report Exhibit P/43 after such serological examination, human blood of blood group 'O', which was also the blood group of the deceased, was found on all the three articles namely *jhabba, baniyan* and blood stained *dahli*.

28. This clearly shows that the body of the deceased was dragged from inside the house of the accused and then thrown near the hand pump. This scientific report fully corroborates the statement of PW15. Another very important piece of evidence is the statement of DW-1, the sole witness who was examined by the defence. In fact, it was Kuria himself who stepped into the witness box. According to him, there were serious disputes in relation to the agricultural land between the deceased's family and the family of the accused. Such disputes were there for nearly two years. According to this witness, there was animosity between the parties regarding this issue. There were cases pending in the court. Though he denied the suggestion that they had murdered Mogji due to this reason, but he does provide a motive for the accused persons to commit the offence. In all likelihood, that was the cause for murdering the deceased. In face of this unimpeachable evidence, ocular and documentary, the question of corroboration by unreliable evidence does not arise in the present case. The reliance placed by the accused

on the judgment of this Court in the case of *State of Punjab v. Parveen Kumar* [(2005) 9 SCC 769] is completely misplaced on facts and in law both.

29. In these circumstances, the cumulative effect of the prosecution evidence is that the prosecution has been able to prove its case beyond reasonable doubt.

30. Lastly, it was contended that the provisions of Section 34, IPC are not attracted in the present case. It is contended on behalf of the appellant that they had no common intention to kill the deceased and it was not a case of pre-meditated murder. This argument is noticed only to be rejected.

31. It has come in evidence that all the accused persons had come with weapons, assaulted the deceased and taken him inside the house where he was again assaulted by the accused persons and after sometime, his body was dragged by the accused persons, including the appellant and thrown near the hand pump. If this is not a case of common intention and object, it is really doubtful as to which cases can fit into that category. There was motive for the accused persons to kill the deceased, they had come out with common intention and object to assault and kill the deceased in which they succeeded. In the cases where it is not possible to attribute a specific role to a particular accused, like the present case, recourse to this provision is appropriately made by the prosecution.

32. According to PW3, Kuria was carrying *lath* while accused Laleng, son of Bajeng was carrying axe (*kulhari)* which as appeared from the statements of the witnesses, could have been used from the other end. In relation to dragging the body, the question of use of any weapon would not arise. It was a communal intended act, in which the accused persons participated accused with the object of killing deceased Mogji. The soul of section 34, IPC is the joint liability in doing a criminal act. The section is a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for

an offence committed by the other in the course of criminal act perpetrates to all other persons, under Section 34 IPC, if such criminal act is done in furtherance of the common intention of the person who joins in committing the crime. The Court has to examine the prosecution evidence in regard to application of Section 34 cumulatively and if the ingredients are satisfied, the consequences must follow. It is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend on the facts and circumstances of the given case whether the person involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together. The provisions of Section 34 IPC come to the aid of law while dealing with the cases of criminal act and common intention. Its basic essentials are : that the criminal act is committed by several persons, such act is done in furtherance of common intention of all and each of such persons is liable for that act in the same manner as if it were done by him alone. Reference in this regard can be made to the cases of *Shyamal Ghosh v. State of West Bengal* [2012 (6) SCALE 381], *Hemchand Jhas alias Hemchandra Jha v. State of Bihar* [(2008) 11 SCC 303] and *Nand Kishore v. State of Madhya Pradesh* [(2011) 12 SCC 120].

33. The above-stated ingredients are fully satisfied in the present case. Undoubtedly, all the accused had committed criminal acts punishable under the provisions of the IPC. They had done so with common intention, as is evident from the statements of the witnesses and the documents on record. And lastly, each one of them, whether he actually made any assault on the body of the deceased or not, dragged him and threw his body in the gully or not, shall all be deemed to have committed the said offences with the aid of Section 34 IPC. Thus, this contention also has no merit and is rejected.

34. For the reasons afore-recorded, the appeal is dismissed.

K.K.T. Appeal dismissed.